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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

KATHY TODD et al., Plaintiffs and Appellants, v. THICK CHOW, M.D. et al., Defendants and Respondents.	B278825 (c/w B280840) (Los Angeles County Super. Ct. No. BC589068)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed in part and reversed in part.

Donald Sherwin Todd and Kathy Todd, in pro. per., for Plaintiffs and Appellants.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mitzie L. Dobson and Michael K. Liu for Defendant and Respondent Thick B. Chow, M.D.

Doyle Schafer McMahon, Raymond J. McMahon and Elena Schionning for Defendant and Respondent Pacific Alliance Medical Center.

The trial court granted summary judgment in favor of defendants Thick Chow, M.D. (Dr. Chow) and Pacific Alliance Medical Center (Pacific Alliance) in a medical malpractice and wrongful death action brought by plaintiffs Donald Sherwin Todd and Kathy Todd (collectively, plaintiffs). As to Dr. Chow's motion, the trial court found plaintiffs failed to offer the requisite expert opinion regarding breach of the standard of care and medical causation. Plaintiffs appealed that ruling and, while the appeal was pending, Pacific Alliance moved for summary judgment, which the trial court granted because plaintiffs' claims were time-barred and there were no triable issues of material fact as to causation, breach of the standard of care, or liability on the part of Pacific Alliance for Dr. Chow's conduct.

We agree that plaintiffs' failure to provide expert opinion on whether Dr. Chow breached his duty of care to the decedent was fatal to their efforts to oppose Dr. Chow's motion. Accordingly, we affirm the trial court's grant of summary judgment as to plaintiffs' claims against Dr. Chow.

We reverse as to Pacific Alliance's summary judgment motion on multiple grounds. First, the trial court erred in finding that plaintiffs' claims were time-barred given California Supreme Court authority holding that a wrongful death action accrues upon the decedent's demise and not earlier. Second, Pacific Alliance failed to proffer evidence addressing all theories of liability in the operative pleading, and thus the trial court erred in finding that Pacific Alliance had met its initial burden in moving for summary judgment.

FACTUAL HISTORY

Kathy Todd's brother, Larry Tucker, died on July 24, 2014. According to the Los Angeles County Coroner's investigation, Mr. Tucker fell down several stairs and sustained head injuries. A call was placed to 911 and Mr. Tucker was pronounced dead at the scene. The autopsy attributed Mr. Tucker's death to "arteriosclerotic heart disease"[1] and reported that his arteries were from 60% to 80% occluded.

Mr. Tucker had been a patient of Dr. Chow's since October 2007. Dr. Chow's records for Mr. Tucker did not contain any complaints of chest pain or shortness of breath; nor did they report any diagnosis of heart disease. In the year before his death, Mr. Tucker presented with complaints of back, neck and shoulder pain, flea bites, rash, and a swelling on his hand. Mr. Tucker's medical records included 2010 test results labeled as "Abnormal ECG" (electrocardiogram) with a notation "probable inferior infarct, old." The records also included laboratory results showing high cholesterol.

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[1] The record refers to both "arteriosclerotic" and "atherosclerotic" heart disease. Arteriosclerosis is a disease characterized by hardening and thickening of the arterial walls. Atherosclerosis is a form of arteriosclerosis characterized by fatty deposits in the arteries. (American Heritage Dictionary of the English Language (4th ed. 2000) pp. 101, 113.) When referring to a party's evidence or papers, we shall use the term used by that party. Otherwise, we will employ the broader term, arteriosclerosis.

PROCEDURAL HISTORY

Acting in propria persona, plaintiffs filed their original complaint on July 23, 2015, naming Dr. Chow, Pacific Alliance, and Garfield Medical Center[2] as defendants. The complaint asserted causes of action for wrongful death, loss of consortium, and medical malpractice.[3] A series of demurrers and amended complaints followed.

On January 8, 2016, plaintiffs filed a motion for summary adjudication, which the trial court denied on February 18, 2016, based on plaintiffs' failure to provide the requisite statutory notice. Although the trial court based its ruling on the lack of notice, it nevertheless discussed the merits of the motion. Plaintiffs had argued that the decedent's arteriosclerosis caused his death and that Dr. Chow had breached a duty to diagnose the disorder. The trial court observed that the standard of care and a breach thereof must ordinarily be established by expert testimony, which plaintiffs had failed to submit—resulting in their failure to carry their initial burden on the motion. Also on February 18, 2016, the trial court set the case for trial on September 19, 2016.

On March 10, 2016, the trial court sustained Dr. Chow's and Pacific Alliance's demurrers to plaintiffs' second amended complaint, with leave to amend within 30 days. On the same day, Dr. Chow changed his reservation for a summary judgment hearing date from July 28, 2016 to September 29, 2016.

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[2] Garfield Medical Center is not a party to this appeal.

[3] The initial complaint was also styled as a survival action under Code of Civil Procedure section 377.60. Undesignated statutory references are to the Code of Civil Procedure.

Plaintiffs filed their third amended complaint on April 11, 2016, asserting claims for wrongful death and medical malpractice.[4] Plaintiffs alleged that Mr. Tucker had an abnormal ECG in 2010 and that Pacific Alliance had become aware of the test results on or about October 11, 2010. Dr. Chow and the other defendants breached the standard of care by failing to diagnose arteriosclerotic heart disease, perform appropriate diagnostic tests, consult with cardiac experts, or provide a proper treatment plan for high cholesterol and high blood pressure. Plaintiffs additionally alleged that Dr. Chow lacked the proper skills, training, and experience to treat cardiac disease without consultation with a specialist. The third amended complaint (TAC) asserted both direct and vicarious liability against Pacific Alliance on theories of agency and respondeat superior.

Dr. Chow and Pacific Alliance filed answers to the TAC on April 14, 2016 and July 21, 2016, respectively.

