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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

GABRIELA C. SCHMIDT, Plaintiff and Appellant, v. UNIVERSAL PAIN MANAGEMENT, INC. et al., Defendants and Respondents.	B276904 (Los Angeles County Super. Ct. No. BC514074)

APPEALS from judgments of the Superior Court of Los Angeles County, Barbara Marie Scheper, Judge. Affirmed.

Law Offices of Ian Herzog and Evan D. Marshall for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Matthew S. Levinson; Packer, O'Leary & Corson, Robert B. Packer and Paul M. Corson for Defendants and Respondents.

INTRODUCTION

Gabriela Schmidt appeals from judgments entered after the trial court granted motions by Universal Pain Management, Inc. (UPM), a pain clinic, and Dr. Ray d'Amours, an anesthesiologist, for summary judgment on her cause of action for negligence. Because UPM and d'Amours met their initial burden on summary judgment, and Schmidt did not submit any evidence in opposition to the motions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *UPM Treats Schmidt with Steroid Injections for Pain*

Schmidt's primary care physician referred her to a neurosurgeon after she complained of back pain. In July 2012 the neurosurgeon recommended treating Schmidt with epidural steroid injections. Dr. Navid Farahmand, a doctor at UPM, evaluated her and recommended two epidural injections of a steroid called methylprednisolone acetate (MPA). Farahmand administered the injections on August 8 and 22, 2012.

Prior to each procedure, Schmidt signed an "Authorization for and Consent to Surgery or Diagnostic Procedures." The consent form included the following language: "I understand that all operations or diagnostic procedures may involve risk of unsuccessful results, complications, injury, or even death, from both known and unforeseen causes. I have been informed of these risks by the named surgeon."

UPM had acquired the MPA used at its clinic from New England Compounding Center, Inc. (NECC), a compounding

pharmacy. The FDA does not regulate compounding pharmacies to the same extent it regulates commercial pharmacies. On September 26, 2012 UPM learned of a voluntary recall of MPA manufactured by NECC. Some patients had developed meningitis after receiving injections with contaminated MPA from NECC.

Schmidt declined further treatment because of the meningitis outbreak. However, none of UPM's patients, including Schmidt, was diagnosed with fungal meningitis, an epidural abscess, arachnoiditis,[1] or any other complication attributable to the use of MPA obtained from NECC.

B. *Schmidt Sues UPM and d'Amours*

In July 2013 Schmidt filed this action against UPM, d'Amours, NECC, and others. In her operative second amended complaint Schmidt named UPM and d'Amours in one cause of action, for negligence, making essentially three claims against them. First, UPM and d'Amours used MPA acquired from NECC knowing that NECC had a poor safety record and that its preservative-free product had a shorter shelf life, which made it more susceptible to contamination than FDA-approved MPA containing preservatives. Second, UPM and d'Amours stockpiled MPA in a manner inconsistent with applicable rules and sound

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[1] "*Arachnoiditis* is the inflammation of the arachnoidea, a delicate membrane surrounding the spinal cord." (*Keith v. Barnhart* (7th Cir. 2007) 473 F.3d 782, 784, fn. 3; see *Cali v. Danek Med., Inc.* (W.D.Wis. 1998) 24 F.Supp.2d 941, 947 ["[a]rachnoiditis is an inflammation surrounding the lining of nerves in the spinal canal"].)

medical judgment, which increased the risk of contamination. Third, UPM and d'Amours engaged in this conduct because preservative-free MPA was significantly cheaper than the alternative. Schmidt claimed she suffered permanent mental, emotional, and physical injuries, and sought to recover the costs of monitoring for signs of illness, future medical expenses, and lost earnings.

C. *The Trial Court Granted Summary Judgment and Denied Schmidt's New Trial Motion*

UPM and d'Amours filed separate motions for summary judgment. UPM supported its motion with a declaration by an expert witness and other evidence. d'Amours presented evidence he never treated Schmidt and had no responsibility for UPM's management or operations. Schmidt did not submit any expert opinion or other admissible evidence in opposition to either motion. The trial court granted both motions and entered judgments in favor of both defendants. The trial court also denied Schmidt's new trial motion. Schmidt timely appealed.

