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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

LYUDMILA LERNER, Plaintiff and Appellant, v. STANLEY COWEN, Defendant and Respondent.	B295916 (Los Angeles County Super. Ct. No. BC632653)

APPEAL from an order of the Superior Court of Los Angeles County. Charles F. Palmer, Judge. Affirmed.

Ozeran Law Offices and Leon Ozeran for Plaintiff and Appellant.

Law + Brandmeyer, Kent T. Brandmeyer, Bryan C. Misshore, and Elizabeth A. Evans for Defendant and Respondent.

Lyudmila Lerner (appellant) appeals from a judgment entered following a jury trial on her claim of medical malpractice against Stanley Cowen, M.D. (respondent). Appellant contends that the trial court erred in excluding the testimony of Dr. Suzuki, who treated appellant upon admission to Cedars-Sinai Hospital, due to appellant's failure to designate Dr. Suzuki as an expert witness.[1]

The relevant case law supports the trial court's decision to exclude Dr. Suzuki's testimony at trial, therefore we affirm the judgment.

BACKGROUND

Appellant was treated by respondent for a wound on her leg from approximately 2014 through 2016. During the time of respondent's treatment, the wound grew in size and appellant experienced escalating discomfort. In March 2016, during an episode in which appellant was suffering heavy bleeding from the wound, she was admitted to Cedars-Sinai Hospital for an emergency procedure. Dr. Suzuki was appellant's treating physician upon her admission to the hospital. The treatment at the hospital resulted in fast and positive results. Appellant was discharged from the hospital within two weeks and has not suffered a relapse since.

Appellant's first amended complaint (FAC) against respondent and others was filed on October 31, 2016. Appellant alleged that the exacerbation of her wound and increased pain and suffering during the time of treatment with respondent was

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[1] The parties refer to Dr. Suzuki by different names throughout the briefs, including "Kazyo Suzuki,""Kozy Suzuki," "Kozu Suzuki," and "Kazu Suzuki." We refer to him as Dr. Suzuki.

caused by respondent's breach of the applicable standard of medical care.

Respondent answered the FAC on November 14, 2016. Respondent was the only remaining defendant at the time the matter came on for trial on January 14, 2019.

On January 3, 2019, respondent filed his motion in limine no. 1, seeking to preclude the testimony of Dr. Suzuki on the ground that he was an undesignated expert witness. Respondent argued that the present opinion of a physician not designated as an expert is irrelevant in a medical malpractice action. Respondent explained that appellant took the deposition of Dr. Suzuki on October 6, 2017, without notice to respondent. Thus, respondent did not attend the deposition or participate in any way. On December 13, 2017, appellant served an expert designation which listed one retained expert and one non-retained expert. She did not designate Dr. Suzuki as either a retained or non-retained expert witness. However, at the time of trial in early 2019, appellant indicated her intention to call Dr. Suzuki as a witness at trial.

On January 8, 2019, appellant filed an opposition to respondent's motion in limine, arguing that as a treating physician, Dr. Suzuki was permitted to testify to his understanding of the standards of medical care and their application to the plaintiff's treatment. Appellant also argued that respondent had been aware of Dr. Suzuki's role as a treating physician and had been given a copy of his deposition.

On January 14, 2019, the trial court heard argument and granted respondent's motion in limine no. 1, precluding the testimony of Dr. Suzuki.

On January 16, 2019, appellant submitted a further opposition to the motion in limine, which the trial court also denied.[2]

On January 24, 2019, the jury returned a defense verdict. Appellant filed her notice of appeal from the judgment on February 22, 2019.

DISCUSSION

I. Standard of review

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 743.) In this case, the question of whether the trial court abused its discretion is limited to an analysis of relevant case law on the issue of whether a treating physician must be designated as an expert in order to testify. Our review is therefore limited to interpretation of that case law.[3]

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[2] Appellant states that she also intended to call certain other treating physicians to testify as to appellant's care. However, in light of the court's ruling excluding Dr. Suzuki's testimony, appellant declined to call these witnesses, as they were in the same position as Dr. Suzuki.

