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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CHARLES NEWHOUSE, Plaintiff and Appellant, v. CHARLES N. MOON, Defendant and Respondent.	B278347 (Los Angeles County Super. Ct. No. BC559480)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teresa A. Beaudet, Judge. Affirmed.

Greg W. Garrotto for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Gregory G. Lynch, Kristi K. Hedrick and John J. Weber for Defendant and Respondent.

* * * * * *

A man who underwent a total knee replacement on both knees sued his doctor for malpractice for using the wrong sized implant on one of his knees. The trial court granted summary judgment because the doctor's expert witness opined that the doctor was not negligent and that the implant size was not the cause of the man's injuries. The man appeals. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In August 2011, Charles Newhouse (plaintiff) first consulted with Dr. Charles N. Moon (Dr. Moon), an orthopedic surgeon, and complained of having pain in both of his knees.

Plaintiff ultimately agreed to have Dr. Moon perform a total knee replacement for both knees. In September 2011, Dr. Moon performed the procedure on plaintiff's left knee using a size 6 femur and a size 6 tibia manufactured by Stryker Corporation (Stryker). In November 2011, Dr. Moon performed the procedure on plaintiff's right knee using a size 5 femur and a size 6 tibia manufactured by Stryker.

Following the surgeries, plaintiff experienced pain in both knees. Plaintiff did not comply with Dr. Moon's instructions to diligently engage in physical therapy. Multiple physical therapists noted plaintiff's repeated resistance, combativeness, and failure to cooperate; they considered discharging him for noncompliance.

Ultimately, Dr. Moon recommended that plaintiff have a "revision" surgery on his left knee. Plaintiff then consulted with a different orthopedic surgeon, Dr. William Long (Dr. Long), who also recommended a "revision" surgery. In February 2014, Dr. Long performed the procedure on plaintiff's left knee and

replaced the size 6 femur with a "fully extended" size 5 femur. Plaintiff continued to experience pain in his left knee, necessitating two "closed manipulations" (that is, when a doctor manipulates the patient's knee while the patient is unconscious).

II. Procedural Background

In October 2014, plaintiff sued (1) Dr. Moon for medical malpractice, and (2) Stryker for products liability on theories of negligence, breach of warranty, and strict liability. With regard to malpractice, plaintiff alleged that the "left total knee arthroplasty was performed such that the implant hardware was improperly sized, fitted and implanted."

Dr. Moon moved for summary judgment. Along with his motion, he submitted a declaration by Dr. Daniel Oakes (Dr. Oakes), an orthopedic surgeon. Dr. Oakes reviewed the records from various physicians and physical therapists who cared for plaintiff, plaintiff's hospital records, and plaintiff's deposition testimony. After summarizing the pertinent medical history, Dr. Oakes opined that: (1) Dr. Moon had "complied with the applicable community standard of care" during the total left knee replacement surgery as well as "in his post-operative follow-up care of [plaintiff]"; and (2) the size of the plaintiff's femur implant had no "causal effect on [plaintiff's] injuries" because plaintiff had pain in his right knee with a size 5 femur and because plaintiff still experienced pain after Dr. Long inserted a fully extended size 5 femur in his left knee. Specifically with regard to Dr. Moon's use of a size 6 femur in plaintiff's left leg, Dr. Oakes opined that: (1) "it is not uncommon for patients to have one leg bigger than the other and therefore require a larger implant"; and (2) "Dr. Moon's operative notes reflect that he took all appropriate steps to balance the knee, resulting in good stability,

fit, and range of motion with a size 6 femur." Dr. Moon submitted all of the underlying records along with his summary judgment motion.

Plaintiff opposed the motion. Plaintiff did not submit any expert testimony. Instead, he argued that Dr. Oakes's opinion should be disregarded because the medical history Dr. Oakes recounted was "materially" different from what was set forth in the underlying medical records; these discrepancies, plaintiff argued, created 36 disputed issues of material fact that precluded summary judgment.

The trial court granted summary judgment. The court overruled plaintiff's objection to Dr. Oakes's declaration, finding that Dr. Oakes "sufficiently described the matter that he relied on in forming his opinions and has provided a reasoned explanation connecting the factual predicates to his ultimate opinions." The court rejected plaintiff's argument that Dr. Oakes's opinion rested on an inaccurate reading of the underlying medical records. Specifically, the court found the "disputes" plaintiff pointed to were either (1) not discrepancies at all because plaintiff "ignore[d] other medical records that are supportive of [Dr.] Oakes's assertions," or (2) were, at best, "technical and immaterial" discrepancies.

After the trial court entered judgment dismissing Dr. Moon, plaintiff filed a timely notice of appeal.

DISCUSSION

Summary judgment is appropriate and the moving party (typically, the defendant) is entitled to judgment as a matter of law where (1) the defendant carries his initial burden of showing the nonexistence of one or more elements of the plaintiff's claim, and (2) the plaintiff thereafter fails to show the "existence of a

triable issue of material fact" as to those elements. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 853; Code Civ. Proc., § 437c, subds. (a)(1), (c), (*o*)(1), (p).) We independently review a trial court's grant of summary judgment, while "liberally construing the evidence supporting" the nonmoving party and "resolving any doubts" against summary judgment. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500.) Although it is still unclear whether a trial court's evidentiary rulings in the course of summary judgment are to be reviewed independently or only for an abuse of discretion (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535), we will employ independent review.

