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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

DANIEL C., a Minor, etc.,[1] Plaintiff and Appellant, v. DAVID MILLER, Defendant and Respondent.	B282595 (Los Angeles County Super. Ct. No. BC585574)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

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[1] Generally, a minor must appear as a party in litigation through a guardian ad litem or some other adult representative. (Code Civ. Proc., § 372, subd. (a)(1).) Although minor filed his notice of appeal in his name only and not through an appropriate representative, we liberally construe the notice in favor of the right to appeal because the faulty notice engenders no prejudice or confusion concerning the scope of the appeal. (See *Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 960–961.)

Law Offices of Martin L. Stanley and Martin L. Stanley for Plaintiff and Appellant.

Fraser Watson & Croutch, Stephen C. Fraser, Alexander M. Watson, and Daniel K. Dik for Defendant and Respondent.

Daniel C. (minor), through his guardian ad litem and mother, Rebecca Gutierrez (Gutierrez) sued David Miller, M.D., (Miller) for professional negligence after minor was born with severe birth defects. Minor alleges that Miller, Gutierrez's perinatologist, negligently failed to disclose to Gutierrez that she could obtain an abortion in another state when that procedure was no longer legally available in California pursuant to Health and Safety Code section 123468, which prohibits the performance of an abortion when the fetus is viable and continuation of the pregnancy poses no risk to the life or health of the mother. The trial court granted summary judgment in favor of Miller, finding no such duty. We affirm.

BACKGROUND

Although the record contains extensive details regarding the history of Gutierrez's pregnancy, we limit our recitation to the undisputed facts that are necessary to decide the narrow issue raised here.

Gutierrez first saw Miller on April 3, 2012, at approximately 31 weeks gestation. Miller raised the possibility of VACTERL[2] based on a combination of vertebral anomalies, renal

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[2] VACTERL is an acronym. "V" stands for vertebral anomaly, "A" stands for anal atresia, "C" stands for cardiac defects, "T" and "E" stand for tracheo-esophageal fistula, "R"

anomalies and possible tracheoesophageal fistula versus esophageal atresia. Miller explained the differential diagnosis and implications to Gutierrez and advised that minor could be born with congenital anomalies. At that time, within a reasonable degree of medical probability, Gutierrez carried a viable fetus and continuation of the pregnancy did not pose a risk to the life of Gutierrez. Miller did not discuss with Gutierrez the availability of abortion as an alternative treatment.

On May 8, 2012, Gutierrez saw Miller for the second time, at approximately 35 weeks gestation. Miller performed an ultrasound, and noted abnormalities of the stomach, bladder, kidneys, spine, and intracranial anatomy. Again, Miller did not advise Gutierrez that abortion was an available treatment outside of California and recommended that she keep the expected date of delivery of June 4, 2012. Four days later, on May 12, 2012, minor was born with severe birth defects.[3] Gutierrez claims that had she known about the availability of late-term abortions in other states, she would have terminated the pregnancy.

Minor sued Miller for negligence. Miller moved for summary judgment on the grounds that he had no duty to advise Gutierrez that she could obtain an abortion outside of California

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stands for renal abnormalities, and "L" stands for limb abnormalities. VACTERL is not a specific disease, but a constellation of findings that tend to cluster together.

[3] This fact is not properly in the record. Minor refers us to the introduction to his memorandum of points and authorities in opposition to Miller's motion for summary judgment, which does not contain a proper citation to the record.

because, at all times while Gutierrez was under his care, the fetus was viable and continuation of the pregnancy posed no risk of life or health to her. In support, Miller's expert testified that it would have been improper for Miller to advise Gutierrez that she should consider abortion after the fetus was viable, and it would have been below the standard of care to discuss the termination of pregnancy with Gutierrez at 31 weeks gestation.

In response, minor's expert testified that, "[w]hile it may . . . not be possible to perform abortions in California if the fetus is viable and the pregnancy is not a risk to the mother, it certainly is permissible and is in my opinion the standard of care to advise the patient about any risk to the mother and child and to advise the patient that there are several other states where there are no restrictions prohibiting abortions after a certain point in the pregnancy."

