Filed 11/20/12 Nguyen v. Scott CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PETER T. NGUYEN, Plaintiff and Appellant, v. TERRY W. SCOTT, Defendant and Respondent.	B235533 (Los Angeles County Super. Ct. No. KC059247)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

Gray ● Duffy, John J. Duffy and Kevin H. Park for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, James J. Kjar and Ryan P. Deane for Defendant and Respondent.

INTRODUCTION

Plaintiff Peter T. Nguyen appeals from a judgment of dismissal with prejudice entered after the trial court granted defendant Terry W. Scott, M.D.'s motion for summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff first went to see defendant, an otolaryngologist, in February 2009 with complaints of, inter alia, bilateral nasal congestion, postnasal drip, facial pressure and pain, fatigue from snoring, choking and stopping breathing while asleep. During the course of treatment, defendant proposed a right nasal endoscopy with possible biopsy and discussed the risks and benefits of the procedure with plaintiff. Plaintiff signed a consent form that indicated some possible complications of the surgical procedure could include infection, bleeding into the eye, and "injury to the orbit or optic nerve causing blindness or eye pain." Plaintiff underwent the surgical procedure on April 29, 2009. On May 4, plaintiff followed up with defendant and complained of increased postnasal drip subsequent to the surgery and double and blurred vision, especially with the left eye. An MRI image obtained on May 4 showed that plaintiff had suffered a bony fracture to the left orbit.

On July 26, 2010, plaintiff filed this medical malpractice action against defendant and his associated medical group, Diamond Bar ENT Specialty Group. Plaintiff alleged one cause of action for professional negligence during a nasal endoscopic procedure on April 29, 2009.[1] He alleged that defendant acted below the standard of care, causing a

---

[1] Plaintiff also presents arguments based on insufficient evidence about another procedure done on April 1, 2009, and in his opening brief asserts that the injury to his left eye was caused by the April 1 procedure. The complaint, however, alleges injury caused by defendant's negligence only as to the April 29, 2009 procedure. On appeal from a summary judgment, our task is to "identify the issues framed by the pleadings, determine

suborbital fracture to his left eye, resulting in permanent damage, causing plaintiff to have double vision. Defendant filed an answer to the complaint in September 2010.

After completing some discovery, defendant filed a motion for summary judgment (Code Civ. Proc., § 437c) in April 2011. Defendant asserted that there was no triable issue of material fact as to any alleged breach of the standard of care by him or his medical group with respect to the April 29, 2009 nasal endoscopic procedure.

In support of his motion, defendant submitted the declaration of his attorney, with its exhibits: copies of plaintiff's responses to interrogatories and plaintiff's medical records from defendant, an ophthalmologist, and health facilities from which plaintiff received care related to his alleged injury (collectively, the documentary evidence).

Defendant also presented the declaration of his expert in otolaryngology, Williard Fee, M.D., which Dr. Fee based on his review of the documentary evidence. In the declaration, Dr. Fee stated his opinions that defendant complied with the standard of care in his performance of the nasal endoscopic procedure as well as in the care defendant provided to plaintiff prior to and after the procedure. In his separate statement of undisputed material facts, defendant included several facts from Dr. Fee's declaration.

In opposition to the motion, plaintiff submitted the declaration of his expert, Geoffrey R. Keyes, M.D., stating that defendant's negligence, i.e., conduct below the standard of care for otolaryngology, caused the fracture of plaintiff's orbit and, thereby, caused plaintiff to suffer from diplopia. In his declaration, Dr. Keyes noted that he had examined plaintiff and reviewed the documentary evidence, but Dr. Keyes gave no further explanation of the basis for his opinion. In the response to defendant's separate statement, plaintiff objected to the facts from Dr. Fee's declaration on the basis that they

---

whether the moving party has negated the nonmoving party's claims, and determine whether the opposition has demonstrated the existence of a triable issue of material fact." (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 763, disapproved on another ground in *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 775.) Inasmuch as injury caused by the April 1 procedure is not an issue raised in the complaint, it is not properly before us.

did not comply with California Rules of Court, rule 3.1350, requiring citation to the record.

