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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

Estate of ELVA ARACELY GARCIA, Deceased.	B264345
VICTOR ANGEL GARCIA et al., Plaintiffs and Appellants, v. TIMOTHY CARMAN, Defendant and Respondent.	(Los Angeles County Super. Ct. No. VC060308)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret M. Bernal, Judge. Reversed.

Law Offices of Ameer A. Shah and Ameer A. Shah for Plaintiffs and Appellants.

Chapman, Glucksman, Dean, Roeb & Barger, Gregory K. Sabo and Grace A. Nguyen for Defendant and Respondent.

* * * * * *

This medical malpractice lawsuit followed the tragic death of Elva Aracely Garcia. The defendant emergency room physician moved for summary judgment, and the parties' experts presented dueling expert declarations. The trial court granted summary judgment in favor of the physician. Finding disputed issues of material fact, we reverse.

FACTS AND PROCEDURE

On August 20, 2011, at 3:20 a.m., Garcia was admitted at Coast Plaza Doctors Hospital (Coast Plaza) with complaints of severe abdominal pain. She was between 13 and 14 weeks pregnant at the time. Emergency room physician Timothy Carman examined Garcia. At 3:50 a.m., Dr. Carman noted Garcia was hypotensive and ordered an IV of normal saline, and Garcia responded. During the 5:00 a.m. hour, both Dr. Carman and a nurse attempted to have Garcia transferred to a hospital with a higher level of care, and Dr. Carman also contacted Garcia's obstetrician-gynecologist, but he had no admitting privileges. Dr. Carman called another doctor at Coast Plaza, Ted Gionis, who indicated that Garcia could not be admitted without an obstetrician-gynecologist. Meanwhile, Garcia's blood pressure decreased substantially.

At 5:55 a.m., in response to Dr. Carman's request, Dr. Ata-Ollah Mehrtash agreed to provide emergency obstetric services. Garcia was received in the intensive care unit at 6:29 a.m. At 7:55 a.m., Garcia suffered cardiac arrest, and Dr. Carman was able to revive her. Dr. Carman advised Drs. Esmali and Mehrtash of the need for urgent followup. At 8:40 a.m., a scan indicated a possible hemorrhage. At 10:55 a.m., Drs. Mehrtash and Esmali operated on Garcia. Garcia was unresponsive after the surgery and was pronounced dead at 11:55 a.m. on August 21, 2012.

1. Motion for Summary Judgment

Defendant Timothy Carman moved for summary judgment.

In support of Dr. Carman's motion for summary judgment, Dr. Raymond Ricci, a physician board-certified in emergency medicine, provided a declaration, opining that Dr. Carman's conduct at all times met the standard of care. Dr. Ricci opined that ordering an IV bolus of saline flood, which led to an improvement in Garcia's blood pressure, met the appropriate standard of care. Dr. Ricci further concluded that Dr. Carman timely

attempted to transfer Garcia to a hospital with a higher level of care and, at the same time, appropriately tried to contact Garcia's prenatal physician. Overall, Dr. Ricci opined that nothing Dr. Carman did or failed to do caused or contributed to Garcia's death.

2. Opposition to Summary Judgment

In support of their opposition to summary judgment, plaintiffs relied on the declaration of Dr. Paul Bronston, a physician board-certified in emergency medicine. Dr. Bronston concluded that "Dr. Carman fell below the applicable standard of care in his treatment of Ms. Garcia, the decedent, and therefore contributed to her death . . . ." Dr. Bronston identified the following five breaches of the standard of care: (1) Garcia did not have immediate transfusions of O negative blood to stabilize her condition. (2) There was a delay in admitting Garcia to the operating room even without an obstetric gynecologist to assist. "In this case it would have been appropriate for a general surgeon to have taken Ms. Garcia to the operating room without an OB-GYN to assist." (3) Garcia's acidosis was not addressed immediately and not treating it leads to cardiac dysfunction, arrhythmias, and low blood pressure. (4) The preliminary ultrasound report stated that there was fluid in the cul-de-sac, and Dr. Carman did not know this in his deposition. (5) Garcia was in the emergency department for over three hours, and Dr. Carman should have recognized the need for an immediate operation.

The trial court granted summary judgment in favor of Dr. Carman. The trial court concluded that ". . . Dr. Bronston identifies several acts and omissions by Dr. Carman. However, the problem is that he does not 'link' those omissions to decedent's death. He does not explain how those purported omissions caused decedent's death." The court further sustained numerous evidentiary objections to Dr. Bronston's declaration, concluding that Dr. Bronston relied on facts not supported by medical records. This appeal followed.

DISCUSSION

As we shall explain, the trial court erred in granting summary judgment in favor of Dr. Carman.