A. Dr. Chow's Ex Parte Application for Continuance of the Trial Date

On June 30, 2016, three and one-half months after calendaring a summary judgment hearing for September 29, 2016, Dr. Chow filed an ex parte application requesting that the September 19, 2016 trial date be continued to permit him to move for summary judgment. Upon receiving notice of the ex parte application, plaintiffs filed an opposition without seeing the actual application, arguing that Dr. Chow had not established good cause and that they would be prejudiced by a continuance given Kathy Todd's arrangement of her work schedule in

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[4] The TAC did not assert survivor claims on behalf of Mr. Tucker's estate.

anticipation of a September 19, 2016 trial. The trial court granted Dr. Chow's application and continued the trial until February 27, 2017.

B. Dr. Chow's Motion for Summary Judgment

Dr. Chow moved for summary judgment on July 11, 2016. He argued that plaintiffs could not establish a triable issue of fact as to (1) whether he complied with the applicable standard of care in treating Larry Tucker, and (2) whether any negligent act or omission on his part caused Mr. Tucker's death. In support of the motion, Dr. Chow submitted an expert declaration by board certified family practitioner Richard A. Johnson, M.D.

Dr. Johnson stated that he had reviewed medical records for Mr. Tucker, including records from Dr. Chow and Pacific Alliance. According to Dr. Johnson, Mr. Tucker never complained of chest pain or shortness of breath at any time while he was treated by Dr. Chow from 2007 to 2014. Dr. Chow frequently measured Mr. Tucker's blood pressure, which "remained within appropriate limits," ordered lab tests "at appropriate intervals," and prescribed "appropriate medications." Dr. Johnson opined that Dr. Chow's treatment of Mr. Tucker at all times complied with the standard of care. He further stated: "The standard of care does not require referral to a cardiologist or cardiac testing unless a patient reports cardiac symptoms. Mr. Tucker did not have symptoms that would have alerted [Dr. Chow] that he may have been suffering atherosclerotic heart disease."

Dr. Johnson additionally opined: "[W]hile atherosclerotic heart disease was noted at the time of autopsy, there is no indication that the atherosclerotic heart disease led to myocardial infarction or other acute process that would have resulted in Mr. Tucker's sudden death. . . . It is my opinion, to a reasonable

degree of medical probability that, his death may well have been caused by a process that would not have been detected even if a cardiology consult or cardiac testing had been ordered." Dr. Johnson concluded: "[I]t is my opinion to a reasonable degree of medical probability that no negligent act or omission on the part of [Dr. Chow] caused or contributed to any injury suffered by Larry Tucker or to Larry Tucker's death."

As evidence supporting his motion, Dr. Chow submitted selected medical records of Mr. Tucker, but not the ECG results. He additionally offered deposition testimony from both Todds, stating that the decedent had never complained to them of chest pains or heart palpitations and that, to their knowledge, he had never gone to an emergency room with complaints of chest pain.

Opposing Dr. Chow's motion, plaintiffs submitted additional medical records, including Mr. Tucker's ECG results.[5] They did not submit expert evidence—despite the trial court's earlier remarks about the need of such evidence to prove a breach of the standard of care. They argued instead that the doctrines of res ipsa loquitur and "common knowledge" applied.

Plaintiffs contended that the alleged injury—Mr. Tucker's death—does not ordinarily occur in the absence of negligence because it was Dr. Chow's duty as Mr. Tucker's primary care physician to order testing when he had constructive knowledge of an abnormal ECG and of the decedent's other cardiovascular risk

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[5] The record indicates that Dr. Chow objected to some of plaintiffs' evidence, but it does not include any rulings on those objections. The case summary from the trial court does not list any documents related to the summary judgment motion. There was no court reporter at the hearing. We thus do not know if any rulings were made.

factors. Plaintiffs argued that the ECG results were an "instrumentality" in the exclusive control of Dr. Chow. They further argued that the injury did not result from any voluntary action or contribution by the decedent because he necessarily relied on his physician to diagnose and treat his medical conditions.

Relying primarily on their own declarations, plaintiffs contended that it is common knowledge that Dr. Chow's professional treatment was out of the ordinary and "if due [care] had been exercised (diagnostic blood testing after the abnormal ECG result; examination of decedent's risk factors—advanced age, history of smoking and periods of elevated blood pressure and cholesterol) by [Dr. Chow], it is more probable than not that Larry Tucker would have received medical treatment for arteriosclerosis heart disease to prevent his loss of life."

Finally, plaintiffs requested a continuance of the summary judgment hearing to permit them to obtain facts essential to their opposition—specifically, (1) how and when Dr. Chow became aware of Mr. Tucker's abnormal ECG results and how the information was obtained; (2) what action Dr. Chow took after October 11, 2010 in response to the ECG results and Mr. Tucker's alleged risk factors; and (3) whether Dr. Chow was asserting that a third party caused the failure to order further testing. Plaintiffs noted that they had filed a motion to compel Dr. Chow to provide further answers to their interrogatories.

The trial court granted Dr. Chow's motion for summary judgment on September 29, 2016. Citing *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, it observed that " ' "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." ' " (*Id.* at pp. 984-985.)

The trial court found that Dr. Johnson's expert testimony was sufficient to satisfy Dr. Chow's initial burden and that plaintiffs had failed to submit any conflicting expert evidence. The trial court additionally ruled that plaintiffs' evidence did not establish facts showing that the doctrine of res ipsa loquitur applied. The trial court declined to grant a continuance, stating that it was not warranted "as facts to be obtained from discovery would not defeat Dr. Chow's motion."

Plaintiffs timely appealed the judgment in favor of Dr. Chow on November 2, 2016.

