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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOEY G. HYNES, Plaintiff and Appellant, v. GLENDALE ADVENTIST MEDICAL CENTER et al., Defendants and Respondents.	B268606 (Los Angeles County Super. Ct. No. BC482449)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed.

Law Office of Marilyn M. Smith, Marilyn M. Smith; Law Office of Lisa Fisher, Lisa Fisher; and Stephen R. McLeod for Plaintiff and Appellant.

LaFollette, Johnson, DeHaas, Fesler & Ames, David Ozeran, Christopher Wend, Nicoli Z. Richardson; Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport for Defendant and Respondent.

Plaintiff and appellant Joey Hynes is the sister of John Fitzgerald (Fitzgerald or decedent), and the administrator of his estate. Respondent Devinder Gandhi, M.D., is a health care provider who cared for the elderly Fitzgerald as he transferred between acute care hospitals and skilled nursing facilities from mid–August to mid–November 2010. In April 2011, several months after Dr. Gandhi ceased acting as his physician, Fitzgerald died at age 77, as a result of blunt head trauma after falling at his nursing home.

Appellant sued Dr. Gandhi, among others, for wrongful death and "neglect" under the Elder Abuse and Dependent Adult Civil Protection Act, Welfare and Institutions Code section 15600, et seq. (Elder Abuse Act). Appellant asserts the trial court erred in granting Dr. Gandhi's motion for summary adjudication on the cause of action for Elder Abuse, after it concluded she failed to demonstrate the level of "reckless neglect" sufficient to entitle her to the heightened remedies under the Elder Abuse Act. Appellant also contends the court erred in granting Dr. Gandhi's subsequent motion for summary judgment on the cause of action for wrongful death, after she failed timely to oppose that motion. Finding no error, we affirm.

FACTUAL BACKGROUND

Glendale Adventist Medical Center

On August 11, 2010, Fitzgerald fractured his femur after falling from his wheelchair. Fitzgerald was transported to the emergency room

at Glendale Adventist Medical Center (GAMC).[1] The emergency room physician noted that Fitzgerald was angry, agitated, combative, extremely confused, had dementia and refused to follow direction. Antipsychotic medications (Haldol and Ativan) were administered because of Fitzgerald's "erratic behavior" before his discharge from the emergency room on August 11.

Dr. Gandhi became Fitzgerald's primary care physician after his admission to the medical floor at GAMC. He ordered a low sodium diet for Fitzgerald, and IV nutrition and hydration. Morphine was administered for pain, and Dr. Gandhi ordered orthopedic and psychiatric consultations.[2]

On August 11, 2010, Fitzgerald was evaluated by psychiatrist Mark Powers. Dr. Powers observed that Fitzgerald showed "generalized difficulty," was not fully oriented to time, made illogical associations and was very suspicious. His mood was angry, irritable and uncooperative. Fitzgerald was "very abusive" and had limited judgment and impulse control. Dr. Powers continued Fitzgerald on Haldol.

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[1] GAMC was one of numerous institutions and individuals (including Fitzgerald's adult sons John and Jesse Fitzgerald) named as defendants; Dr. Gandhi is the only defendant who is a party to this appeal.

[2] Dr. Gandhi also ordered special skin risk precautions for Fitzgerald, including diapers, regular repositioning to avoid bedsores, no massage over certain areas and special positioning.

On August 12, 2010, an orthopedist recommended surgical repair of the fractured femur, upon cardiac clearance, and the surgery was performed on August 16, 2010. Post-surgery, Dr. Gandhi continued morphine for pain, and added Percocet, Tylenol and a sleep medication (Restoril). Fitzgerald developed a stage–1 pressure ulcer on his sacrum; Dr. Gandhi ordered treatment with ointment and a wound care consultation.

Studio City Rehabilitation Center

On August 19, 2010, following consultation with a social worker and with approval from his adult son, Fitzgerald was transferred from GMAC to Studio City Rehabilitation Center (Studio City Rehab), where he remained until September 30, 2010. Dr. Gandhi was Fitzgerald's primary care physician at Studio City Rehab. His treatment included multiple orders for care and treatment of Fitzgerald's surgical wound, bedsores and skin tears and discoloration. Dr. Gandhi ordered nutritional assessments for Fitzgerald, modified his diet as recommended by dieticians, and ordered the provision of nursing assistance with eating. Dr. Gandhi ordered that Fitzgerald's pain level be monitored every shift, and altered his medications, as necessary.