DISCUSSION

A. *The Trial Court Properly Granted UPM's Motion for Summary Judgment*

1. *Applicable Law and Standard of Review*

"'"[I]n any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession

commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'"'" (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 (*Borrayo*); accord, *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122 (*Powell*).)

A defendant moving for summary judgment in a medical malpractice case must support the motion with an expert declaration stating the defendant's conduct fell within the community standard of care. (*Powell, supra*, 151 Cal.App.4th at p. 123.) Doing so shifts the burden to the opposing party. (*Borrayo, supra,* 2 Cal.App.5th at pp. 309-310; *Powell,* at p. 123.) Unless the plaintiff produces conflicting expert evidence, there is no triable issue of material fact regarding the defendant's compliance with the standard of care, and the defendant is entitled to summary judgment. (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 153; *Powell,* at p. 123; see *Borrayo,* at p. 310 ["[w]hen a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence"].)

"'On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]' [Citation.] A motion for summary judgment is properly granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party

is entitled to judgment as a matter of law.'" (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) "'In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party.'" (*Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 818, fn. omitted.)

2. *The Evidence Was Undisputed UPM Did Not Breach Its Duty of Care*

UPM moved for summary judgment based on evidence it did not breach its duty of care. On the issue of stockpiling and mismanagement, UPM submitted the declaration of Lance Jackson, UPM's chief executive officer, who stated UPM had used MPA from NECC for over seven years without incident. He stated he regularly attended pain management seminars and conventions, reviewed literature about pain management, and had regular discussions and meetings with other pain clinic professionals. Nevertheless, he stated that, until UPM learned of NECC's voluntary recall on September 26, 2012, UPM had no information NECC had a poor safety record. He also explained UPM chose to use preservative-free MPA to minimize the risk of adverse reactions by patients to preservatives, not because it was cheaper. Jackson stated UPM acquired preservative-free MPA from NECC, a compounding pharmacy, because preservative-free MPA was not available from commercial pharmacies. He further stated that, consistent with California law, UPM purchased reasonable quantities of compounded MPA commensurate with the needs of the practice, stored the MPA in a controlled environment, and used individual sterilized vials for single dose administration.

Jackson admitted UPM received two shipments of MPA lots that were subsequently recalled. Jackson stated UPM stopped using any NECC products after the first lot was recalled, and, by the time UPM learned the second lot had been recalled, UPM had already set aside the vials in that lot. According to Jackson, UPM sent all of its unused NECC stock to the FDA, and none of UPM's patients, including Schmidt, who received medication purchased from NECC developed fungal meningitis.

UPM also presented a declaration by an expert witness stating that UPM's conduct was within the standard of care. Dr. Kevin P. Becker, a licensed anesthesiologist, reviewed Schmidt's operative pleading, her medical records from the referring neurologist's office and UPM, an August 15, 2013 Board of Pharmacy accusation against NECC and NECC's stipulated surrender of its licenses, Jackson's declaration and accompanying exhibits, and Schmidt's deposition testimony. Based on his review of these materials, together with his knowledge, background, training, and experience, Becker opined: "[T]he care and treatment provided to [Schmidt] at UPM at all times complied with the applicable standard of care as applied to a pain management practice in the Southern California community during the relevant time period. Further, based upon a reasonable degree of medical probability, it is my opinion that there was no act or omission on the part of [UPM] including physicians and staff, which caused, contributed to, or was a substantial factor in bringing [about] the injuries Schmidt alleges she suffered."

Becker further explained that "[t]he use of preservative free MPA was not a breach of the standard of care. Some patients have reactions to preservatives used in commercially produced

steroids and preservative free versions have an added benefit." Commenting on the procedures performed on Schmidt, Becker stated: "Preservative free MPA is commonly used during epidural steroid injections at all levels of the spine," the "procedures themselves were performed within the standard of care," and the "procedure notes document the appropriate technique for administration of [Schmidt's] epidural steroid injections."

Becker also stated that NECC was a licensed facility at all relevant times and that purchasing preservative-free MPA from NECC was not a breach of the standard of care. Moreover, in Becker's opinion, UPM purchased reasonable quantities of MPA based on its needs. Finally, Becker noted Schmidt had not developed meningitis or any other complication attributable to UPM's use of MPA received from NECC.