C. Pacific Alliance's Motion for Summary Judgment

Shortly after the trial court granted Dr. Chow's motion, Pacific Alliance moved for summary judgment on October 3, 2016. Pacific Alliance stated that plaintiffs based their claim of liability against Pacific Alliance on an alleged agency relationship between Pacific Alliance and Dr. Chow "relating to an ECG test on decedent, Larry Tucker." Although Pacific Alliance denied any such agency relationship, it argued that because the trial court had granted summary judgment as to Dr. Chow, plaintiffs' claims against Pacific Alliance necessarily failed as well.

Pacific Alliance additionally argued that plaintiffs could not establish a triable issue of material fact as to either the standard of care or causation without expert testimony establishing that

the care "provided to decedent, Larry Tucker by the staff of [Pacific Alliance] was below the standard of care" and that "the care provided by [Pacific Alliance], its nurses and ancillary staff" was causally linked to Mr. Tucker's injuries. Finally, Pacific Alliance contended plaintiffs' claims were barred by the applicable statute of limitations, section 340.5.

In support of its motion, Pacific Alliance submitted only Larry Tucker's medical records pertaining to the ECG. It also requested judicial notice of the trial court's order granting summary judgment to Dr. Chow and plaintiffs' original complaint, filed on June 23, 2015.

In opposing the motion, plaintiffs argued that the trial court lacked jurisdiction to rule upon Pacific Alliance's motion under section 916, which stays further court proceedings upon matters "embraced within" or "affected" by a pending appeal. Although they stated that their claim of liability against Pacific Alliance rested on a theory of vicarious liability, plaintiffs also appeared to suggest that Pacific Alliance was itself negligent in failing to provide Dr. Chow with the ECG test results. They argued that Pacific Alliance owed a duty to Mr. Tucker resulting from his "hospitalization within their corporate place of business" and asserted that there were triable issues of fact as to whether Pacific Alliance breached the standard of care and caused plaintiffs' injuries. Finally, plaintiffs argued that the statute of limitations was tolled by Dr. Chow's "intentional concealment" of Mr. Tucker's medical records.

The motion was heard on December 22, 2016. Apparently, the trial court issued a tentative ruling prior to, or at that hearing, in which it rejected Pacific Alliance's argument based on statute of limitations because the date of injury was Mr. Tucker's

date of death. In contrast, the tentative ruling stated that Pacific Alliance's argument that it could not be liable on an agency theory of liability given the trial court's previous granting of Dr. Chow's summary judgment motion "has merit" because "Dr. Chow's alleged professional negligence is the basis of Pacific Alliance's liability." The tentative ruling granted summary judgment on that basis. The trial court noted that Pacific Alliance failed to "submit any expert testimony to establish that Pacific Alliance is not liable for Decedent's death independent of Dr. Chow," but that this omission was "irrelevant" because "it is clear from both the TAC and the parties' arguments that it is only Dr. Chow's alleged professional negligence that forms the basis of liability against Pacific Alliance." The record does not contain a transcript of that hearing, if one was even prepared.[6]

The trial court issued its ruling on February 9, 2017. The reasoning in that order differs from the trial court's above-described tentative ruling. The order lists four reasons for granting summary judgment in favor of Pacific Alliance: (1) Plaintiffs' TAC was barred by the statute of limitations; (2) "There is no triable issue of material fact as to standard of care or causation based on medical negligence as a matter of law. Plaintiffs have failed to create a triable issue of fact that Pacific Alliance Medical Center breached the standard of care as to decedent, Larry Tucker"; (3) "Plaintiffs have failed to create a

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[6] Pacific Alliance also objected to some of plaintiffs' evidence. The trial court's tentative ruling states that it declined to rule on those objections because they "were largely directed at Plaintiffs' argument that res ipsa loquitur principles apply which the Court has already addressed in relation to Dr. Chow's motion for summary judgment."

triable issue of fact that any conduct or omission by Pacific Alliance Medical Center was a substantial factor in proximately causing decedent's alleged damages"; and (4) "Plaintiffs have failed to create a triable issue of fact that Pacific Alliance Medical Center has liability for any conduct of " Dr. Chow.

Notice of the entry of judgment was filed on February 14, 2017. Plaintiffs timely appealed on the same day and the two appeals were consolidated.

DISCUSSION

We construe plaintiffs' opening brief as raising five issues on appeal:

1. Whether plaintiffs' Fourteenth Amendment rights to due process were violated by alleged procedural violations in the notice and service of Dr. Chow's ex parte application to continue the trial date;

2. Whether the trial court abused its discretion in granting Dr. Chow's ex parte application to continue the trial date;

3. Whether the trial court properly granted Dr. Chow's motion for summary judgment;

4. Whether the trial court had jurisdiction to hear Pacific Alliance's motion for summary judgment while plaintiffs' appeal of the summary judgment for Dr. Chow was pending; and

5. Whether the trial court properly granted Pacific Alliance's motion for summary judgment.

I. Dr. Chow's Ex Parte Application For A Trial Continuance

A. The Trial Court Did Not Violate Plaintiffs' Due Process Rights in Granting Dr. Chow's Motion for a Trial Continuance.

Plaintiffs argue that they were denied procedural due process guaranteed by the Fourteenth Amendment due to Dr. Chow's failure to provide sufficient notice and timely service of his ex parte application for a continuance of the trial date. We conclude that Dr. Chow's application complied with the applicable procedural requirements.

California Rules of Court 3.1203 and 3.1204 set forth the requirements for notice of an ex parte application. Rule 3.1203(a) requires that notice be given "no later than 10:00 a.m. the court day before the ex parte appearance." (Cal. Rules of Court, rule 3.1203(a).) Rule 3.1204 requires that the notice "[s]tate with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application" and "[a]ttempt to determine whether the opposing party will appear to oppose the application." (Cal. Rules of Court, rule 3.1204(a)(1), (a)(2).) Rule 3.1206 governs service of the application: "Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made." (Cal. Rules of Court, rule 3.1206.)