On August 26, 2010, on Dr. Gandhi's order, Nitin Nanda, M.D., conducted the first of several psychiatric examinations of Fitzgerald at Studio City Rehab. Dr. Nanda observed that Fitzgerald was "very confused" and "agitated with [his] caregivers" who said he "frequent[ly] . . . scream[ed] and thr[ew] things at staff and family." Fitzgerald was

diagnosed with psychosis, depression and dementia, and Dr. Nanda prescribed psychotropic medications (Seroquel and Ativan).

On Dr. Nanda's orders, those medications were continued after Fitzgerald's second psychiatric examination by Dr. Nanda on August 30, during which he was reportedly "combative, aggressive, fighting and loud." On September 18, 2010, Dr. Nanda conducted a third evaluation of Fitzgerald. Dr. Nanda observed that Fitzgerald "continue[d] to pull his diaper off and play with his feces, and scream at times. [Appellant] believes this is healthy for him as that means he is more alert. [Fitzgerald] is very difficult to care for and cannot be redirected." Dr. Nanda reduced the dosage of Ativan, and ordered Celexa for depression. Dr. Nanda (not Dr. Gandhi) ordered and adjusted the administration of Fitzgerald's antipsychotic medications during his stay at Studio City Rehab. The record indicates that Dr. Nanda received signed informed consent forms from Fitzgerald's family members for the administration of the medications.

Saint Joseph Medical Center and Alameda Care Center

On September 30, 2010, swelling was observed in Fitzgerald's left cheek and Dr. Gandhi ordered him transferred to Saint Joseph Medical Center (St. Joseph), an acute care facility. He was diagnosed with staph and urinary tract infections, and renal failure, and prescribed a 14–day regimen of antibiotics to be completed at a skilled nursing facility, Alameda Care Center (ACC), where Dr. Gandhi continued to serve as his primary care physician.

Fitzgerald transferred to ACC on October 7, 2010. At the time of his admission to ACC, Fitzgerald had Stage 2 pressure ulcers on his buttocks. In addition to physical therapy, Dr. Gandhi ordered wound treatment, a pressure relieving mattress, regular repositioning, a professional nutritional assessment and various supplements. Dr. Gandhi also ordered a nutritional assessment from a dietitian and the provision of nutritional supplements, as necessary.

Fitzgerald's antipsychotic medications were continued after ACC obtained written consent from his son, and Dr. Nanda conducted an additional psychiatric evaluation. Dr. Nanda observed that Fitzgerald still engaged in inappropriate, combative behavior with staff and peers and his "[y]elling and cursing [had] increase[d]." Dr. Nanda diagnosed Fitzgerald with Alzheimer's dementia. Although appellant was "made aware of [her brother's] behaviors, . . . she denie[d]" them. On November 4, 2010, appellant contacted Dr. Gandhi to insist that all of Fitzgerald's psychotropic medications be discontinued. Dr. Gandhi complied with that request.

Verdugo Hills Hospital and Goldstar Healthcare Center

Fitzgerald's combative behavior escalated after his antipsychotic medications were discontinued; he yelled, cursed and struck out at staff. By November 10, Dr. Gandhi had concluded that Fitzgerald posed a danger to ACC staff and, with appellant's consent, had him transferred to the geropsychiatric unit at Verdugo Hills Hospital (Verdugo Hills).

Fitzgerald was transferred from Verdugo Hills to Goldstar Healthcare Center (Goldstar) on December 17, 2010. After Fitzgerald left Verdugo Hills, Dr. Gandhi no longer served as his attending physician. Fitzgerald fell out of bed on March 5, 2011. He died on April 6, 2011, due to blunt head trauma.

PROCEDURAL BACKGROUND

This lawsuit was filed in April 2012. The operative third amended complaint, filed May 27, 2014, alleges two causes of action against Dr. Gandhi: (1) negligence in violation of the Elder Abuse Act, seeking attorney fees and punitive damages, and (2) wrongful death, premised on medical negligence.