This evidence met UPM's burden on summary judgment of showing UPM did not breach its duty of care, thus shifting the burden to Schmidt to create a triable issue of fact. (See *Sanchez v. Kern Emergency Medical Transportation Corp., supra,* 8 Cal.App.5th at p. 153 [in a medical negligence action, """"[w]hen 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""""]; *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 318 [once the medical malpractice defendants "met their initial burden of producing evidence that they did not breach the standard of care," the "burden then shifted to plaintiff to raise a triable issue of material fact"].) As noted, Schmidt did not submit any evidence, expert declarations or otherwise, in opposition to

the motion.[2] (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741 ["'[i]n professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen'"].)[3]

Schmidt argues the trial court nevertheless erred in granting the motion for summary judgment because, under *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 (*Kelley*) and

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[2] Schmidt did ask the trial court to take judicial notice of testimony before the United States Senate Committee on Health, Education, Labor, and Pensions on October 23, 2003 (9 years before Schmidt's treatment) by Sarah L. Sellers, PharmD Executive Director of the Center for Pharmaceutical Safety. The trial court denied Schmidt's request for judicial notice, a ruling Schmidt does not challenge on appeal. As the trial court noted, Sellers's testimony before Congress, even if admissible, would not have created a triable issue of fact regarding UPM's knowledge of NECC's practices. Sellers testified generally about compounding pharmacies and never mentioned NECC. The trial court stated: "The testimony does mention prior outbreaks of meningitis from spinal injections, but it is unclear from the testimony when these outbreaks occurred or whether they involved MPA or NECC."

[3] "This '"common knowledge"' exception is 'principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."' [Citation.] The 'classic example' is an instrument left in a patient's body after surgery.'"" (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.) Schmidt does not argue the doctrine of res ipsa loquitur applies here.

Bushling v. Fremont Medical Center (2004) 117 Cal.App.4th 493 (*Bushling*), Becker's declaration was conclusory and not competent evidence. Schmidt, however, did not object to the admissibility of Becker's declaration in the trial court, thus forfeiting any argument the trial court erred in considering it. (See Code Civ. Proc., § 437c, subd. (d) [objections to supporting and opposing declarations based on lack of personal knowledge, failure to set forth admissible evidence, and lack of competency are forfeited if not made at the hearing on the motion for summary judgment]; *People v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1045 ["[u]nder the summary judgment statute, objections to declarations are generally forfeited when not asserted before the trial court"]; *Kelley*, at p. 524 [plaintiff in medical negligence action forfeited the objection the declaration of the defendant's expert on the standard of care was conclusory by failing to object in the trial court].)

Moreover, even if Schmidt had preserved the argument for appeal, it lacks merit. It is true that "[s]imply because the defendant doctor provides an unopposed declaration by an expert does not necessarily mean the court should grant summary judgment" and that a "'defendant doctor is not entitled to obtain summary judgment based on a conclusory expert declaration which states the opinion that no malpractice has occurred, but does not explain the basis for the opinion.'" (*Powell, supra,* 151 Cal.App.4th at p. 123.) As the cases Schmidt cites make clear, to be admissible an expert's opinion must rest on the underlying facts and explain how those facts lead to the expert's ultimate conclusion. (See *Bushling, supra,* 117 Cal.App.4th at pp. 510-511; *Kelley, supra,* 66 Cal.App.4th at pp. 523-524.) This is because "'"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.'"" (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1116; see *Kelley*, at p. 523.) For example, in *Lynn v. Tatitlek Support Services, Inc.*, *supra*, 8 Cal.App.5th 1096 the court held the doctor's declaration was inadmissible because it stated "conclusions, without stating any medical or scientific bases for reaching his opinions." (*Id.* at p. 1116.) In *Kelley* the court held the expert's declaration was inadmissible because the expert did not disclose the matter the expert relied on and did not explain what underlying facts informed the expert's opinion. (*Kelley,* at pp. 522-524.) And in *Bushling*, because there was no evidence of how the plaintiff's injury occurred, the court held there was no factual basis for the two experts' speculative opinions. (*Bushling*, at pp. 510-511.)