The record shows that Dr. Chow satisfied these requirements. Plaintiffs received telephone and email notice on Monday, June 27, 2016 that Dr. Chow intended to apply for a continuance of the trial date on June 30, 2016, including the time

and place. According to plaintiffs' reply brief, plaintiffs were served with the application itself at the hearing on June 30, 2016.[7] The trial court's minute order granting the application indicates that the court considered both Dr. Chow's application and plaintiffs' opposition.

Plaintiffs argue that Dr. Chow's notice was deficient in that it did not set forth the *grounds* upon which Dr. Chow would seek a continuance and that service of the application was deficient in that it occurred too late to enable plaintiffs to respond to Dr. Chow's specific arguments in their written opposition. In claiming that the notice failed to satisfy Rule 3.1204's "specificity requirement," plaintiffs confuse the "relief" sought by Dr. Chow—a continuance—with the grounds to be asserted for that relief. Rule 3.1204 requires only that the relief be stated with specificity (Cal. Rules of Court, rule 3.1204(a)(1)), and Dr. Chow's notice complied with that requirement. Plaintiffs do not claim that Dr. Chow did not serve them with the application prior to the hearing. Nor do they claim that they were denied an opportunity to address Dr. Chow's arguments at the hearing.

Dr. Chow thus satisfied the minimum requirements set forth in the rules of court and plaintiffs have not challenged the constitutionality of the rules themselves.

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[7] Plaintiffs note, and Dr. Chow admits, that notice of the ex parte application contained the wrong department number. Plaintiffs also acknowledge, however, that they were directed to the correct department by the court clerk.

B. The Trial Court Did Not Abuse Its Discretion in Granting Dr. Chow's Motion for a Trial Continuance.

A ruling on a motion for a trial continuance is not an independently appealable order. (§ 904.1.) It is reviewable, however, on appeal from the judgment. (See *Taylor v. Bell* (1971) 21 Cal.App.3d 1002 [reviewing order granting continuance].)

The decision to grant or deny a requested continuance is committed to the discretion of the trial court. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126, citing *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) We review the ruling for abuse of discretion and will uphold the decision if it is "based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court." (*Thurman*, at p. 1126, quoting *Forthmann*, at p. 984.)

California Rule of Court 3.1332(c) provides: "The court may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Cal. Rules of Court, rule 3.1332(c).) The rule then lists "[c]ircumstances that may indicate good cause."[8] (Cal. Rules of Court, rule 3.1332(c).) This wording indicates that the list is suggestive rather than exhaustive. Subdivision (d), which lists other "factors" to be considered in ruling on a continuance request, reinforces such an interpretation, because it instructs "the court must consider all

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[8] Plaintiffs cite the Standards of Judicial Administration for the Superior Courts (effective January 1, 1972, amended in 1974) as providing the criteria for granting a continuance. These are simply guidelines; the governing rule is California Rules of Court, rule 3.1332, discussed above.

the facts and circumstances that are relevant to the determination." (Cal. Rules of Court, rule 3.1332(d).)

In light of the particular circumstances presented, the trial court did not abuse its discretion in continuing the trial. Dr. Chow established good cause for a continuance with counsel's declaration that that the first available date for a summary judgment hearing was after the scheduled trial date. Summary judgment motions serve important policy goals by eliminating needless trials and thereby expediting litigation overall. (See *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323, citing *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854.)

We acknowledge that Dr. Chow offered no explanation for his delay in seeking a continuance until almost four months after he reserved the September 29, 2015 hearing date and almost two months after he answered plaintiffs' TAC.[9] Even so, the trial court may reasonably have concluded that the prejudice to Dr. Chow of undergoing the expense of a potentially unnecessary trial outweighed the prejudice to plaintiffs from adjusting their work schedules to accommodate the new trial date. As long as there is " 'a reasonable or even fairly debatable justification, under the law, for the action taken' " in the trial court's discretion, we will not set that decision aside. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507, quoting *Harrison v. Sutter St. Ry. Co.* (1897) 116 Cal. 156, 161.)

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[9] Regardless of the availability of a hearing date, by June 30, 2016 when Dr. Chow applied for a continuance, he could not have filed a summary judgment motion in compliance with section 437c's timing requirements with a September 19, 2016 trial date. (See § 437c, subd. (a).)

Even if we were to conclude that Dr. Chow failed to show good cause, plaintiffs do not demonstrate any prejudice due to the continuance of the trial. They argue that they did not receive a trial on the merits, but in granting summary judgment, the trial court concluded there were no material disputed facts for a jury to decide.

II. Dr. Chow's Motion For Summary Judgment

A. Legal Standards

A trial court properly grants summary judgment when the papers submitted establish that no triable issue of material fact exists, and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).) We review the trial court's decision de novo, liberally construing a plaintiff's evidence while strictly scrutinizing the moving defendant's showing. (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355-356.) We consider all evidence offered by the parties in connection with the motion (except that which the court properly excluded) and uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.)

A defendant meets its burden of showing that a cause of action has no merit if it shows that "one or more elements of the cause of action, . . . cannot be established, or that there is a complete defense to that cause of action." (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once a defendant has carried 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." (§ 437c, subd. (p)(2); *Aguilar*, at p. 849.) The plaintiff may not rely upon the

allegations in the pleadings, but must set forth specific facts. (§ 437c, subd. (p)(2); *Aguilar*, at p. 849.)

Plaintiffs' claim of medical malpractice required them to establish four elements: (1) a duty to use the skill, prudence, and diligence that other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the alleged negligent conduct and the injury; and (4) resulting loss or damage. (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968, quoting *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

The first element, the standard of care, must be proved by expert testimony, "unless the circumstances are such that the required conduct is within the layperson's common knowledge." (*Lattimore v. Dickey*, *supra*, 239 Cal.App.4th at p. 968, citing *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) Medical causation likewise "must be proven within a reasonable medical probability based upon competent expert testimony" when it involves matters beyond a layperson's knowledge. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.)