On August 25, 2014, Dr. Gandhi moved for summary adjudication on the first cause of action for Elder Abuse.[3] The motion was supported by the declaration of Dr. Karen Josephson, an expert in internal and geriatric medicine. Dr. Josephson opined that Dr. Gandhi's care and treatment of Fitzgerald had been appropriate and within the standard of care, and never rose to the level of egregious misconduct necessary to establish a cause of action for Elder Abuse, or to support a claim for punitive damages. In response to allegations that Dr. Gandhi rendered a false diagnosis of psychosis to justify administration of antipsychotic medications to Fitzgerald, Dr. Josephson explained that such

[3] The motion was also directed and granted as to appellant's request for punitive damages. That ruling is not contested on appeal.

medications were ordered by decedent's psychiatrists, and opined that Dr. Gandhi acted appropriately in deferring to their treatment recommendations.

The hearing on the summary adjudication motion, initially scheduled for mid-November 2014, was continued several times.[4] The

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[4] The first continuance (to January 15, 2015) was agreed upon by the parties. On December 29, 2014, appellant filed an ex parte application to continue the hearing. (Code Civ. Proc., § 437c, subd. (h).) It was denied.

Appellant filed an untimely opposition to the motion. She argued that the condition of decedent's skin and availability of alternatives to antipsychotic medications raised triable factual issues whether Dr. Gandhi committed elder neglect. Appellant responded to Dr. Gandhi's separate statement of material facts asserting an identical objection to each of 210 separate facts, and took issue with the authenticity of medical records submitted in connection with Dr. Gandhi's motion, on which Dr. Josephson relied to form the bases for her opinions. Appellant also lodged evidentiary objections on which the court ruled, but those objections are not included in the appellate record. Alternatively, appellant requested that the hearing on the motion be continued to permit her to conduct additional discovery, and to give her expert witness time to review voluminous medical records. (Code Civ. Proc., § 437c, subd. (h).) In response to appellant's challenge to the authenticity of Fitzgerald's records, Dr. Gandhi submitted declarations from custodians of records for medical and nursing facilities. The hearing was continued to February 10, 2015, subsequently assigned to a new judge, and continued again to April 28, 2015.

On April 28, 2015, appellant filed a "supplemental opposition" to the summary adjudication motion comprised of declarations from decedent's sons and a declaration by Dr. Colin Hamblin, a family practice expert. Dr. Hamblin criticized Dr. Gandhi for having failed to obtain a pain consultation, failing adequately to assess and treat decedent's pain, failing to speak with Dr. Nanda about the informed consent for antipsychotic medications, and following appellant's

hearing was ultimately conducted on June 25, 2015. The court then took the matter under submission, and issued a written ruling on August 7, 2015. The court overruled appellant's evidentiary objections. It found that appellant had failed to demonstrate the existence of a triable issue of material fact whether, based on clear and convincing evidence, Dr. Gandhi's conduct or omissions constituted "reckless neglect" sufficient to support a statutory cause of action for Elder Abuse or a claim for punitive damages, and granted the motion for summary adjudication.

Summary Judgment Motion

On June 1, 2015, Dr. Gandhi filed a motion for summary judgment as to the remaining cause of action against him for wrongful death. He argued that no negligent act or omission on his part caused Fitzgerald's death, because he had neither been responsible for nor involved in decedent's medical care for at least three months before his death on April 6, 2011. The motion was supported by a second declaration from Dr. Josephson. She affirmed that Fitzgerald resided at Goldstar (or elsewhere) for three or more months before his death,

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directive to discontinue medications "without speaking to her as the responsible party."

The hearing was continued to June 16, 2015, to give Dr. Gandhi an opportunity to respond to appellant's evidence. Dr. Gandhi objected to appellant's evidence. The court did not review the objections before the hearing, and continued the matter to June 25 in order to further consider Dr. Gandhi's reply papers.

during which time he was not under Dr. Gandhi's care. Dr. Josephson opined that antipsychotic medications Fitzgerald took while under Dr. Gandhi's care had not caused nor contributed to his fall or the blunt head trauma he suffered as a result. In Dr. Josephson's opinion, when Fitzgerald fell on March 5, 2011, he would no longer have felt effects from the use or the discontinuation of antipsychotic medications he had taken several months earlier, which could have caused his fall. In Dr. Josephson's opinion, Fitzgerald's fall and the concomitant blunt head trauma were "caused by a natural progression of his dementia and conditions accompanying old age, and not by any act or omission on the part of Dr. Gandhi months earlier."