Standards governing summary judgment are well established. "Summary judgment and summary adjudication provide courts with a mechanism to cut through the parties'

pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citations.] A defendant moving for summary judgment or summary adjudication may demonstrate that the plaintiff's cause of action has no merit by showing that (1) one or more elements of the cause of action cannot be established, or (2) there is a complete defense to that cause of action." (*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 587.) "A defendant moving for summary judgment or summary adjudication need not conclusively negate an element of the plaintiff's cause of action. [Citations.] Instead, the defendant may show through factually devoid discovery responses that the plaintiff does not possess and cannot reasonably obtain needed evidence." (*Ibid*.)

"After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action or affirmative defense. [Citations.] The plaintiff may not simply rely on the allegations of its pleadings but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. [Citation.] A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof." (*Collin v. CalPortland Co., supra*, 228 Cal.App.4th at p. 588.) We review the order granting summary judgment de novo. (*Ibid*.) Our task is to determine whether a triable issue of material fact exists. (*Ibid*.)

In wrongful death actions predicated on medical negligence, the plaintiff must show that the negligent act is a substantial factor in the causation of the death, that is, that there was "a 'reasonable medical probability'" that "the death was 'more likely than not' the result of the negligence." (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1499.) A possible cause is insufficient. (*Ibid*.; see *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118.) "'In *any* negligence case, the plaintiff must present evidence from which a reasonable fact finder may conclude that defendant's conduct probably was a substantial factor in bringing about the harm.'" (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746.)

Generally, causation must be demonstrated by expert testimony. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) In reviewing an expert's declaration for purposes of summary judgment, a court should apply a liberal construction and resolve any doubts in favor of the party opposing summary judgment. (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332.) Applying this standard of review, Dr. Bronston's declaration raised triable issues of material fact.

Here, the disagreement between the two experts—Dr. Ricci and Dr. Bronston—must be determined by the trier of fact. Whereas Dr. Ricci concluded that Dr. Carman promptly and timely requested assistance, meeting the applicable standard of care, Dr. Bronston opined that Dr. Carman failed to timely request assistance and the delay fell below the standard of care. As critical here, Dr. Bronston further opined that the delay in finding a surgeon fell below the standard of care and contributed to Garcia's death. Both experts rely on the same facts—the actions taken by Dr. Carman to obtain a surgeon to operate on Garcia—but reach different conclusions from those facts. This is a triable issue of material fact that must be determined by the trier of fact.

The expert declarations raised an additional triable issue of material fact. Whereas Dr. Ricci concluded that an IV bolus of saline was sufficient to stabilize Garcia's blood pressure, Dr. Bronston concluded that the saline was not sufficient to stabilize her blood pressure. Dr. Bronston opined that Garcia should have been given an immediate transfusion of O negative blood to stabilize her condition, and the failure to do so contributed to her death. These differing opinions form a disputed issue of material fact precluding summary judgment. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 128-129 [declaration stating that injuries were caused by doctor's conduct that fell below standard of care sufficient to withstand summary judgment].)

Finally, the trial court abused its discretion in concluding that the above relied upon portions of Dr. Bronston's declaration lacked foundation. (*Powell v. Kleinman*, *supra*, 151 Cal.App.4th at p. 122 [trial court's ruling on evidentiary objections reviewed for abuse of discretion].) The rule that an expert opinion "may not be based on assumptions of fact that

are without evidentiary support or based on factors that are speculative or conjectural" is well established but has no application here. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; see *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742.) Here, as explained below, Dr. Bronston's opinion would have allowed a trier of fact to find the underlying fact in favor of plaintiffs. (See *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc*. (2006) 136 Cal.App.4th 1409, 1415 [expert declaration "'must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment'"].)

Dr. Bronston was board-certified in emergency medicine. He reviewed Garcia's medical records, declarations filed in this litigation, and Dr. Carman's deposition. His opinions were not based on assumptions of fact but instead were based on his review of the pertinent records and his experience in emergency medicine. It was undisputed that Garcia was given an IV bolus of saline in an effort to stabilize her blood pressure, not a blood transfusion. The experts' dispute concerned only whether that conduct—i.e., not giving her a blood transfusion—breached the standard of care and caused Garcia's death. Similarly, there was undisputed evidence of a delay between the time Garcia was admitted (3:20 a.m.) and the time a physician was found to operate on her (5:55 a.m.). The fact that the experts disagree as to the significance, if any, of the delay demonstrates a triable issue of fact, not the absence of a foundational fact. In short, Dr. Bronston's opinions upon which we have relied were based on foundational facts supported by the evidence in this case.

DISPOSITION

The judgment is reversed. Appellants are entitled to costs on appeal.

FLIER, J.

I CONCUR:

RUBIN, J.

Bigelow, P. J., Dissenting:

I respectfully dissent.

When reviewing a motion for summary judgment on appeal, "'[w]e begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.'" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931-932; *Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1252.)

Plaintiffs and appellants elected to proceed on appeal with an appellant's appendix, and their appendix *does not contain copies of the operative pleadings.* The case summary printout from the superior court's docket that appellants did include in their appendix indicates that appellants filed a third amended complaint in September 2012, and that Dr. Carman filed an answer to the third amended complaint in December 2012, but these pleadings are not included in the appellant's appendix.

