

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARGARET SHEPHERD,

Plaintiff and Appellant,

v.

JOEL ARONOWITZ,

Defendant and Respondent.

B228798

(Los Angeles County
Super. Ct. No. SC099840)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Richard A. Stone, Judge. Affirmed.

Mirch Law Firm, Kevin J. Mirch, Marie C. Mirch and Erin E. Hanson for Plaintiff and Appellant.

Taylor Blessey and Barbara M. Reardon for Defendant and Respondent.

In this medical malpractice action the trial court granted summary judgment in favor of the defendant doctor, expressly basing its ruling on the ground that the submitted proof established “that no act or omission on behalf of the defendant . . . caused or contributed to the alleged injuries of plaintiff” Appealing from the resulting judgment, the plaintiff all but ignores that explanation. She instead focuses her appeal on the statute of limitations, arguing at length that the trial court’s reliance on that ground constitutes error.

To no avail. We conclude, as did the trial court, that appellant’s proof in opposition to summary judgment is insufficient to show that she suffered any injury resulting from the defendant doctor’s acts or omissions.

STATEMENT OF FACTS

On September 18, 2008 plaintiff Margaret Shepherd filed a complaint for damages against defendants Joel Aronowitz, M.D., nurse Kita Stovall, Wells Fargo Bank, Cedars Sinai Hospital, and a number of Doe defendants. Her First Amended Complaint—the operative pleading—apparently was filed on or about June 26, 2009. Against Dr. Aronowitz and nurse Stovall, it alleged medical malpractice, including allegations that Dr. Aronowitz negligently hired and refused to fire nurse Stovall for incompetence and dishonesty; against nurse Stovall alone, it alleged conversion; and against Wells Fargo Bank, it alleged negligence. It omitted Cedars Sinai Hospital as a defendant. Dr. Aronowitz answered the pleading with a general denial and 13 affirmative defenses, including the allegation that the action against him is barred by the statute of limitations set forth in Code of Civil Procedure section 340.5.

In July 2010, Dr. Aronowitz moved for summary judgment. (Code Civ. Proc., § 437c.) So far as relevant to this appeal, his motion contended that the claims against him were untenable as a matter of law because (1) he had complied with the applicable standard of care and did not cause or contribute to Ms. Shepherd’s injuries, and (2) Ms. Shepherd failed to file her action within the applicable statute of limitations. Ms. Shepherd argued in opposition that her claims against Dr. Aronowitz were not time-barred, and that there remained disputed material facts with respect to whether Dr.

Aronowitz's conduct fell below a reasonable standard of care and caused or contributed to her injuries.

After hearing argument on September 7, 2010, the trial court granted Dr. Aronowitz's summary judgment motion on September 13, 2010. Judgment was entered on October 5, 2010.¹ Ms. Shepherd timely filed her notice of appeal on November 1, 2010.

In a detailed tentative decision the trial court had expressed its intention to grant summary judgment on the basis of the statute of limitations; however the order signed by the court states that its ruling is based on "proof having been made . . . that no act or omission on behalf of defendant, Joel Aronowitz, M.D., caused or contributed to the alleged injuries of plaintiff, Margaret Shepherd." Because we conclude that the judgment must be affirmed on the ground stated in the signed order, we disregard the statute of limitations issue.²

DISCUSSION

Standard of Review

To determine whether summary judgment was properly granted, we review the trial court's decision de novo. Dr. Aronowitz was entitled to summary judgment if the record establishes as a matter of law that Ms. Shepherd's asserted claim against him

¹ Only the judgment against Shepherd and in favor of nurse Stovall, rather than the judgment against Shepherd and in favor of Dr. Aronowitz, was included by the parties in the appellate record supplied to this court. However the Superior Court records reflect entry of judgment against Shepherd and in favor of Dr. Aronowitz on October 5, 2010, providing this Court with jurisdiction to hear the appeal. (See *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7 [appeal must be taken from judgment entered on summary judgment order, not from order granting summary judgment].)