[3] Respondent argues that this court should decline to find an abuse of discretion because appellant has failed to provide a transcript of the lower court's proceedings. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 690, fn. 5 ["many cases hold that the absence of a transcript precludes a determination that a trial court abused its discretion"].) We find that the record, with augmentation subsequently provided by the parties, is sufficient to review the issue raised on appeal, therefore we decide the issue on the merits.

II. The trial court did not err in excluding Dr. Suzuki's testimony

A. Dr. Suzuki's opinions were not relevant because he was not designated as an expert witness

Dr. Suzuki was a doctor who treated appellant after the time of respondent's purportedly negligent care. Appellant did not designate Dr. Suzuki as an expert witness, but listed him as a potential witness for trial. Appellant argues that Dr. Suzuki was not an expert, but was listed as a percipient witness only.

The trial court correctly determined that testimony from a treating physician such as Dr. Suzuki is not admissible in a medical malpractice trial unless the physician is designated as an expert. (*County of Los Angeles v. Superior Court* (1990) 224 Cal.App.3d 1446, 1455 (*County of LA*).) Like other expert witnesses, treating physicians have knowledge "sufficiently beyond common experience," and their testimony is "[b]ased on matter (including . . . special knowledge, skill, experience, training, and education) . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subds. (a), (b).)

The Supreme Court has articulated the status of a treating physician as a "percipient expert." (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35 (*Schreiber*).) The high court explained:

> "[W]hat distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the factual basis for the medical opinion."

(*Schreiber, supra,* 22 Cal.4th at pp. 35-36.)

Thus, a treating physician such as Dr. Suzuki, who provided care to appellant subsequent to the purportedly negligent care, must be designated as an expert in order to testify at trial.

The *County of LA* court further explained the rationale behind this rule. In deciding negligence, a fact finder must consider the circumstances which the evidence shows "'"may reasonably be supposed to have been known to [the defendant] and to have influenced his mind and actions at the time." . . .' [Citation.]" (*County of L.A., supra*, 224 Cal.App.3d at p. 1455.) In other words, "'[n]egligence is not to be determined by hindsight nor by what a party subsequently learns.' [Citation.]" (*Ibid.*)

Based on this rationale, questions to defendant physicians about their "impressions and reasons for their action or lack of action" at the time of the purportedly negligent treatment are entirely appropriate. (*County of LA, supra*, 224 Cal.App.3d at pp. 1455-1456.) However, "after-the-fact opinions and impressions" of physicians are only appropriate if the physicians offering such "after-the-fact" opinions are designated as defense experts "on the propriety of the procedures used." (*Id.* at p. 1456.) "Should they be so designated, a full inquiry into their present opinions would be entirely appropriate." (*Ibid.*) However, the *County of LA* court made it clear that "the inquiry is not appropriate until and unless there is such a designation." (*Ibid.*)

In *County of LA*, the Court of Appeal reversed a trial court order requiring party physicians to provide deposition testimony regarding their present opinions of the medical propriety of their previous acts. Appellant attempts to distinguish the case based on the status of those physicians as defendants in the case. Because Dr. Suzuki is not a defendant, appellant requests that

different rules be imposed here. We find the distinction unpersuasive. Regardless of whether Dr. Suzuki is a party to the lawsuit or not, his medical opinions are not relevant unless he is designated as an expert.[4]

Appellant's argument that Dr. Suzuki would be called merely as a fact witness is also unpersuasive. As the Supreme Court explained, the requirement that treating physicians be designated as experts "avoids assigning trial judges the near-impossible task of determining whether an expert witness treating physician is providing percipient or opinion testimony." (*Schreiber, supra,* 22 Cal.4th at p. 39.) *Schreiber* dictates that a trial court cannot be charged with the task of policing a treating physician's testimony to ensure that it remains purely percipient. Thus, appellant was not permitted to avoid designating Dr. Suzuki as an expert witness by claiming that Dr. Suzuki's testimony would be merely that of a percipient witness.

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[4] Appellant argues that in *County of LA*, because the physicians were defendants and under the control of defense attorneys, they could not testify as to their present opinions regarding their alleged malpractice without violating the attorney work product privilege and attorney-client privilege. This was not the rationale for the court's decision. The court held that the physician defendants could not testify about their present opinions regarding the propriety of their previous medical decisions because they had not been designated as experts. (*County of LA, supra*, 224 Cal.App.3d at p. 1457.) The court made it clear that regardless of communications with counsel, "once a defendant physician is designated as an expert for trial, . . . her present and previous opinion about the medical procedures at issue in the malpractice action would be proper subjects of discovery." (*Id.* at p. 1458.)