Error is not to be presumed on appeal. In fact, judgments are presumed correct; it is appellant who bears the burden of overcoming this presumption by affirmatively showing error with an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.) This is "'not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Given the law on this point, I would stop here, as the record is incomplete.

I acknowledge the trial court's order granting Dr. Carman's MSJ states that appellants "allege that [Dr. Carman] failed to diagnose an ectopic pregnancy," but this is not a substitute for the pleadings. Without being able to review the operative pleadings,

I would find appellants failed to provide a foundation for the arguments that they present in their opening brief on appeal, and I would affirm. The majority opinion does not acknowledge the defect in appellants' appendix, but I find appellants' failure to provide copies of the operative pleadings to be important, and telling.

Even were I to assume what the pleadings say, and that we are reviewing a judgment in an action alleging acts and omissions in an emergency room setting, I would find appellants have failed to demonstrate error. The critical section of the trial court's order granting Dr. Carman's MSJ reads as follows:

"[Dr. Carman] . . . argues that [the declaration of appellants' expert,] Dr. Bronston[,] . . . does not support the element of causation, as he does not opine that Carman's alleged breach was a cause in fact of the subject injury. [Citations.] As not above, Dr. Bronston identifies several acts and omissions by Dr. Carman. However, the problem is that he does not 'link' those omissions to decedent's death. He does not explain how those purported omissions caused decedent's death. [Dr. Carman]'s evidentiary objections to the Bronston declaration are SUSTAINED."

I have read Dr. Bronston's declaration in its entirety, and have formed the same impression regarding the element of causation as did the trial court. Further, I would note that appellants' opening brief focuses exclusively on Dr. Carman's objections to certain parts of Dr. Bronston's declaration, and does not meaningfully address the element of causation. On the contrary, there is no discussion of the element of causation at all in appellants' opening brief beyond a conclusory, half-sentence argument as follows: "Dr. Bronston sets forth in his declaration that Dr. Carman's acts and omissions contributed to the death of [the decedent] . . . ." This assertion is not supported by reference to any part of Dr. Bronston's declaration, but seems predicated on the position that Dr. Bronston's declaration, if admitted in its entirety, would show causation. As I read Dr. Bronston's declaration, assuming here that all of it should have been admitted,

at no point did he offer an opinion that, had Dr. Carman acted in the manner in that Dr. Bronston opined that he should have, then the decedent *would not have died*.

The majority opinion states that Dr. Bronston opined that the decedent "should have been given an immediate transfusion of O negative blood to stabilize her condition, *and the failure to do so contributed to her death*." (Maj. Opn. at p. 5, italics added.) This is an overstatement of Dr. Bronston's opinion as to causation. This is what Dr. Bronston actually stated in his declaration: "Based on the history and physical exam of this patient, transfusing [her] with blood was indicated on a STAT basis. She needed to have immediate transfusions of O neg blood in order to stabilize her condition. This did not occur." In my reading of Dr. Bronston's declaration, he did not opine that, had Dr. Carman given the decedent a blood transfusion STAT, she would not have died. Accordingly, I agree with the trial court's conclusion that Dr. Bronston identified acts and omissions by Dr. Carman, but did not "link" those omissions to the decedent's death.

This brings me to the arguments that appellants actually did present in their opening brief on appeal. In the trial court, Dr. Carman interposed 20 objections to Dr. Bronston's declaration.[1] As noted above, the trial court's order granting Dr. Carman's MSJ states: "[Dr. Carman]'s evidentiary objections to the Bronston declaration are SUSTAINED." Appellants' opening brief interprets the court's statement to mean that the court sustained all 20 of Dr. Carman's objections; they argue seriatim that all 20 of the court's evidentiary rulings on Dr. Carman's objections are infected with error. As for prejudice from any particular evidentiary ruling, appellants argue in conclusory fashion that, with Dr. Bronston's declaration in place without any objections sustained, "he sets forth . . . that Dr. Carman's acts and omissions contributed to the [decedent's] death." Apart from their challenges to the trial court's evidentiary rulings as summarized here, no other argument is made in appellants' opening brief. The majority

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1 Essentially, Dr. Carman objected to every passage in Dr. Bronston's declaration where he offered an opinion as to what Dr. Carman had failed to do, and what he should have done.

opinion does not address the issue actually argued in appellants' opening brief, namely, whether the trial court's evidentiary rulings were correct.

Even aside from the blatant error in considering this motion for summary judgment without the operative pleadings, and assuming appellants were correct that the trial court erred in making 20 evidentiary rulings, reversal is not warranted. As I discussed above, even were one to give credit to the entirety of Dr. Bronston's declaration, he did not offer an opinion that, had Dr. Carman acted in the manner in that Dr. Bronston opined that he should have, then the decedent would not have died.

BIGELOW, P. J.