B. The Trial Court Properly Granted Summary Judgment in Favor of Dr. Chow.

Dr. Chow did not contest that he owed the decedent a duty to comply with the standard of care. He submitted an expert declaration stating that in his treatment of Mr. Tucker, he complied at all times with that duty. As plaintiffs argued below, Dr. Johnson's declaration did not reference the abnormal ECG results, and it is not possible to ascertain from the record before us whether those results were among the medical records Dr.

Johnson reviewed in reaching his conclusion.[10] Dr. Johnson did state, however, that "there was no indication in any of Mr. Tucker's records from Dr. Chow or any other health care provider that he complained of chest pain, shortness of breath, or any other symptoms of a cardiac nature prior to his death," and that "[t]he standard of care does not require referral to a cardiologist or cardiac testing unless a patient reports cardiac symptoms." This sufficed to shift the burden to plaintiffs to establish a triable issue of material fact as to Dr. Chow's compliance with the standard of care.

When, as here, a defendant physician moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant ordinarily is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310, citing *Munro v. Regents of University of California*, *supra*, 215 Cal.App.3d at pp. 984-985.) Plaintiffs do not dispute this well-established standard. Nor do they dispute that they failed to submit expert evidence. Instead, they argued in the trial court and reiterate on appeal that the exceptions created by the

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[10] Dr. Johnson does not state that he reviewed "all" of Mr. Tucker's records from the named medical providers. Dr. Chow's summary judgment motion attaches selected medical records, but it is clear that Dr. Johnson reviewed more than the documents attached to the motion. For example, Dr. Johnson stated that he reviewed records from a Dr. Lee and no records from Dr. Lee are included in Dr. Chow's summary judgment papers. The TAC alleges that the ECG was performed following a referral by Dr. Chow. There is no evidence in the appellate record confirming this allegation.

"common knowledge" and res ipsa loquitur doctrines applied to relieve them of the need for expert opinion establishing a material triable issue as to whether Dr. Chow's treatment met the standard of care.

The "common knowledge" exception applies and dispenses with the need for expert testimony regarding the standard of care only "if the medical facts are commonly susceptible of comprehension by a lay juror—that is, if the jury is capable of appreciating and evaluating the significance of a particular medical event." (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 7, citing *Cobbs v. Grant* (1972) 8 Cal.3d 229, 236; *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 141.) The exception is generally limited to circumstances in which a plaintiff can invoke the related doctrine of res ipsa loquitur, where a layperson may conclude as a matter of common knowledge and observation that the consequences of a particular medical treatment ordinarily could not have occurred if due care had been exercised. (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 317, citing *Flowers v. Torrance Memorial Hospital Medical Center, supra,* 8 Cal.4th 992, 1001.)

Courts have applied the common knowledge doctrine in cases where a foreign object has been left inside a patient's body for no medical reason (see *Gannon*, *supra*, 19 Cal.App.4th at pp. 6-7 [collecting cases involving sponges and other surgical tools left inside plaintiffs' bodies during surgery]); and where a plaintiff has suffered injury to a part of her body unrelated to a medical procedure (see *Hurn v. Woods* (1982) 132 Cal.App.3d 896, 901-902 [collecting cases]; see also *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1303 [collecting cases]). Where, as in these situations, the failures of medical

personnel are obvious, expert opinion is not needed to establish a breach of the standard of care.

Once Dr. Chow had produced expert evidence that he did not violate the standard of care, plaintiffs were relieved of the need to produce contrary expert evidence only if they established the three prerequisites for application of the doctrines of res ipsa loquitur and common knowledge: (1) the injury ordinarily does not occur in the absence of someone's negligence; (2) the accident was caused by an instrumentality in the exclusive control of the defendant; and (3) the injury was not due to any voluntary action or contribution on the part of the plaintiff. (*Elcome v. Chin, supra,* 110 Cal.App.4th 310, 316-317.) We conclude plaintiffs failed to demonstrate a disputed issue of material fact as to the first and second criteria. As for the first, plaintiffs themselves pointed out in their opposition below that cardiovascular disease is one of the most common causes of death in the United States. Hence, a death from arteriosclerosis is not by itself suggestive of negligence. As for the second criterion, plaintiffs claimed that the instrumentality in exclusive control of Dr. Chow was the abnormal ECG results, but this argument simply *assumes* that a failure to order further tests or a specialist consultation in response to those results caused Mr. Tucker's death—that is, plaintiffs' argument assumes what it must prove.

On appeal, plaintiffs point out that the injury to the decedent was unrelated to a medical procedure. They argue that "the gravamen of their opposition rested on the consideration by Dr. Chow in sufficiently considering Decedent's personal risk factors and a 10/11/2010 abnormal ECG." Plaintiffs appear to suggest that because the injury did not result from an actual procedure, an opinion by an expert versed in the procedure was

unnecessary to establish a negligent failure to comply with the standard of care.[11] Plaintiffs maintain it is "common knowledge" that physicians use patient questionnaires in combination with medical tests to determine whether a patient should be referred to a specialist. If Mr. Tucker's primary care doctor did not consider the relevant factors, plaintiffs contend, the decedent could not be referred to a specialist. Relying upon *Cho v. Kempler* (1960) 177 Cal.App.2d 342, 348-349, plaintiffs urge that where a defendant has a position of special responsibility toward the plaintiff, the res ipsa loquitur doctrine "protects the dependent party from unexplained injury at the hands of one in whom he has reposed trust."