The hearing on the summary judgment motion was scheduled for August 25, 2015. Appellant filed her opposition papers on August 24, 2015. Appellant also submitted a declaration from her attorney, Marilyn Smith. Smith claimed to have been "in trial preparation for the last 45 days," and also said she still suffered from injuries sustained in an accident months before. Smith said she had relied on an affiliate (attorney Lisa Fisher) to complete the summary judgment opposition, but Fisher had a "family emergency and had hurt her hand." Smith stated she had "recently learned" Fisher had experienced difficulty reaching Dr. Hamblin, who had been out of state quite a bit due to the death of his brother. Dr. Hamblin's "availability to continue to assist in this case [was] unknown." Accordingly, Smith requested that the trial court accept appellant's untimely opposition and consider the prior declaration of Dr. Hamblin filed in connection with the earlier summary

adjudication motion. Alternatively, Smith requested the court continue the matter to permit appellant to retain a new expert.

The court denied appellant's request for a continuance, noting she had failed to comply with the procedural requirements for seeking a continuance, and this was her second untimely opposition submitted close to the time of a hearing on a dispositive motion. The motion was granted. Judgment was entered in favor of Dr. Gandhi on August 28, 2015.

On September 18, 2015, appellant filed a notice of intent to move for new trial. (Code Civ. Proc., § 659, subd. (a)(2).) The court later granted her request for an extension of time (to October 5, 2015) to file a memorandum of points and authorities in support of that motion. Appellant failed to meet that deadline, and filed an untimely memorandum of points and authorities relying principally on the same evidence and arguments asserted in opposition to the motion for summary adjudication. The new trial motion was argued, and denied, on October 26, 2015.

Appellant subsequently filed a motion to set aside the judgment based on attorney mistake, arguing summary judgment was the equivalent of a dismissal or default judgment. (Code Civ. Proc., § 473, subd. (b).) That motion was also denied. This timely appeal followed.

DISCUSSION

1. *Elder Abuse*

As pertinent here, the "Elder Abuse and Dependent Adult Civil Protection Act . . . provides heightened remedies to a plaintiff who can prove 'by *clear and convincing evidence* that a defendant is liable for . . . neglect as defined in Section 15610.57,' and who can demonstrate that the defendant acted with '*recklessness,* oppression, fraud, or malice in the commission of this abuse.' Section 15610.57, [subdivision (a)(1)] in turn, defines '[n]eglect,' in relevant part, as '[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.' [Citation.]" (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152, italics added.) Examples of such neglect include: failure to assist in personal hygiene, or the provision of food, clothing, or shelter; failure to provide medical care for physical and mental health needs; failure to protect an elder or dependent adult from health and safety hazards; and failure to prevent malnutrition or dehydration. (§ 15610.57, subd. (b)(1)–(4).)

Statutory Elder Abuse does not apply to simple or gross professional negligence by a licensed health care provider. (§ 15657.2 ["any cause of action for injury or damage against a health care provider . . . based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to . . . professional negligence causes of action"].) Rather, "the Legislature intended the Elder Abuse Act to sanction only egregious acts of

misconduct distinct from professional negligence." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 784 (*Covenant Care*).)

In actions against health care providers, we look to the "gravamen" of the claims to determine if the Elder Abuse Act applies. (See *Covenant Care, supra*, 32 Cal.4th at pp. 783, 790 [statutory limitation on pleading punitive damages claims against health care provider in action for professional negligence actions is not applicable if "the gravamen of an action is violation of the Elder Abuse Act"]; *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1525 [allegations of elder abuse were sufficient to "alter[] the gravamen of what would otherwise have been professional negligence causes of action"].) A thorough review of the record reveals that the gravamen of this action– in which appellant complains Dr. Gandhi improperly managed Fitzgerald's pain, improperly administered antipsychotic medications, and acted without informed consent–sounds in negligence, not Elder Abuse.