The trial court granted defendant's motion for summary judgment. In its written decision, the court found that defendant presented sufficient evidence in the declaration of Dr. Fee to meet defendant's burden of showing that plaintiff could not establish the element of causation[2] and to shift the burden to plaintiff to show that a triable issue of material fact existed. According to the court, the declaration of plaintiff's expert, Dr. Keyes, was conclusory and, therefore, without evidentiary value. As a result, the court found that plaintiff failed to meet his burden.

Plaintiff promptly filed a motion captioned as a motion for a new trial. Noting that there had been no trial to serve as a basis for a new trial motion, the court deemed the motion to be one for reconsideration. (Code Civ. Proc., § 1008, subd. (a).) The trial court denied the motion.

The trial court entered judgment in favor of defendant and his associated medical group and ordered that plaintiff take nothing. The court ordered dismissal of plaintiff's complaint with prejudice.

DISCUSSION

We review a trial court's grant of a summary judgment motion brought by a defendant de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Code of Civil Procedure section 437c, subdivision (c), provides that a "motion for 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." We must "consider all of the evidence set forth in the papers, except that to which

---

[2] In its written decision, the trial court used the term "causation." The court's discussion and analysis, however, focused on whether defendant had breached his duty to provide professional services in accordance with the standard of care.

objections have been made and sustained . . . and all inferences reasonably deducible from the evidence except . . . [inferences] contradicted by other inferences or evidence . . . ." (*Ibid*.; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) "[W]e view the evidence in the light most favorable to [the plaintiff]." (*Wiener*, *supra*, at p. 1142.) Our task is to "liberally construe" a plaintiff's evidence and "strictly scrutinize" evidence submitted by the defendant, resolving "any evidentiary doubts or ambiguities in [the plaintiff's] favor." (*Ibid.*) We review the validity of the judgment and not the reasons given for it by the trial court. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.)

Initially, a moving defendant has "the burden of showing that a cause of action has no merit," such as by showing "that one or more elements of the causes of action . . . cannot be established." (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 854.) The defendant may make such a showing "by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) If the moving defendant meets that burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.)

The elements of a cause of action for medical malpractice by a physician are (1) the physician's duty owed to the plaintiff to use such skill, prudence and diligence as other members of the physician's profession commonly possess and exercise; (2) a breach of that duty; (3) causation of injury by the breach; and (4) damage or loss resulting from the breach. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.)

The standard of care by which a physician's breach of his duty is measured is "'peculiarly within the knowledge of experts . . . , unless the conduct required by the particular circumstances is within the common knowledge of the layman.'" (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410; accord, *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) For this reason, "'"California courts have incorporated the expert evidence requirement into their standard for summary judgment

in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." [Citations.]' [Citation.]" (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607.)

In order to establish the presence or absence of a triable issue of material fact, the expert opinion must be supported by a reasoned explanation of "why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not" the physician did, or did not, negligently cause the plaintiff's injury. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1119, italics omitted; see, e.g., *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 [expert declaration listing expert's credentials, reciting facts of the case and stating his opinion that the defendant physician at all times acted within the standard of care was insufficient to carry the burden of the defendant moving for summary judgment].) The standard for summary judgment, such as the absence or presence of triable issues of material facts, "is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation." (*Kelley*, *supra*, at p. 525.) "[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value." (*Jennings*, *supra*, at p. 1117.)

Plaintiff's primary contention is that the declaration of his expert was sufficient to raise a triable issue of fact that would preclude the grant of defendant's motion for summary judgment. We disagree.

In his declaration in support of the summary judgment motion, Dr. Fee identified the information sources he used to arrive at his opinion, consisting of the documentary evidence. Dr. Fee set forth a detailed medical chronology of plaintiff's care by defendant prior to, during, and after the April 29 nasal endoscopy and plaintiff's related consultation with Dr. Michael Burnstine, who specialized in ophthalmology and ocular plastic surgery. Dr. Fee opined that defendant met the standard of care in treating

plaintiff and gave an illuminating reasoned explanation for his conclusion.[3] (*Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1118.)

Thus, defendant met his burden to produce evidence that his conduct was within the community standard of care (*Hanson v. Grode*, *supra*, 76 Cal.App.4th at p. 607), negating an essential element of plaintiff's cause of action for medical malpractice. The burden thus shifted to plaintiff to produce evidence that showed a triable issue of material fact existed. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 854.) Plaintiff failed to meet his burden.