Plaintiffs' argument fails to overcome Dr. Chow's summary judgment showing that he complied with the standard of care. Even assuming that plaintiffs are correct that it *is* common knowledge that a physician considers a patient's medical history and test results in deciding whether a referral to a specialist is warranted, this assumption does not address the critical question here: Was Dr. Chow acting in compliance with the applicable standard of care in *not* referring Mr. Tucker to a specialist or ordering further tests, given the decedent's particular risk factors and specific test results? That is a question of medical judgment and practice, requiring medical expertise. Absent medical opinion, it is impossible to determine whether the ECG results signaled a slight aberration or a significant one, whether they portended serious complications or likely none at all. It is not "inherently probable," as plaintiffs argued in the trial court, that

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[11] Contrary to Dr. Chow's argument, plaintiffs do not assert that the instant case is not a medical malpractice action.

Mr. Tucker would not have died when he did if diagnostic tests had been performed to rule out arteriosclerotic disease or if he had been seen by a cardiologist.

Again, an assessment of the probability that such actions would have more likely than not prevented Mr. Tucker's early death requires expert knowledge of the underlying medical condition, the efficacy of diagnostic testing, and the availability of treatment—all in the context of Mr. Tucker's particular risk factors. Even if it were probable that a specialist referral and treatment would have benefited Mr. Tucker, that does not address the question of whether Dr. Chow acted in conformity with applicable professional standards in not referring Mr. Tucker to a specialist for consultation or further tests. Only an expert versed in appropriate medical practice was qualified to opine on whether Dr. Chow appropriately assessed his patient's needs for treatment and testing.

Because plaintiffs failed to rebut Dr. Chow's showing that they could not establish a breach of the standard of care, the trial court properly granted summary judgment.[12]

III. Pacific Alliance's Summary Judgment Motion

On appeal, plaintiffs argue, as they did below, that under sections 916 and 430.10, subdivision (c)[13], the trial court lacked

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[12] Having concluded that plaintiffs failed to establish a triable issue as to Dr. Chow's compliance with the standard of care, we need not reach the question of causation.

[13] Plaintiffs contend that Pacific Alliance's motion should have been held in abeyance pursuant to section 430.10, subdivision (c). That section permits a party against whom a complaint or cross-complaint has been filed to object to the

jurisdiction to hear Pacific Alliance's motion while plaintiffs' appeal of the judgment in favor of Dr. Chow was pending. They additionally argue that Pacific Alliance had a duty to inform Mr. Tucker, either through his primary care physician or directly, of the abnormal ECG results, and Pacific Alliance's summary judgment motion failed to make a prima facie case that plaintiffs could not show breach of this duty.

We reverse the summary judgment against Pacific Alliance on the merits.

A. Section 916 Did Not Preclude The Trial Court From Entertaining Pacific Alliance's Summary Judgment Motion.

Section 916 provides with certain exceptions not relevant here, that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (§ 916, subd. (a).) The purpose of the statute is to prevent further actions in the trial court from rendering an appeal futile. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*).)

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complaint or cross-complaint, by demurrer or answer, on the ground that "[t]here is another action pending between the same parties on the same cause of action." (§ 430.10, subd. (c).) On its face, the statute does not apply to a summary judgment motion or an appeal involving different parties than those involved in Pacific Alliance's summary judgment motion.

To determine whether a proceeding is "embraced" within or "affected" by an appeal, we "consider the appeal and its possible outcomes in relation to the proceeding and its possible results." (*Varian*, *supra*, 35 Cal.4th at p. 189.) Examples implicating section 916's automatic stay include a proceeding in the trial court that could alter the appealed judgment or order (*Varian*, at p. 189), or when the "possible outcomes on appeal and the actual or possible results of the [trial court] proceeding are irreconcilable" (*id.* at p. 190; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 7:9.1, p. 7-4).

To the extent the trial court's ruling in favor of Pacific Alliance was based on its grant of summary judgment in favor of Dr. Chow, to wit, plaintiffs' theory of vicarious liability against Pacific Alliance, the specter of potential inconsistent rulings arises if we would have reversed the granting of Dr. Chow's summary judgment motion. To that extent, arguably, section 916 would have prohibited the trial court from entertaining Pacific Alliance's motion if vicarious or agency liability were the only issues presented in Pacific Alliance's motion. They, however, were not the only issues as discussed on the merits more fully below.

Section 916, subdivision (a) expressly states that its stay does not apply to "any other matter embraced in the action and not affected by the judgment or order." Here, Pacific Alliance asserted an independent ground for granting its motion, to wit, that plaintiffs' claims were time-barred. The trial court's ruling on that "other matter" would raise no possibility of inconsistency vis-a-vis the appeal of Dr. Chow's summary judgment motion.

Similarly, section 916 would not preclude the trial court from addressing theories of direct liability against Pacific Alliance.[14]

In sum, even were we to assume for argument's sake that section 916 would have precluded the trial court from addressing that part of Pacific Alliance's motion addressing vicarious or agency liability, it had no bearing on the court's consideration of direct theories of liability or Pacific Alliance's limitations argument.

B. Plaintiffs' Action Was Not Barred by the Statute of Limitations.

As noted above at pages 11-12, the trial court's December 22, 2016 tentative ruling rejected Pacific Alliance's contention that plaintiffs' action was time barred, while the trial court's February 9, 2017 order took a contrary position, citing the statute of limitations as one of the bases for granting summary judgment.[15] In supplemental briefing on the issue, Pacific

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[14] We also note the application of section 916 here arises in an unusual procedural context. Typically, two summary judgment motions where one is based on the liability of another are heard at the same time by the trial court, which would have obviated this case's simultaneously proceeding in the trial and appellate courts. We also recognize that plaintiffs could have brought their claims against Dr. Chow, on the one hand, and Pacific Alliance, on the other, in two separate cases, which could have proceeded on two entirely separate tracks absent a request for a stay. We also acknowledge that we have not found case authority addressing section 916 in a similar fact pattern and the parties cite none.