The trial court granted summary judgment in favor of Miller. Minor appealed.

DISCUSSION

I. Standard of review

A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Miller bears the initial burden to show one or more elements of minor's negligence cause of action cannot be established, or that there is a complete defense to minor's claims. (See *id.*, § 437c, subds. (a)(1), (p)(2).) Once Miller meets this initial burden, the burden shifts to minor to demonstrate the existence of a triable issue of material fact. (See *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) Miller

must show that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. (See *ibid.*)

We review appeals from summary judgment de novo and liberally construe the evidence and resolve all doubts in favor of minor. (See *Delgadillo v. Television Center, Inc.*, *supra*, 20 Cal.App.5th at p. 1085.) We consider all evidence submitted by the parties except that which was properly excluded by the trial court. (*Ibid.*)

II. Wrongful life

Minor's claim for negligence is based on a theory of "wrongful life." A wrongful life action is brought by a child born with a genetic defect who alleges that a physician or other health care provider negligently failed to inform the child's parents of the possibility that the child would be born with the defect. (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 225.) The child's claim is, but for the physician's negligence, the child would not have been born into the pain and suffering caused by his or her genetic defect. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 492–493.) As in any other action for professional negligence, in a wrongful life action, the plaintiff must establish the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise, a breach of that duty, a causal connection between the negligent conduct and the resulting injury, and actual loss or damage resulting from the professional's negligence. (*Turpin*, at pp. 229–230.)

III. Duty to obtain informed consent

Minor claims that Miller breached his duty of disclosure when he failed to advise Gutierrez about the availability of an

abortion outside of California, which deprived Gutierrez of a meaningful and informed choice regarding her pregnancy.

The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) A physician has a duty to disclose to a patient the available choices with respect to a proposed therapy and its inherent and potential dangers. (*Id.* at p. 244.) At minimum, a physician must disclose the risk of death or serious harm known to be inherent in the proposed treatment and explain, in lay terms, the complications that might occur. (*Ibid.*) In addition to these minimal disclosures, the physician must also disclose "additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Id.* at pp. 244–245.) Similarly, a physician's duty to disclose alternative treatments is circumscribed by what is required for competent practice within the medical community. (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071.) The duty to disclose is also limited to treatments that are " 'available.' " (*Schiff v. Prados* (2001) 92 Cal.App.4th 692, 701.) A treatment that cannot be legally administered in California is not available within the meaning of this rule. Accordingly, a physician cannot be held liable for failing to disclose the existence of such a treatment. (See *id.* at p. 707.)

When Gutierrez saw Miller, abortion was no longer an available treatment in California.[4] California prohibits abortions

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[4] " 'Viability' means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus' sustained survival outside the uterus

on a viable fetus when continuation of the pregnancy poses no risk to the life or health of the mother. (Health & Saf. Code, § 123468.) Therefore, an abortion was not an available treatment and Miller had no duty disclose it as an option to Gutierrez. (See *Barragan v. Lopez* (2007) 156 Cal.App.4th 997, 1005.)

Nevertheless, minor contends that Miller had a duty to advise Gutierrez that there were several other states where there are no restrictions prohibiting abortions after a certain point in the pregnancy. Minor's expert opined that, if Miller was unfamiliar with the abortion laws in other states, he should have inquired as to whether or not other states would allow for an abortion at Gutierrez's stage in the pregnancy. Minor's contention goes too far and is beyond what the law expects of physicians and is a job more suitable to lawyers. (See *Schiff v. Prados*, *supra*, 92 Cal.App.4th at p. 707.) Indeed, the difficulty with determining what is available in another state is on full display here, where minor's own expert failed to provide which states could have provided Gutierrez with an abortion at that late stage in her pregnancy. Only now, for the first time on appeal, has minor's counsel identified states where a late term abortion would have been available. And, even then, it is not entirely clear from the laws of those states if abortion would have been available to Gutierrez. We agree with the trial court and decline to find such a duty here.

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without the application of extraordinary medical measures." (Health & Saf. Code, § 123464, subd. (d).)

DISPOSITION

The judgment is affirmed. David Miller is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.