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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Michael Berlin,

Plaintiff and Appellant,

v.

Patrick Johnson,

Defendant and Respondent.

B288003

(Los Angeles Super. Ct. No.  
BC612484)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Gail Ruderman Feuer, Judge. Affirmed.

Steiner & LIBO, Leonard Steiner, for Plaintiff and  
Appellant.

Fraser Watson & Croutch, Craig R. Donahue and Daniel K.  
Dik, for Defendant and Respondent.

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## INTRODUCTION

This is an appeal of a summary judgment in favor of Patrick Johnson, M.D. The trial court ruled that Michael Berlin, M.D. had failed to raise a triable issue of fact about whether Dr. Johnson had exercised reasonable care in performing back surgery on Dr. Berlin and whether any aspect of that surgery had caused Dr. Berlin injury.

Dr. Berlin asserts that the trial judge erred in so concluding. Dr. Berlin contends that he provided competent evidence that one aspect of his back surgery—a right distal foraminotomy at L5—was never performed. Dr. Berlin cites doctors Esa-Pekka Palvimaki and Daniel Powers as support for this claim. And, if there is a triable issue of fact on whether the procedure was performed at all, Dr. Berlin argues that there is no need for expert testimony on standard of care. Saying that you performed a procedure when you did not is indisputably below any relevant standard of care within the common knowledge of the layman.

As for causation, Dr. Berlin asserts that Dr. Johnson's expert, William Taylor, M.D., could not competently testify as to causation because his opinion accepted as true Dr. Johnson's medical records showing that a right distal foraminotomy at L5 was performed. Because Dr. Taylor did not know that the foraminotomy had not been performed, his opinion lacked foundation. Dr. Johnson, therefore, failed to meet his initial burden on the issue of causation.

Finally, for the first time on appeal, Dr. Berlin asserts new objections to the admissibility of Dr. Johnson's evidence adduced in support of his motion for summary judgment.

Dr. Johnson responds that the trial court correctly found that the declarations of Drs. Palvimaki and Powers do not establish a factual dispute that the right distal foraminotomy at L5 was not performed. Dr. Palvimaki opined that the procedure was not performed *or* was performed unsuccessfully. Dr. Palvimaki's equivocal declaration fails to raise a triable issue of fact that Dr. Johnson did not perform the foraminotomy—in fact, Dr. Palvimaki's alternative opinion assumes the procedure was performed, albeit unsuccessfully. Dr. Powers's declaration similarly fails to establish a triable issue of fact that the right distal foraminotomy at L5 was not performed at all. Dr. Powers's declaration neither makes such a statement nor does it contain facts that would support a reasonable inference that Dr. Johnson did not perform that procedure.

On the issue of causation, Dr. Johnson rejects Dr. Berlin's challenge to Dr. Taylor's expert opinion. Dr. Taylor's causation opinion does, in fact, account for Dr. Berlin's unproved contention that Dr. Johnson did not perform the right distal foraminotomy at L5. Dr. Taylor stated "there is nothing J. Patrick Johnson, M.D. *did or failed to do* that caused or contributed to any residual condition or complication to Michael Berlin, M.D." (Italics added.) Therefore, assuming *arguendo* that Dr. Johnson failed to perform the foraminotomy, Dr. Taylor uncontroverted causation opinion addresses that possibility.

Dr. Johnson also rejects Dr. Berlin's untimely assertion of evidentiary objections to Dr. Johnson's evidence submitted in support of his motion for summary judgment. As these objections were not properly made at the hearing on the motion for summary judgment, they have been waived on appeal.

We affirm the trial court's decision. The declarations submitted by Dr. Berlin in opposition to Dr. Johnson's motion for summary judgment fail to establish a triable issue of material fact on the standard of care and causation. Further, Dr. Berlin's evidentiary objections, which were not made at the hearing on the motion for summary judgment, are waived on appeal.

### **BACKGROUND FACTS**

Dr. Berlin has suffered with a long and extensive history of orthopedic and spinal problems, dating back long before he ever sought treatment from Dr. Johnson. Dr. Berlin was injured in a number of collisions, resulting in constant back pain, radiating pain into the right buttock and thigh, and difficulty standing erect. An MRI of Dr. Berlin's spine revealed severe stenosis, foraminal thickening and small fractures of his vertebrae. As early as 2001, Dr. Berlin received epidural steroids and discussed back surgery with his physician. In 2007, Dr. Berlin was hospitalized for a fractured hip and underwent surgery.

Dr. Berlin first met with Dr. Johnson in 2010. Dr. Berlin's principal complaints were being unable to stand for very long without back and thigh pain and weakness in his lower extremities with foot drop. On examination, Dr. Berlin was found to have weakness in his extremities and mild atrophy in the right calf. Although Dr. Johnson recommended new imaging, Dr. Berlin did not undergo a lumbar MRI until September 2012.