² We also disregard any issues that pertain to claims other than for professional negligence against Dr. Aronowitz. At the time of the summary judgment motion Ms. Shepherd's lawsuit consisted of negligence claims against Dr. Aronowitz and nurse Stovall, and a separate claim for conversion against nurse Stovall. Ms. Shepherd declined to appeal from the trial court's grant of summary judgment to nurse Stovall, and her appeal from the judgment granted in Dr. Aronowitz's favor raises no issues concerning Dr. Aronowitz's alleged negligent hiring or supervision of nurse Stovall.

cannot prevail. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 641; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 279.) We construe Dr. Aronowitz's evidence strictly and Ms. Shepherd's evidence liberally, and we accept as undisputed only those portions of Dr. Aronowitz's evidence that are uncontradicted. If the material facts are in conflict, the factual issues must be resolved by trial, and the summary judgment must be reversed. (*Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 382.) However, we will affirm the summary judgment if it is justified on any ground, regardless of the trial court's stated reasons. (*JEM Enterprises v. Washington Mutual Bank* (2002) 99 Cal.App.4th 638, 644.)

Allegations of the First Amended Complaint

So far as relevant to this appeal, the First Amended Complaint alleges that Ms. Shepherd consulted with Dr. Aronowitz on two occasions to discuss her decision to have surgical procedures for breast augmentation, repair of her lower neck area, and a facelift to repair her mouth and smile lines. It alleges that Dr. Aronowitz refused to listen to her history of "medically relative digestive disorders," and her intestinal and migraine problems. It alleges that on August 31, 2005, Dr. Aronowitz performed the surgery at Cedars Sinai Hospital, including breast augmentation, reconstructive lip surgery, and cosmetic neck surgery. It alleges that Ms. Shepherd remained Dr. Aronowitz's patient until November 2007. And it alleges that various serious psychological and medical problems "were linked with medical certainty" to Dr. Aronowitz's surgery and her postsurgical care.

Facts Alleged To Be Undisputed

According to Dr. Aronowitz's evidence in support of summary judgment, on July 5, 2005, Ms. Shepherd, then 58 years old, consulted with Dr. Aronowitz, a specialist in plastic and reconstructive surgery, regarding additional breast augmentation and facelift surgery. Years earlier she had had breast augmentation and facelift surgery done by a different physician. Dr. Aronowitz recommended placement of new breast implants and revision of her facelift with new lip implantations.

Dr. Aronowitz took her history, performed a physical examination, ordered and obtained copies of recent laboratory studies, ordered an electrocardiogram, and discussed the requested procedures with her. Ms. Shepherd agreed to the recommended surgeries, signing a detailed consent form. Dr. Aronowitz performed the surgery without incident on August 31, 2005.

Dr. Aronowitz examined Ms. Shepherd postoperatively on September 2, September 7, September 13, and December 1, 2005, noting in her chart that her incisions were healing satisfactorily, without report of problems or complaints by Ms. Shepherd. On September 15, 2006 Ms. Shepherd was examined by Dr. Landis, an internist, to whom she reported many problems, including stress, gastrointestinal problems, and unspecified problems with her breasts. Dr. Landis recommended that she “follow up closely with her physician.”

In a follow-up visit with Dr. Aronowitz on May 29, 2007, Ms. Shepherd complained of ““grooving”” and ““stretching”” of her breasts. At that time Dr. Aronowitz recommended that Ms. Shepherd undergo another procedure to replace her breast implants with smaller implants. The May 29, 2007 appointment was her last visit with Dr. Aronowitz.

Dr. Lesavoy, a surgeon specializing in plastic and reconstructive surgery, reviewed Ms. Shepherd’s medical records and her deposition, and concluded “to a reasonable degree of medical probability”:

— Dr. Aronowitz’s care and treatment of Ms. Shepherd, and his pre-operative workup and evaluation of Ms. Shepherd, “was appropriate and well within the standard of care at all times.”

— Dr. Aronowitz had complied with the standard of care in disclosing the risks and obtaining Ms. Shepherd’s consent to the procedures.

— Dr. Aronowitz’s surgical technique was appropriate and well within the standard of care.

— Dr. Aronowitz’s post-operative care was appropriate and well within the standard of care.

— No act or omission of Dr. Aronowitz caused or contributed to any injury to Ms. Shepherd.

— Ms. Shepherd’s complaints of gastrointestinal problems are not causally related to Dr. Aronowitz’s care and treatment.³

Upon the motion’s presentation of evidence that no injury to Ms. Shepherd resulted from Dr. Aronowitz’s acts or omissions, it became Ms. Shepherd’s burden to come forward with contrary evidence—evidence that Dr. Aronowitz’s acts or omissions caused injury to her. (Code Civ. Proc. § 437c, subd. (p)(2); *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485 [where summary judgment motion presents declaration showing no triable issue on essential factual element of claim, opposing party’s burden is to produce competent evidence showing factual element is controverted].)