In contrast to the expert's declarations in these cases, Becker explained in detail the records and materials he reviewed, including Schmidt's medical records and deposition testimony. He described the facts on which he relied in forming his opinion, including the medical treatment Schmidt received at UPM and UPM's use of preservative-free MPA acquired from NECC. And he explained how those facts led to his ultimate conclusions. (See *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [defendants' expert declarations on standard of care shifted the burden on summary judgment where each expert reviewed plaintiff's medical records and other material, briefly summarized the plaintiff's treatment, and concluded the defendants met the applicable standard of care, so that it was "incumbent on [the

plaintiff] to produce expert evidence raising a triable issue of fact on the standard of care issue"].)

3. *Schmidt Cannot Avoid Summary Judgment on a Lack of Informed Consent Theory*

Schmidt argues the trial court erred in granting summary judgment on a negligence cause of action based on lack of informed consent. Schmidt argues UPM should have warned her that UPM used preservative-free MPA, which had a higher susceptibility to contamination, and that there were safer alternatives.

There are two problems with Schmidt's argument. First, Schmidt did not allege a cause of action for negligence based on a failure to obtain consent, and UPM did not have the burden to submit evidence disproving it.

A summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Canales v. Wells Fargo Bank, N.A.* (2018) 23 Cal.App.5th 1262, 1268-1269.) "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the boundaries of the issues to be resolved at summary judgment.'" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250; accord, *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 (*Jacobs*).) A party moving for summary judgment only has to address issues raised by the pleadings. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 (*Howard*); see *Jacobs,* at p. 444.) A complaint must give fair notice of the theories on which the plaintiff is seeking relief. (*Jacobs,* at p. 444; *Howard,* at p. 422.) "The test is whether such a particular theory or defense is one

that the opposing party could have reasonably anticipated would be pursued . . . ." (*Howard,* at p. 422.) "A party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings. [Citation.] Evidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3.)[4]

For purposes of a cause of action based on lack of informed consent, a "physician is under a legal duty to disclose to the patient all material information—that is, 'information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure'—needed to make an informed decision regarding a proposed treatment." (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1186.) In addition, "[t]here must be a causal relationship between the physician's failure to inform and the injury to the plaintiff." (*Cobb v. Grant* (1972) 8 Cal.3d 229, 245.) "Such causal connection arises only if it is established that had revelation been made" a reasonably prudent person in the patient's position would not have consented to the treatment. (*Ibid.*; see *Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [material information is information a reasonable person would regard as significant to the decision].)

Schmidt did not allege a cause of action for lack of informed consent. She did not allege UPM or its employees had a duty to disclose that UPM used preservative-free MPA. She did not

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[4] We independently review the adequacy of Schmidt's pleading. (See *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1251-1252; *Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

allege a reasonable person in her position needed the information to make an informed decision about UPM's proposed treatment, nor did she allege she would not have consented to the medical procedure had she been fully informed of the risks. She did not allege that she did not give informed consent or that the consent form she signed was inadequate. In the absence of these or similar allegations, UPM did not have notice Schmidt was asserting a cause of action based on lack of informed consent, and therefore UPM did not have the burden on summary judgment to submit evidence on such a claim.[5]

Schmidt points to one word in her second amended complaint that she argues alleges a claim based on lack of informed consent: "[Schmidt] is informed and believes and thereon alleges that defendant UPM [and] d'AMOURS . . . negligently treated, *advised,* cared for and prescribed medication for [Schmidt], and that during said treatment, defendants and each of them acted in an unprofessional manner . . . ." (Italics added.) Even liberally construing this allegation, it was not enough to give UPM notice Schmidt was claiming UPM had failed to disclose information necessary for her to give informed

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[5] Schmidt did not move for leave to amend her complaint after UPM served its motion for summary judgment. (See *Jacobs, supra,* 14 Cal.App.5th at p. 445 [plaintiffs' failure to seek to amend their complaint "precluded them from defeating [the defendant's] motion for summary judgment based on their new theory"]; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186 ["'[i]f the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion'"].)