For the next two years, as Dr. Berlin's symptoms became more painful and debilitating, he consulted with different doctors, including Dr. Johnson. The general medical consensus was that if conservative treatment and pain management were ineffective, Dr. Berlin would require surgery. A 2014 MRI

showed further degeneration and foraminal stenosis and marked discogenic and facet disease associated with scoliosis.

On April 8, 2014, Dr. Johnson, assisted by Dr. Terrence Kim, performed surgery on Dr. Berlin. The surgical notes prepared by Dr. Johnson regarding what he did during that operation show, inter alia, that Dr. Johnson performed distal foraminotomies of L4-L5. Dr. Johnson noted that there was complete occlusion of the foramen at L4-L5 at the beginning of the procedure, but that after Dr. Johnson opened the distal foramen, the serial curved curettes, Kerrison rongeurs, and a Murphy ball probe were all passed out of the foramen of each level bilaterally without obstruction. These tests confirmed adequate decompression.

One month after surgery, Dr. Berlin saw Dr. Johnson. Dr. Berlin was doing well with no leg pain and leg weakness was improving. Two months after surgery, Dr. Berlin again saw Dr. Johnson and reported that he did not have significant radiating pain, but that when he stood or walked, he had discomfort in his right calf. Throughout 2014 and 2015, Dr. Berlin continued to be periodically evaluated by Dr. Johnson and Dr. Kim.

Dr. Berlin also was seen by Dr. Praveen Mummaneni in October 2014 and evaluated for further surgery. Dr. Mummaneni recommended further tests and suggested that a right L4 screw reversion surgery may be required if it was determined to be the cause of his symptoms.

In June 2015, Dr. Berlin saw Dr. Johnson and complained of worsening right lower extremity pain. Dr. Johnson reviewed a recent CT scan and observed a collapsed L5-S1 disc space and a narrow distal L5 foramen. Although additional surgical options

were discussed for Dr. Berlin's lumbar scoliosis, no further action was taken by Dr. Berlin with Dr. Johnson. Rather, more diagnostic tests were conducted by other health care providers.

Nine months later, Dr. Berlin underwent surgery performed by Dr. Palvimaki at Helsinki Hospital in Finland. Dr. Palvimaki performed an L5 decompression.

Dr. Berlin filed a complaint against Dr. Johnson on February 28, 2016, and filed a first amended complaint on August 22, 2016. Dr. Berlin's complaint alleged a single cause of action for professional negligence. Dr. Johnson's motion for summary judgment was first heard on November 15, 2017. The trial court requested a supplemental brief from the Dr. Johnson addressing issues that Dr. Berlin had raised at the hearing. The trial judge conducted a second hearing on the motion on November 30, 2017, and granted Dr. Johnson's motion for summary judgment. The trial court entered judgment for Dr. Johnson on December 7, 2017. Dr. Berlin filed a notice of appeal on February 5, 2018.

## DISCUSSION

### I. Standard of Review

Where, as here, the case comes before us after a trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (*Id.*) The appeal “ ‘ ‘reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial

court for its consideration.” ” ” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1239, quoting *In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

II. Dr. Berlin failed to establish that Dr. Johnson did not perform a right L5 distal foraminotomy.

To prevail on a motion for summary judgment, a defendant must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) On review of a summary judgment motion, we review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673–674.) The evidence of the moving party is to be strictly construed, and any doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.)

In moving for summary judgment, Dr. Johnson established by medical records and other competent evidence that the multi-level, multi-technique spinal surgery that he performed on Dr. Berlin was within the standard of care. Dr. Johnson submitted the expert declaration of Dr. Taylor, who described Dr. Berlin's medical history of lower back pain and radicular symptoms and the varied medical interventions he had received to address those problems. Part of Dr. Berlin's treatments included back surgery performed by Dr. Johnson including a right L5 distal foraminotomy. Dr. Taylor then opined that, as a neurosurgeon, he was familiar with the care and treatment of patients with conditions like those of Dr. Berlin. Dr. Taylor

opined to a reasonable degree of medical probability that in performing the surgery on Dr. Berlin, Dr. Johnson and Dr. Kim exercised their judgment for which the surgical performance and technique were within the standard of care. Dr. Taylor opined that there was not excessive bone removal and that the surgery performed was successful in providing decompression and that the post-surgical CT show the foramina at L4-5 to be widely patent, thus, confirming post-operative changes at each side and at each level. Dr. Taylor further opined that, to a reasonable degree of medical probability, that Dr. Berlin's outcome was within the range of acceptable outcomes for such surgeries.