2. *Controlling Law and the Standard of Review for Motions for Summary Judgment or Adjudication*

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." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden to show that "one or more elements of the cause of action . . . cannot be established, or that there is a complete

defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If defendant makes such a showing, the burden shifts to the plaintiff to show by admissible evidence that a triable issue of material fact exists as to the cause of action or defense. (*Ibid.*)

"'Motions for summary adjudication are procedurally identical to motions for summary judgment [citation], and our review of rulings on those motions is de novo [citation].' [Citation.]" (*State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017, 1031.)

We employ the same three-step process as the trial court. First, we identify issues framed by the pleadings. Next, we determine if defendant has made an adequate factual showing to justify judgment in his favor. (Code Civ. Proc., § 437c, subd. (p)(2).) Finally, if the defendant has satisfied his initial burden, we determine whether the plaintiff was able to raise a triable factual issue. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1153–1154.) To satisfy this burden, the plaintiff must "'set forth the specific facts showing that a triable issue of material fact exists . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 653–654.) In reviewing a defendant's summary judgment motion in a case such as this, in which plaintiff's burden of proof at trial on a claim or issue is "clear and convincing" evidence, the plaintiff can only defeat the motion by offering evidence that meets that higher standard of proof. (*Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118–1121; cf., *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [in defamation action, plaintiff opposing summary judgment against

magazine and journalist required to produce clear and convincing evidence of actual malice].)

3. *Appellant Failed to Show that Dr. Gandhi's Conduct Amounted to Reckless Neglect*

Appellant contends the trial court erred in granting summary adjudication because medical records on which Dr. Josephson relied to form her opinion that Dr. Gandhi's treatment of Fitzgerald met the standard of care were not properly authenticated, and because triable factual issues exist based on conflicting expert witness declarations. We conclude otherwise.

a. *The Trial Court Did Not Err in Overruling Appellant's Evidentiary Objections to Fitzgerald's Medical Records*

Appellant maintains that the trial court erred in overruling her evidentiary objections to Dr. Josephson's declaration, because the medical records on which the expert relied to form the bases for her medical opinion were inadmissible under the "business records" exception to the hearsay rule. (Evid. Code, § 1271.)[5] An expert's

[5] Evidence Code section 1271 provides that "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
"(a) The writing was made in the regular course of a business;
"(b) The writing was made at or near the time of the act, condition, or event;
"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

opinion based on assumptions of fact without evidentiary support lacks evidentiary value. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743 (*Garibay*) [expert, who lacked personal knowledge of underlying facts, was precluded from testifying regarding facts derived from medical and hospital records not properly before the court].)

It appears appellant filed evidentiary objections in opposition to Dr. Gandhi's summary adjudication motion (on January 15, 2015). Although the objections are not in the appellate record,[6] it is not disputed that appellant filed them. The record is sufficient to permit review, based on appellant's memorandum of points and authorities in opposition to the motion, Dr. Gandhi's reply materials, and the court's order specifying the bases for its ruling as to appellant's 50 evidentiary objections.

As the court noted, appellant asserted only two bases for her objections: (1) objection Nos. 1–7: "the medical records [were] not properly authenticated because the declaration of the custodian does not state when they were provided to defense counsel. (Evid. Code, § 1271(d) ['The source of information and method and time of preparation were such as to indicate its trustworthiness.'])"; and (2) objection Nos. 8–50: "because the medical records are inadmissible,

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"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[6] Appellant did designate the objections for inclusion in the appellate record, and their absence is not explained. Neither party sought to augment the record to include the objections.

declarations by [Dr. Gandhi's] expert which recite portions of the medical records as a basis for their opinion are inadmissible." The objections were overruled on the ground that Dr. Gandhi provided declarations from custodians of record.