Ms. Shepherd’s opposition to summary judgment contended that there remained disputed material facts with respect to whether Dr. Aronowitz’s conduct fell below a reasonable standard of care and caused or contributed to her injuries. However, the opposition’s responses do not meet the requirements for a separate statement of facts in opposition to summary judgment. (Code Civ. Proc. § 437c, subd. (b)(3) [opposition must cite support for each disputed fact]; Cal. Rules of Court, rule 3.1350(f) [separate statement must identify each disputed fact, must state “the nature of the dispute and describe the evidence that supports the position that the fact is controverted,” with “citation to exhibit, title, page, and line numbers in the evidence submitted”]; see also Cal. Rules of Court, rule 3.1350(g) & (h).) These deficiencies are repeated in the opposition’s responses to each of the supposedly controverted facts.

The defects of form were not the ground on which the trial court granted summary judgment, however. The opposition’s critical defect is its substantive failure to identify

³ Dr. Lesavoy’s opinions on these subjects was based on his review of Ms. Shepherd’s medical records from eight identified physicians (including Dr. Aronowitz); review of her medical records from two different medical centers; and review of her deposition testimony.

any evidence that could establish that Dr. Aronowitz's acts or omissions caused or contributed to injuries to Ms. Shepherd. The order granting summary judgment identified this failure as the basis for the grant of summary judgment, and it is this ground on which we are compelled to affirm the trial court's ruling.

Causation of Damages

The opposition purported to dispute many of the specific facts proffered by the motion, but it did not identify any particular fact or facts sufficient to show that Dr. Aronowitz's acts or omissions had caused or contributed to any injury to Ms. Shepherd, and it did not identify where in the record such evidence appears. The opposition was insufficient to establish that Dr. Aronowitz's professional negligence caused Ms. Shepherd to suffer harm. Without the ability to establish that fact, Ms. Shepherd could not prove key elements of her claim against Dr. Aronowitz, and summary judgment would be appropriate. (Code Civ. Proc. § 437c, subd. (c) [summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"]; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 835, pp. 52-53.)

Ms. Shepherd's opposition to summary judgment relied primarily on the declaration of Dr. Ereren. After reciting Dr. Ereren's qualifications as a surgeon, his declaration listed the bases for his opinions, including his review of Dr. Aronowitz's medical file for Ms. Shepherd, the documents supporting the summary judgment motion (including Dr. Lesavoy's declaration), and unsworn letters from Drs. Nickels and Olson, Ms. Shepherd's internist and gastroenterologist, respectively. Based on his review of these documents, Dr. Ereren opined that Dr. Aronowitz had failed in a number of respects to adhere to standards of good care. Dr. Ereren concluded "to a reasonable degree of medical certainty" that Dr. Aronowitz's acts and omissions "caused and contributed to harm suffered by Mrs. Shepherd," and that his conduct (as well as that of nurse Stovall and the surgery center) "imposed harm on Mrs. Shepherd's health and well being."

But Dr. Ereren did not specify *what* acts or omissions imposed harm on Ms. Shepherd; nor did he specify *what* harm resulted from Dr. Aronowitz's acts or omissions.

His opinion that unspecified conduct imposed unspecified harm does not raise any triable issues of material fact sufficient to prevent summary judgment, for a number of reasons.⁴

First, the trial court's evidentiary rulings eliminated critical portions of Dr. Ereren's declaration from the evidence opposing summary judgment. The court sustained the objection to Dr. Ereren's opinion that Dr. Aronowitz's conduct fell below the standard of care by failing to sign Ms. Shepherd's consent form, because his opinion did not identify any risk about which Ms. Shepherd was not fully informed. The court sustained the objection to Dr. Ereren's opinion that Dr. Aronowitz's conduct fell below the standard of care by failing to identify Ms. Shepherd's medications, allergies, and surgical scars in the record of her physical examination, because the conclusion lacked any evidentiary basis and no resulting harm was identified. The court sustained the objection to Dr. Ereren's opinion that Dr. Aronowitz's conduct fell below the standard of care by failing to include records concerning Ms. Shepherd's allergies to medications, and failing to record the timing of medications she received after the surgery, again because no resulting harm was identified. The court sustained the objection to Dr. Ereren's opinion that Dr. Aronowitz's conduct fell below the standard of care because his deposition reflects an admission that he had changed his mind about the appropriate size for Ms. Shepherd's breast implants, on the ground that Dr. Aronowitz's declaration does not in fact reflect a change of mind about the implant size (nor, even if it did reflect such a change of mind, does Dr. Ereren supply any basis for his conclusion that it would be below the standard of care).