In opposition, Dr. Berlin submitted two declarations, neither of which contained a definitive statement that a right L5 distal foraminotomy had not been performed. Dr. Palvimaki simply posited, as one of two possibilities, that the right L5 distal foraminotomy had not been performed. Dr. Palvimaki's alternative proposition is that the operation was performed, but was not successful. Neither possibility was found by Dr. Palvimaki to constitute a breach of any standard of care. This type of conjectural and ambiguous evidence cannot create a triable issue of fact. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.)

Similarly, Dr. Powers never opined that Dr. Johnson had not performed the right L5 distal foraminotomy. Instead, he simply claimed not to see something he had expected to see on certain post-operative radiology films. This statement, without more, does not provide a sufficient factual basis upon which a finder of fact could reasonably infer that the L5 distal foraminotomy had not been performed. An expert's opinion rendered without a reasoned explanation of why the underlying



facts lead to the conclusion has no evidentiary value. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

Given that Dr. Berlin's two physician declarants did not controvert Dr. Johnson's evidence that the distal foraminotomy had been performed, the burden remained on Dr. Berlin to establish a triable issue of fact on the issue of whether the procedure that Dr. Johnson had performed deviated from the community standard of care.<sup>1</sup> He failed to do so. Dr. Berlin did not proffer any expert opinion that Dr. Johnson's surgical performance fell below the community standard of care. This omission is fatal to his medical malpractice claim. (*Sarka v. Regents of University of California* (2006) 146 Cal.App.4th 261, 273; *Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1424 ["No medical malpractice claim is viable without expert testimony establishing the appropriate standard of care."].)

III. Dr. Berlin failed to establish a triable issue of fact on causation.

Dr. Johnson also moved for summary judgment on the element of causation. Dr. Johnson satisfied his initial burden of production on this issue through the declaration of his expert,

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<sup>1</sup> Due to the absence of a triable issue of fact on whether Dr. Johnson had, in fact, performed the right L5 distal foraminotomy on Dr. Berlin, it is not necessary to decide whether the common knowledge exception would apply to such an omission. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523, ["In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care, except in cases where the negligence is obvious to [the] layman."].)

Dr. Taylor. Dr. Taylor stated that, in his opinion to a reasonable degree of medical probability, “there is nothing J. Patrick Johnson did or failed to do that caused or contributed to any residual condition or complication” to Dr. Berlin.

In response, Dr. Berlin failed to submit any expert opinion on causation. Neither Dr. Palvimaki nor Dr. Powers proffered any expert opinion that Dr. Johnson caused injury to Dr. Berlin. Nor, as Dr. Berlin now argues, was Dr. Taylor’s opinion—that nothing that had been done or that had not been done caused injury to Dr. Berlin—based on inadmissible or otherwise faulty evidence. Dr. Taylor’s causation opinion anticipates the possibility that a right L5 distal foraminotomy had not been performed by Dr. Johnson. Assuming *arguendo* this fact, Dr. Taylor opined that such an omission did not cause Dr. Berlin injury. In the face of this opinion, Dr. Berlin failed to provide an expert rebuttal. Without such evidence, Dr. Berlin could not create a triable issue of fact on the essential element of causation. (*Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1572.)

IV. Dr. Berlin’s evidentiary objections are waived.

On appeal, Dr. Berlin asserts several evidentiary objections to the evidence submitted by Dr. Johnson in support of the motion for summary judgment. These objections were never made to the trial judge. Dr. Berlin did respond to Dr. Johnson’s evidentiary objections, thereby establishing that Dr. Berlin knew that evidentiary objections were available and could be properly made at or before the hearing on the motion for summary judgment. The trial judge ruled on Dr. Johnson’s evidentiary objections.

“Unless otherwise excused by the court on a showing of good cause, all written objections . . . in support of or in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party’s opposition or reply papers are served and filed.” (Cal. Rules of Court, rule 3.1354, subd. (a).) “Evidentiary objections not made at the hearing shall be deemed waived.” (Code of Civ. Proc. § 437c, subd. (b)(5).) Thus, objections to evidence must be made in the trial court to avoid waiver. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 530–531.)

Where, as here, a party has failed to object to evidence submitted by Dr. Johnson in support of a motion for summary judgment, those objections are waived. (See *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1184, fn.2 [evidentiary objections to medical records introduced as part of summary judgment motion, which were not made in the trial court, deemed waived on appeal]; *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 599 fn. 5.)

## **DISPOSITION**

The judgment is affirmed. Dr. Patrick Johnson is awarded his costs on appeal.

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JONES, J.<sup>\*</sup>

We concur:

LAVIN, Acting P.J.

DHANIDINA, J.

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.