[15] At oral argument, counsel for Pacific Alliance acknowledged that Pacific Alliance had filed the order with its

Alliance and plaintiffs agree that plaintiffs' claims were timely under section 340.5.

Section 340.5 provides that, unless certain tolling provisions apply, an action for injury or death against a health care provider based on that person's alleged professional negligence must be brought within three years after the date of "injury" or one year after the plaintiff discovers, or with reasonable diligence should have discovered, the injury—whichever occurs first. (§ 340.5.) In *Larcher v. Wanless* (1976) 18 Cal.3d 646, 650-651, our Supreme Court held that "as applied to wrongful death actions arising from alleged medical malpractice, 'injury' as used in section 340.5 refers to the death, with its allegedly wrongful cause, which gives rise to the lawsuit." Larry Tucker died on July 24, 2014, and plaintiffs timely filed their original complaint a year later on July 23, 2015. Therefore, summary judgment for Pacific Alliance cannot be affirmed on statute of limitations grounds.

C. Pacific Alliance Failed to Make a Prima Facie Showing that Plaintiffs Could Not Establish Liability as to Pacific Alliance.

Pacific Alliance contended, and the trial court agreed, that plaintiffs could not establish the elements of their medical negligence cause of action as to Pacific Alliance. It argued, first, that it could not be vicariously liable for Dr. Chow's alleged negligence because the trial court had granted summary judgment in Dr. Chow's favor. Second, Pacific Alliance argued plaintiffs failed to offer evidence establishing either that Pacific

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motion and did not move to modify or otherwise correct the order following the hearing on the motion.

Alliance or its staff failed to comply with the standard of care or that any breach of that standard caused Mr. Tucker's death. On appeal, plaintiffs contend that Pacific Alliance's own showing lacked the expert opinion necessary to satisfy its initial burden on summary judgment, thus defeating its motion.

1. Pacific Alliance's mere submission of a non-final order granting the summary judgment in favor of Dr. Chow is insufficient to carry its initial burden regarding a theory of vicarious liability based on Dr. Chow's conduct.

Plaintiffs' TAC alleged that Pacific Alliance was liable for Dr. Chow's actions or omissions on theories of agency, respondeat superior, and vicarious liability.[16] Moving for summary judgment, Pacific Alliance argued that, even if an agency relationship did exist between Pacific Alliance and Dr. Chow (which it denied), Pacific Alliance could not be determined to have caused or contributed to Mr. Tucker's death because the trial court had already granted summary judgment in favor of Dr. Chow. "Plaintiffs' agency theories fail as a matter of law," Pacific Alliance argued, "because [Pacific Alliance] cannot be held [liable] if its alleged agent, Dr. Chow did not cause plaintiffs' damages."

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[16] "[A] principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." (Civ. Code, § 2338.)

The only evidence Pacific Alliance offered in support of its contention that liability could be established as to Dr. Chow was the trial court's February 9, 2017 order granting Dr. Chow's summary judgment motion. It did not, for example, submit Dr. Johnson's declaration. Instead, Pacific Alliance effectively relied on a theory of issue preclusion—contending that the summary judgment order in favor of Dr. Chow itself sufficed to carry its burden on its own summary judgment motion.

Issue preclusion, or collateral estoppel, bars relitigation of issues under certain circumstances: (1) the issue previously decided is identical to the one sought to be relitigated; (2) the party to be estopped must have been a party or privy of a party in the prior suit; and (3) the previous litigation must have resulted in a final judgment on the merits. (*Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 787.) When these circumstances are present, collateral estoppel "prevents relitigation of previously decided issues." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) "Summary judgment is an appropriate remedy when . . . collateral estoppel refutes all triable issues of fact suggested by the pleadings and supporting documents." (*Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 327 (*Sartor*), citing *County of Alameda* v. *Sampson* (1980) 104 Cal.App.3d 584, 589-590.) Issue preclusion is appropriately applied even when the prior adjudication occurred in the same action, not a separate suit. (See *Freeman v. Churchill* (1947) 30 Cal.2d 453, 461 [when employee and employer are sued in same lawsuit and employer's alleged liability derives from employee's, judgment favorable to employee conclusively establishes lack of employer liability]; *Sartor*, *supra*, 136 Cal.App.3d at pp. 325-328 [when plaintiff sued employees

and principal corporation, and claim against employees stayed pending arbitration against principal corporation, ruling in favor of corporation operated as issue preclusion on question of employees' liability].)

Under California law, however, a judgment is not final for collateral estoppel purposes when an appeal of the judgment is pending.[17] (*Abelson v. National Union Fire Ins. Co., supra,* 28 Cal.App.4th at p. 787*,* citing *National Union Fire Ins. Co. v. Stites Prof. Law Corp*. (1991) 235 Cal.App.3d 1718, 1726; *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169; *Sandoval v. Superior Court, supra,* 140 Cal.App.3d at pp. 936-937.) Thus, Pacific Alliance could not rely on the summary judgment order, standing alone, to carry its own burden of showing that Dr. Chow could not be held liable. The summary judgment in favor of Dr. Chow accordingly affords no basis for affirming the summary judgment as to Pacific Alliance.

Even if we were to consider Dr. Johnson's declaration as part of Pacific Alliance's summary judgment motion, this would not change the outcome. Pacific Alliance did not move for summary adjudication on the issue of its vicarious liability based on Dr. Chow's alleged negligence. Because we conclude below that Pacific Alliance failed to carry its burden on summary judgment as to its direct liability or its vicarious liability based on the actions or omissions of employees other than Dr. Chow,

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[17] Once a judgment is affirmed on appeal, "the trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel." (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 937.)

the trial court erred in affirming summary judgment of the entire action.