Finally, the trial court sustained the objection to Dr. Ereren's opinion that the conduct of Dr. Aronowitz (and others) "imposed harm on Mrs. Shepherd's health and

⁴ Appellant's opening brief purports to quote 56 paragraphs of Dr. Ereren's declaration (in 4-1/2 single-spaced pages). But in the record on appeal (and apparently the record before the trial court) his declaration ends after 40 paragraphs; it does not include what the opening brief quotes as paragraphs 41 through the first sentence of paragraph 56. Nevertheless, the opening brief's inclusion of this matter, although improper, is of no consequence. The added paragraphs contain nothing about Ms. Shepherd's postsurgical condition or evidence from which Dr. Ereren might have evaluated its causes.

well being,” on the ground that Dr. Ereren’s declaration shows that he did not review any records of Ms. Shepherd’s medical or psychological condition after her surgery. In addition to its failure to identify either the harm or the manner in which it was caused, Dr. Ereren’s opinion thus lacked foundation, was speculative and conclusory, and was irrelevant. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 [expert’s conclusion lacks foundation and has no evidentiary value where it is based on factors that are speculative or conjectural].)⁵ The trial court also sustained objections to the opinions of Drs. Nickels and Levine that Ms. Shepherd’s medical and psychological condition had worsened since her surgery, and that certain of Dr. Aronowitz’s acts were below the standard of care.

Ms. Shepherd’s appeal does not challenge any of these evidentiary rulings; consequently, this Court is bound by them (without regard to the rulings’ merits). (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 [In appeal from judgment following summary judgment, “[a]s with an appeal from any judgment,” “review is limited to issues which have been adequately raised and briefed”].) These evidentiary rulings eliminate any evidence that Ms. Shepherd’s harm resulted from Dr. Aronowitz’s conduct, that Dr. Aronowitz’s conduct fell below the standard of care, or even that Ms. Shepherd suffered any harm. (Code Civ. Proc. § 437c, subd. (c) [in determining summary judgment motion, court does not consider evidence as to which objection is made and sustained]; subd. (d) [admissibility requirement applies to evidence opposing summary judgment as well as evidence supporting it].)

Also missing from the declarations of Ms. Shepherd’s medical experts (even without the rulings eliminating their key conclusions) is any identification of *what harm*

⁵ Dr. Ereren’s declaration does not indicate that he reviewed any of the surgical medical records or documentation relating to Ms. Shepherd’s postsurgical condition, apart from Dr. Aronowitz’s patient file. With respect to Ms. Shepherd’s post-surgical condition he identifies no harm to her health, citing only the fact that she was in the recovery room for a long time, where she received narcotic medications. (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761-762 [expert testimony is not competent to prove fact, where expert states no factual basis for opinions]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [“The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed.”].)

she claims Dr. Aronowitz's acts or omissions caused, *which acts or omissions* caused that harm, and *how those acts or omissions* resulted in the alleged harm. Without evidence sufficient to establish these facts, Dr. Aronowitz's showing that his acts and omissions caused no injury or damage to Ms. Shepherd is uncontroverted, and Ms. Shepherd cannot establish Dr. Aronowitz's liability for professional negligence. As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff's damages. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; see also *Kelley v. Trunk, supra*, 66 Cal.App.4th at p. 525 [proof regarding summary judgment "is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation"].)

The record contains nothing to controvert the summary judgment motion's prima facie factual showing that no act or omission of Dr. Aronowitz caused or contributed to any injury suffered by Ms. Shepherd. Missing proof of both causation and damages, her claim of malpractice against Dr. Aronowitz fails. The judgment must be affirmed.

DISPOSITION

The judgment is affirmed. Respondent to recover costs.

NOT TO BE PUBLISHED

CHANNEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.