"An expert may rely on otherwise inadmissible hearsay evidence provided the evidence is reliable and of the type that experts in the field reasonably rely upon in forming their opinions. [Citations.]" (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 856.) Medical records, although hearsay, can be used as a basis for an expert medical opinion. (*Garibay, supra*, 161 Cal.App.4th at p. 743.) Relying on *Garibay,* appellant contends the medical records on which Dr. Josephson relied were not sufficiently authenticated to satisfy the business records exception. In *Garibay*, the court reversed summary judgment in favor of a doctor in a medical malpractice action, after finding that an expert's declaration lacked foundation. (*Id*. at p. 743.) The expert demonstrated no personal knowledge of the underlying facts, and the moving papers did not include authenticated copies of the medical records on which the expert based his opinion. (*Ibid*.) The court in *Garibay* reasoned that an expert's opinion based on medical records is deficient if the underlying records are not properly in evidence before the court. (*Id*. at pp. 742–743; cf. *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 505–506.) Because the moving party bears the burden of production on summary judgment, the doctor defendant in *Garibay* failed to satisfy that burden. (*Garibay, supra*, 161 Cal.App.4th at pp. 742-743.) "Without [the] hospital records, and without testimony

providing for authentication of such records, [the expert] declaration had no evidentiary basis." (*Id*. at p. 742.)

Here, Dr. Josephson declared that she reviewed decedent's medical records from GAMC, Studio City Rehab, St. Joseph, ACC, Verdugo Hills and Goldstar. In contrast with *Garibay*, the medical records she reviewed were submitted to the court in connection with Dr. Gandhi's motion. And, apart from Studio City Rehab, Dr. Gandhi produced authenticating affidavits from custodians of record from each medical facility at which Fitzgerald received treatment.[7] (Evid. Code, § 1561.) Thus, *Garibay* does not assist appellant. Dr. Gandhi submitted pertinent underlying medical records in support of his motion and the expert's declaration, and those records were properly authenticated and before the trial court. (See *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 [on summary judgment,

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[7] Former defendant Studio City Rehab submitted a sworn statement from an administrator stating that Fitzgerald's medical records were lost after being copied and produced to appellant. During discovery, Studio City Rehab requested that appellant produce all medical records from Studio City Rehab pertaining to decedent, and she did. Studio City Rehab, in turn, produced those records to Dr. Gandhi in response to discovery he propounded, accompanied by a verification signed by an administrator at Studio City Rehab. This was sufficient for the court to find the medical records produced by Studio City Rehab properly authenticated. (See *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 394, review granted May 10, 2017, S240704 [proponent's burden of producing evidence to demonstrate the authenticity of a document under Evid. Code, § 1400 is satisfied if sufficient evidence is produced "to sustain a finding that it is the writing that the proponent of the evidence claims it is"]; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.)

court considers "'all of the evidence . . . except the evidence to which objections have been made and sustained"'], quoting Code Civ. Proc., § 437c, subd. (c).) Under the circumstances, it cannot be said the court abused its discretion in overruling appellant's objections to this evidence. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [appellate court reviews summary judgment de novo, but reviews trial court's rulings on evidentiary objections under abuse of discretion standard].)

b. *Appellant's Evidence Was Not Sufficient to Create a Triable Factual Issue*

Appellant also contends she raised material factual issues as to Elder Abuse and informed consent by way of a contradictory declaration from her medical expert, Dr. Colin Hamblin, and declarations from Fitzgerald's sons, submitted in opposition to the motion for summary adjudication. Appellant does not identify any specific contradiction between the opinions expressed by Drs. Josephson and Hamblin that raise a triable factual issue. She merely asserts that statutory Elder Abuse claims are "inherently factual in nature," and that "there can be no dispute that Dr. Hamblin's declaration provides conflicting testimony" that requires reversal of the grant of summary adjudication. She is mistaken. The court carefully reviewed the parties' submissions, bearing in mind that a claim of Elder Abuse requires a showing of "reckless neglect" by clear and convincing evidence. It evaluated Dr. Hamblin's conclusions regarding and criticisms of the purportedly

deficient medical care Dr. Gandhi provided to Fitzgerald, and found that none of that conduct rose to the level of reckless neglect required under the Elder Abuse Act.

Dr. Hamblin criticized Dr. Gandhi for not having "adequately address[ed] [Fitzgerald's] pain issues," and said it was "reckless" not to order a pain consult for Fitzgerald because Dr. Gandhi "knew or should have known" the prescribed pain treatment was "insufficient" given the patient's behavior, potential side effects of the medications and inquiries by the family. The court rejected this contention, noting that ineffective, "[i]nsufficient or improper pain treatment . . . does not rise to the level of 'reckless neglect' required by the Elder Care act." At best, the court found that such allegations show a "type of standard professional negligence to which the enhanced remedies" for Elder Abuse are simply "inapplicable."