Plaintiff submitted the declaration of his expert, Dr. Keyes, but the trial court properly found that it had no evidentiary value. Dr. Keyes' declaration identified the items of documentary evidence reviewed, but it did not identify specific facts or inferences Dr. Keyes considered regarding defendant's care and treatment of plaintiff. Dr. Keyes stated that he examined plaintiff, but the declaration is devoid of any facts, observations or conclusions Dr. Keyes derived from the examination. The declaration recited that plaintiff underwent the nasal surgery and immediately thereafter had a new complaint of postnasal drip and double vision, especially with his left eye, and that the subsequent MRI revealed a bony fracture of the orbit. Dr. Keyes then gave his opinions that "the fracture of the orbit is a significant complication, and it was caused by the surgery performed by [defendant] . . . . [¶] [T]he fracture to [plaintiff's] orbit was caused by the negligence of [defendant], i.e., conduct which fell below the standard of

---

[3] In his declaration, Dr. Fee stated that he was aware that plaintiff suffered "a bony fracture after this April 29th procedure and as documented in a May 4, 2009 Orbital MRI. However, a bony fracture to the lamina papyracea is a known risk and complication of undergoing a nasal endoscopy. Moreover, the plaintiff was provided a consent form that he signed that specifically detailed this potential risk and complication. Further, notwithstanding the findings detailed in the May 4, 2009 Orbital MRI, there is nothing in [defendant's] preoperative documentation, operative report and/or postoperative documentation to suggest that he performed the April 29, 2009 procedure below the standard of care. Thus, it is my opinion that [defendant] appropriately and in compliance with the standard of care recommended and performed a right nasal endoscopy and biopsy on April 29, 2009."

care required of him in his specialty of otolaryngology . . . . The fracture . . . has resulted in damage to the musculature of the eye, causing [plaintiff] to suffer from diplopia . . . . [Defendant] was required to comply with the standard required of him in otolaryngology, and in this case, he failed to comply with the standard and caused injury to [plaintiff]." The declaration did not offer any explanation as to the bases of Dr. Keyes' opinions.

As previously noted, "when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value." (*Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1117.) Dr. Keyes' declaration included only "an ultimate opinion, unsupported by reasoned explanation" and, therefore, it did not raise any triable issue of material fact that would defeat defendant's motion for summary judgment. (*Kelley v. Trunk*, *supra*, 66 Cal.App.4th at p. 525.)

Plaintiff next contends that the trial court erred in granting defendant's motion for summary judgment, in that defendant's separate statement of material facts violated Code of Civil Procedure section 437c, subdivision (b)(1), and California Rules of Court, rule 3.1350(d). Plaintiff objected to several of the facts from Dr. Fee's declaration on the grounds Code of Civil Procedure section 437c "requires individual facts," and rule 3.1350(d) of the California Rules of Court "requires reference to the exhibit, title, page, and line numbers." Defendant maintains that his separate statement was sufficient to meet the requirements. We are inclined to agree with defendant. In any case, the trial court has the discretion to consider facts not properly raised in the separate statement of facts, and we find no abuse of discretion in the trial court's decision to do so here. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315-316.)

Plaintiff's final contention is that the trial court erred in treating his motion for a new trial (Code Civ. Proc., § 657) as one for reconsideration (*id.*, § 1008, subd. (a)). Plaintiff relies on *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at page 858, which states that "[a] motion for a new trial is appropriate following an order granting summary judgment." Assuming arguendo that the trial court erred, under the facts and

circumstances of this case, any such error was harmless, in that there is no probability plaintiff would have obtained a more favorable judgment in the absence of the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Plaintiff argues that he was entitled to a new trial on the ground of "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (Code Civ. Proc., § 657, subd. 4.) The "newly discovered evidence" was a supplemental declaration by Dr. Keyes, elaborating on the anatomy of the area involved in the April 29, 2009 nasal endoscopic surgery.

A motion for reconsideration may be granted "based upon new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a).) In denying plaintiff's motion, the trial court found that the purported "new" facts were available to plaintiff prior to the grant of the summary judgment motion and therefore did not support the granting of reconsideration. Had the trial court had been applying the standard for granting a new trial on the basis of newly discovered evidence, the result would have been the same; the evidence was not newly discovered, under either statute.

DISPOSITION

The judgment is affirmed. Defendant shall recover his costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J. ZELON, J.