Because appellant failed to disclose Dr. Suzuki as an expert in accordance with the law, the trial court did not abuse its discretion in declining to allow Dr. Suzuki to testify at trial.

B. The case law cited by appellant does not change the result

Appellant relies heavily on *Schreiber, supra*, 22 Cal.4th 31. *Schreiber* does not support appellant's position that a treating physician need not be designated as an expert. In *Schreiber*, the plaintiff "designated as expert witnesses, but did not submit expert witness declarations for, seven treating physicians." (*Id.* at p. 33.) The issue in *Schreiber* was whether the treating physicians were required to provide expert declarations under former Code of Civil Procedure section 2034.[5] *Schreiber* noted that treating physicians are percipient experts. (*Schreiber*, at p. 35.) A treating physician has the type of knowledge "'sufficiently beyond common experience'" to qualify as an expert. (*Id.* at p. 34; Evid. Code § 801, subd. (a).) As the *Schreiber* court pointed out, a treating physician "does not *become* an expert only when nonpercipient opinion testimony is elicited." (*Schreiber*, at p. 34.) A treating physician is an expert by virtue of his or her special knowledge and expertise.

The *Schreiber* court held that the treating physicians in that case did not have to provide expert declarations pursuant to former Code of Civil Procedure section 2034, subdivision (a)(2), because they were not "parties, employees of parties, or . . . 'retained by a party for the purpose of forming and expressing an

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[5] The current rules regarding the exchange of expert witness information are found under Code of Civil Procedure section 2034.210 et seq.

opinion in anticipation of the litigation or in preparation for the trial . . . .' [Citations.]" (*Schreiber, supra*, 22 Cal.4th at p. 34.)[6] While the *Schreiber* court confirmed that treating physicians need not always provide expert declarations, it did not undercut the basic rule that treating physicians must be designated as experts.[7]

Appellant also cites *Hurtado v. Western Medical Center* (1990) 222 Cal.App.3d 1198 (*Hurtado*), which does not change the outcome here. In *Hurtado,* a medical malpractice plaintiff designated three of her treating physicians as experts. (*Id.* at p. 1201.) After much back and forth between the parties regarding the treating physicians' depositions, the trial court dismissed the plaintiff's action for failure to obey a court order requiring her to produce the doctors for deposition. (*Id.* at p. 1202.) The *Hurtado* court reversed, noting that "[t]he burden to produce an expert for deposition is shifted from the noticing party to the designating party only if the expert is a retained expert." (*Id.* at p. 1203.)

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[6] The rule regarding expert declarations is now found in Code of Civil Procedure section 2034.210, subdivision (b), and includes the same categories as the former statute.

[7] *Huntley v. Foster* (1995) 35 Cal.App.4th 753 (*Huntley*) involved the same issue discussed in *Schreiber*. A plaintiff in a personal injury matter designated her treating physicians as experts, but did not provide expert witness declarations. The *Huntley* court held that expert witness declarations were not required for the treating doctors. Because the treating physicians were already designated as experts, the case did not discuss the issue of whether such treating physicians are required to be designated as experts.

The treating physicians were not retained experts, therefore the plaintiff was not obligated to produce them for deposition. (*Ibid.*)

The cases above confirm that treating physicians, as percipient experts, are treated somewhat differently from retained experts under the discovery rules. However, the cases do not support appellant's position that a treating physician need not be designated as an expert. Instead, as set forth in *County of LA*, treating physicians must be designated as experts, or their testimony is irrelevant. The trial court did not abuse its discretion in so holding.[8]

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

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[8] Because we have found that the trial court did not commit error, we do not reach respondent's argument that appellant failed to show that any error was prejudicial. We also decline to comment on appellant's argument, raised for the first time in her reply brief, that she could have called Dr. Suzuki to impeach expert testimony under Code of Civil Procedure section 2034.310. Appellant provides no citation to the record indicating that she raised this point in the trial court, therefore it is forfeited. (*Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1011.)