Dr. Hamblin acknowledged that, although it was "normally appropriate" for Dr. Gandhi to rely on psychiatric consults, such reliance was questionable here given the fact that Fitzgerald's family had inquired about using these medications. The trial court found that Dr. Hamblin's criticisms of Dr. Gandhi for failing to "question the long term use of the anti-psychotics," did not rise to the level of clear and convincing evidence that Dr. Gandhi recklessly withheld medical treatment. Rather, Dr. Hamblin's opinions relate–at most–to the adequacy of Dr. Gandhi's medical services. The court correctly concluded that Dr. Gandhi's "conduct in obtaining only 'questionable' consent, and for allegedly failing to prescribe an effective pain

management plan are not, as a matter of law, subject to the enhanced penalties in the Elder Abuse Act." "In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, supra*, 32 Cal.4th at p. 789; Welf. & Inst. Code, § 15657.) Dr. Hamblin identified no conduct by Dr. Gandhi that rose to the level of recklessness.

The court also rejected Dr. Hamblin's opinion that Dr. Gandhi "knew or should have known that there was no informed consent or appropriate disclosure of [Fitzgerald's] medical treatment and use of anti–psychotics to the responsible parties[.]" Appellant argues that declarations from Fitzgerald's sons "specifically contradict[] the inference that any document purportedly evidencing 'informed consent' may raise." These declarations state, in sum, that one of Fitzgerald's sons requested pain medication be given to his father at one facility, but the request was ignored and Dr. Gandhi did not contact the family to discuss the medication or its side effects. Appellant does not explain how these declarations negate or call into question signed "informed consent" forms permitting administration of the specific anti–psychotic medications Fitzgerald received. More fundamentally, as the court recognized, a theory based on lack of informed consent sounds in negligence and cannot, as a matter of law, constitute "reckless neglect within the meaning of the Elder Abuse Act." A "medical act performed without a patient's informed consent . . . is medical negligence[.]" (*Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690,

698, 700 [proposed claim of elder abuse based on injection of morphine without informed consent and with intent to defraud does not give rise to claim under Elder Abuse Act]; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 240-241 (*Cobbs*); *Delaney v. Baker* (1999) 20 Cal.4th 23, 32 [recovery of enhanced remedies under Elder Abuse Act requires proof of more than simple or even gross negligence].)

4. *Summary Judgment Was Properly Granted on the Cause of Action for Wrongful Death*

The wrongful death claim is also based on allegations of medical negligence, i.e., that Dr. Gandhi failed to obtain informed consent to use anti–psychotic medications, improperly administered those medications and provided inadequate pain management.

To prevail on a wrongful death claim sounding in medical negligence, a plaintiff must prove to a reasonable medical probability that the defendant doctor's negligence caused the patient's death. (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1319.) Such proof must be presented through expert evidence. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.) "'"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."' [Citation.]" (*Ibid.*)

In his motion for summary judgment, Dr. Gandhi argued that no act or omission on his part caused Fitzgerald's death. His motion was

supported by a second expert declaration from Dr. Josephson, who opined that appellant could not establish causation because Fitzgerald's fall and resultant head trauma were the natural progression of conditions related to his age and dementia. Dr. Josephson noted that Dr. Gandhi had not been Fitzgerald's doctor for over three months after Fitzgerald left Verdugo Hills. In Dr. Josephson's expert opinion, neither the administration of anti–psychotic drugs to Fitzgerald while under Dr. Gandhi's care, nor the discontinuation of those drugs had "cause[d] or contribute[d] to the patient falling while at Goldstar . . . and suffering a subdural hematoma."

Dr. Josephson's declaration established, to a reasonable medical probability, that no act or omission by Dr. Gandhi caused Fitzgerald's death. Accordingly, the burden shifted to appellant to present opposing expert evidence "to show that a triable issue of one or more material facts exists[.]" (Code Civ. Proc., § 437c, subd. (p)(2).) Appellant failed to satisfy that burden.