To prevail on a claim for medical malpractice, a plaintiff must prove that: (1) the physician-defendant did not """use such skill, prudence, and diligence as other members of his profession commonly possess and exercise"""; (2) this negligent conduct """proximate[ly] caus[ed]""" the plaintiff's injury; and (3) """actual loss or damage.""" (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.) Because "the conduct required of a medical professional is not within the common knowledge of laymen," expert testimony is typically required regarding the first element of a medical malpractice claim. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Accordingly, a defendant who presents expert testimony "is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Borrayo*, at p. 310; cf. *Hernandez v. KWPH Enterprises* (2004) 116 Cal.App.4th 170, 176 [summary judgment not appropriate where there are "dueling expert opinions"].)

Under this precedent, the trial court properly granted summary judgment because plaintiff presented no competing expert to counter Dr. Oakes's expert opinion. Plaintiff seeks to avoid this result. Relying on the principle that "an unopposed declaration by an expert does not *necessarily* mean the court should grant summary judgment" (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123, italics added), he asserts that Dr. Oakes's opinion does not support the trial court's grant of summary judgment because it is based on a "distort[ion]" or "color[ing]" of the facts set forth in the underlying medical records. As a result, plaintiff continues: (1) Dr. Oakes's opinion has "no evidentiary value" because it is "based on assumptions of fact without evidentiary support" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117), and is therefore an improper hypothetical (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 ["'a hypothetical question must be rooted in facts shown by the evidence'"]); and (2) the discrepancies between the facts set forth in Dr. Oakes's declaration and the underlying medical records are *themselves* material issues of disputed fact that preclude summary judgment.

We reject plaintiff's argument that Dr. Oakes's expert opinion relies upon an inaccurate reading of the underlying medical records, and do so for two reasons.

First, plaintiff's argument is deficient. Plaintiff identifies which of Dr. Oakes's statements he believes to be inaccurate, but he nowhere provides the other half of the equation—that is, the facts set forth in the medical records that *show* Dr. Oakes's statements to be inaccurate. There are thousands of pages of medical records, and plaintiff provides no citations to those records whatsoever. It is the appellant who bears the burden of

showing error (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601), and this burden includes supporting his argument with "'appropriate citations to the material facts in the record'" (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599). Plaintiff has not done so.

Second, even if we put to the side the deficiency of plaintiff's argument and review the thousands of pages of medical records ourselves, those records do not demonstrate that Dr. Oakes distorted the record or that there are any triable issues of material fact. Plaintiff says that Dr. Oakes misrepresented (1) plaintiff's reports of knee pain when he first consulted with Dr. Moon, (2) Dr. Moon's assessment of the stability of the left knee replacement, (3) the extent of plaintiff's noncompliance with physical therapy, (4) plaintiff's condition on October 3, 2011, (5) plaintiff's post-surgery complaints about his left knee, (6) Dr. Moon's recommendation to have a "revision" of the left knee, (7) the content of plaintiff's first consultation with Dr. Long, and (8) plaintiff's compliance with the care Dr. Long prescribed after the revision surgery. In many instances, there is no discrepancy at all between the medical records and Dr. Oakes's characterization of them; in the remaining instances, the discrepancy comes down to a difference in wording, not substance. If an expert's opinion "does not become valueless by reason of omission . . . of some disputed facts" or by failure to include "all [of] the evidence in the case" (*Forbis v. Holzman* (1936) 5 Cal.2d 407, 410; *People v. Hill* (1897) 116 Cal. 562, 566), it certainly does not become incompetent because it rests on all of the pertinent facts but phrases them differently.

Plaintiff raises three further sets of arguments. First, he seems to suggest that the trial court did not evaluate his

objection that Dr. Oakes's opinion was not supported by the facts (and hence an improper hypothetical). This is incorrect because, as noted above, the trial court explicitly addressed this objection in its written order.

Second, plaintiff asserts that Dr. Oakes's opinion should be disregarded because he did not, when summarizing plaintiff's medical history, spell out which page of which record each fact could be corroborated. While such "pin cites" would undoubtedly be helpful, no law *requires* them on pain of exclusion. We decline to fashion such a rule.

Lastly, plaintiff cites *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735 and its progeny as support. *Garibay*, however, stands for the proposition that an expert's opinion relying on medical records is deficient if the underlying records are not 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.) *Garibay* does not assist plaintiff because, in this case, Dr. Moon submitted the underlying medical records along with his motion for summary judgment; what is more, because plaintiff never objected to those records, they were properly before the trial court. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 [on summary judgment, court considers "'all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained'"], quoting Code Civ. Proc., § 437c, subd. (c).)

DISPOSITION

The judgment is affirmed. Dr. Moon is entitled to his costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