2. Pacific Alliance failed to make the required showing that plaintiffs could not establish direct liability against Pacific Alliance or vicarious liability based on agents other than Dr. Chow.

In addition to alleging that Pacific Alliance was vicariously liable for Mr. Tucker's death based on the actions and omissions of Dr. Chow, plaintiffs alleged that Pacific Alliance was directly liable for the death due to its own negligence and vicariously liable due to actions by employees other than Dr. Chow. For example, paragraph 16 of the TAC alleges: "Pacific Alliance performed medical service on the deceased at Pacific Alliance Medical Center located at 531 West College, Los Angeles, California. The services were ordered procedures of Defendant Dr. Chow, and performed under the supervision of Pacific Alliance staff, employees, contract employees, those under the direction and control of defendant Pacific Alliance." Paragraph 23 alleges: "On or about the 11th, [sic] of October, 2010 at 5:59 P.M., Defendant Pacific Alliance became aware of Larry [Tucker's] '*abnormal ECG from Young Kim, M.D.,*' of the Cardiology Department. Pacific Alliance in concert with Dr. Chow failed to order or perform appropriate diagnostic [tests], failed to consult with a cardiac expert to determine [whether] the deceased needed treatment for the heart."

In moving for summary judgment, Pacific Alliance contended that "a hospital's duty to its patients does not extend to diagnosing, advising, and treating" them. It likewise argued that "[w]ithout expert testimony that causally links the care

provided by [Pacific Alliance], its nurses and ancillary staff to plaintiff's [sic] injuries, Plaintiff [sic] cannot establish a triable issue of material fact regarding causation." It did not, however, offer any expert evidence establishing either that Pacific Alliance and its employees complied with the applicable standard of care or that plaintiffs cannot establish that any actions or omissions by Pacific Alliance or its employees were a substantial factor in causing the death of Mr. Tucker.

Plaintiffs countered that Pacific Alliance owed a standard of care to Larry Tucker resulting from his hospitalization within its place of business. On appeal, plaintiffs elaborate that Pacific Alliance failed to address its "responsibility" as a modern hospital that not only furnishes facilities for treatment, but also coordinates care and appoints physicians and surgeons to its medical staff. That responsibility, plaintiffs argue, "created a direct liability" to inform the decedent, either through his primary care physician or directly, of his abnormal ECG result. Plaintiffs contend that Pacific Alliance failed to present evidence defeating the alleged direct liability and vicarious liability for actions or omissions by employees other than Dr. Chow—and therefore did not carry its initial burden of production on summary judgment. We agree.

As discussed above, in moving for summary judgment, a defendant has the initial burden to make a prima facie showing that one or more elements of the cause of action at issue cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2).) As also discussed above, in a medical malpractice case, this principle generally requires the moving party to proffer expert opinion on the issues of breach of the standard of care and causation.

In order to establish that plaintiffs could *not* establish a breach of the standard of care, Pacific Alliance was itself required to provide expert evidence of the applicable standard. It failed to do so. Pacific Alliance argues that "[a]ppellant improperly assumes the expert declaration used in Dr. Chow's Motion for Summary Judgment did not apply to" Pacific Alliance. Yet Dr. Johnson's declaration nowhere addressed the standard of care applicable to Pacific Alliance or any of its staff other than Dr. Chow, and Pacific Alliance did not offer the declaration as evidence with its summary judgment.

Even if it had been offered, Dr. Johnson's declaration does not suffice to establish that plaintiffs cannot prove that any breach of the standard of care by Pacific Alliance or its employees was a substantial factor in causing Mr. Tucker's injuries. Dr. Johnson did state: "It is my opinion, to a reasonable degree of medical probability that [Mr. Tucker's] death may well have been caused by a process that would not have been detected even if a cardiology consult or cardiac testing had been ordered." He not only failed to specify *what* physiological "process" he believed might have caused the death, but he also offered no facts or reasoning for this conclusion.

He opined that the autopsy contained "no indication that the atherosclerotic heart disease led to myocardial infarction or other acute process that would have resulted in Mr. Tucker's sudden death." He then concluded without explanation that some other process led to Mr. Tucker's death. The autopsy did not indicate any other "process" responsible for the death or what medical condition caused Mr. Tucker's death. Nor did Dr. Johnson base his conclusion about an unnamed cause of death on any facts in Mr. Tucker's medical record. "[A]n opinion

unsupported by reasons or explanations does not establish the absence of a material fact issue for trial, as required for summary judgment." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.) As the Court pointed out in *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Id.* at p. 123, quoting *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

Pacific Alliance further asserted that "[s]ince independent liability of [Pacific Alliance] for the death of Mr. Tucker was not alleged in the trial court pleadings, nor was there any evidence submitted to support such a claim, it is not proper to bring this unsupported theory now to the Court of Appeal." As we have noted, however, plaintiffs' TAC does allege direct liability, as well as Pacific Alliance's vicarious liability for staff other than Dr. Chow. Pacific Alliance's motion for summary judgment acknowledged as much, arguing that *plaintiffs* were required to produce "expert testimony that establishes the care provided to decedent, Larry Tucker by the staff of [Pacific Alliance] was below the standard of care." Pacific Alliance's contention that plaintiffs failed to produce evidence in support of direct liability overlooks the crucial point that on summary judgment a moving defendant must make a prima facie showing that a plaintiff cannot establish an element of its claim *before* the burden of production shifts to the plaintiff.

Because Pacific Alliance has failed to produce legally sufficient evidence to make a prima facie case that plaintiffs

cannot establish the elements of their medical negligence claim, we reverse the summary judgment in its favor.

DISPOSITION

We affirm the judgment in favor of Dr. Chow, reverse the judgment in favor of Pacific Alliance, and remand for further proceedings. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.