Appellant concedes that her opposition to the summary judgment motion, filed the day before the hearing, was untimely. (See Code Civ. Proc., § 437c, subd. (b)(2) [unless the court for good cause orders otherwise, opposition papers are due at least 14 days before hearing].) The court rejected appellant's argument that it should consider her untimely opposition, which was purportedly late because of her attorneys' health issues, the press of business and the unavailability of her expert witness. The court noted none of appellant's excuses had just arisen, she had not explained the delay in seeking relief, and had

time, but failed to comply with the procedure that permits a party to seek a continuance in order to obtain discovery necessary to oppose the motion. (See Code Civ. Proc., § 437c, subd. (h) [requiring that an application to continue a hearing on motion to obtain necessary discovery be made "at any time on or before the date the opposition response to the motion is due," i.e. 14 days before the hearing date] Code Civ. Proc., § 437c, subd. (b)(2).) The court acted within its discretion in refusing to consider appellant's untimely submission, or to continue the hearing. (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100.)

The "attorney mistake" provision of Code of Civil Procedure section 473, subdivision (b), provides that "[n]otwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, . . . and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . (2) resulting default judgment or dismissal entered against his or her client[.]" Relying on *Avila v. Chua* (1997) 57 Cal.App.4th 860 (*Avila*), appellant argues the court should have granted her motion for relief, and considered the declaration from Dr. Hamblin, filed in opposition to the summary adjudication motion because she should not lose her case because of her counsel's or expert's personal troubles. (*Id*. at p. 867 [extending mandatory relief provision of Code Civ. Proc., § 473, subd. (b) to summary judgment motion].)

But appellant disregards the fact that *Avila* has been disavowed by this and most appellate courts that have considered its rationale, including the court that decided that case. (See *The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993, 1002 ["we conclude our analysis in *Avila* . . . broadly construing the section 473, subdivision (b) default, default judgment, or dismissal language was incorrect"]; see also *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 457-458; *Las Vegas Land & Development Co., LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1090-1092; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 142–143, 147–148; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 295–296; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 228.) The court did not err in denying appellant relief under Code of Civil Procedure section 473, subdivision (b).

5. *There is No Cause of Action for Medical Battery*

Appellant contends reversal is required because she has a viable claim for medical battery. She is mistaken.

A battery cause of action is "reserved for those circumstances when a doctor performs an operation to which the patient has not consented," or intentionally exceeds the terms or conditions of consent. (*Cobbs, supra,* 8 Cal.3d at p. 240; *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1497–1498; *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1269 [to establish claim for medical battery for a violation of conditional consent, patient

must show: (1) his consent was conditional; (2) physician intentionally violated the condition while providing treatment; and (3) he suffered harm as a result of doctor's violation of the condition].)

Appellant cannot rely on allegations of medical battery to survive a summary judgment motion because she did not plead a battery claim. A summary judgment motion is addressed to the issues framed by the pleadings. (*Van v. Target Corp*. (2007) 155 Cal.App.4th 1375, 1387.) A party cannot avoid summary judgment by asserting on appeal a theory inconsistent with her pleadings or representations made to the trial court. (See *ibid*.) Appellant did not allege that Dr. Gandhi failed to obtain consent to administer the medications, and the evidence established that Fitzgerald's sons signed consent forms.

Relying on *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 661-662 (*Perry*), however, appellant claims a medical battery occurred because such consent was inadequate or uninformed. But "battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324; see *Cobbs, supra,* 8 Cal.3d at pp. 241–242.) In *Perry,* plaintiff went to a surgeon to have excess skin removed. During that surgery the doctor performed a breast augmentation procedure, despite plaintiff's instructions not to do so. (*Perry, supra,* 88 Cal.App.4th at pp. 661–662.)

Here, the trial court readily distinguished *Perry*, which "involves a complete lack of consent in a surgery context, [from] the case at hand [which] involves a lack of informed consent regarding the use of drugs." As the court correctly found, appellant did not identify any authority that extends "the medical battery theory to encompass the set of facts at hand, and has cited no case in which a medical battery for lack of informed consent was found to be sufficient to support an Elder Abuse cause of action."

The motions for summary adjudication and summary judgment were properly granted.

DISPOSITION

The judgment is affirmed. Respondent Dr. Gandhi is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.