consent to the treatment. It alleges only that UPM negligently "advised" her. The allegation does not suggest that any failure by UPM to disclose information about the use of preservative-free MPA had any significance for her in deciding to undergo the treatment or that a reasonable person in her position would not have agreed to the procedure had he or she been advised of the potential for contamination in preservative-free steroids. (See *Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 253 [plaintiff's allegation the defendants "'negligently advised plaintiff that she needed surgical treatment consisting of a colectomy and an ileostomy for her condition'" did "not present any issue of whether the consent was informed or otherwise"]; cf. *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164-1165 [plaintiff's allegations that the defendant negligently prescribed ongoing treatment with a drug, which the plaintiff only discovered by his own research was a mistake, and that the plaintiff had unsuccessfully tried to obtain the information during his treatment, "[a]lthough not a model of clarity," stated a claim for failure to obtain informed consent].)[6]

Second, even if Schmidt had pleaded a claim based on lack of informed consent, UPM still would have been entitled to summary judgment. A medical care provider has a duty to disclose risks of death, serious injury, or significant complications inherent in a given treatment if such a disclosure would be material to the patient's decision without regard to the custom or practice in the medical community. (*Arato v. Avedon, supra,* 5 Cal.4th at pp. 1190-1191; *Cobbs v. Grant, supra,* 8 Cal.3d

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[6] The two cases cited by Schmidt, *Guilliams v. Hollywood Hosp.* (1941) 18 Cal.2d 97 and *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, did not involve lack of informed consent.

at pp. 244-245; *Spann v. Irwin Medical Blood Centers* (1995) 34 Cal.App.4th 644, 655-657.) Schmidt does not argue UPM failed to disclose risks inherent in the treatment. The risk of exposure to contaminated MPA is not inherent in the steroid injection treatment, but rather arises, if at all, from mishandling by the compounding pharmacy or by the pain clinic.

Under these circumstances, expert testimony, such as that submitted by UPM, is relevant and admissible to show whether a skilled practitioner in the relevant medical community would have made additional disclosures (other than inherent risks). (*Arato v. Avedon, supra,* 5 Cal.4th at p. 1191.) Becker stated in his declaration: "[T]he standard of care does not require the physician to disclose whether the steroids to be administered have preservatives or are preservative free. Similarly, the standard of care does not require a physician to advise the patient of the particular type of steroid to be used or its provenance. Therefore, there was no breach of the standard of care due to failure to discuss the risks and benefits of preservative free steroids versus steroids which contain preservatives." This evidence shifted the burden to Schmidt, who, as noted, did not submit any expert opinion evidence in response.

B. *The Trial Court Properly Granted d'Amours's Motion for Summary Judgment*

Schmidt's opening brief contains no separate argument regarding d'Amours. Thus, she forfeited any argument the court erred in granting his, as opposed to UPM's, motion for summary judgment. (See *Laabs v. Southern California Edison Co.* (2009)

175 Cal.App.4th 1260, 1271, fn. 5; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Even if Schmidt had challenged the trial court's order granting d'Amours's motion for summary judgment, d'Amours was entitled to summary judgment for the same reasons UPM was. In addition, d'Amours submitted Schmidt's deposition testimony that she never met d'Amours, never spoke with him, and did not know who he was. d'Amours stated in his declaration he had never treated or examined Schmidt, recommended any treatment, or participated in any discussions with her "regarding the risks and benefits of any proposed treatments." He also stated he had no role in UPM's daily operations and was not involved in the decision to purchase MPA from NECC. He too stated that, prior to the recall, he had no indication NECC had a poor safety record, failed to follow accepted compounding practices, or failed to maintain a sterile environment. This evidence shifted the burden to Schmidt.

Again, Schmidt offered no evidence to the contrary. Schmidt simply stated in her separate statement in opposition to the motion: "Disputed based upon his name and/or signature at the end of many of the subject reports describing treatment." Schmidt observed in her separate statement that d'Amours's name appeared on UPM's letterhead and at the bottom of an August 8, 2012 procedure report Farahmand had electronically signed. But Schmidt did not submit or cite any evidence d'Amours treated or examined Schmidt, was involved in discussions about her treatment, or was involved in UPM's operations or management.

C. *The Trial Court Did Not Err in Denying Schmidt's New Trial Motion*

Schmidt's sole argument on appeal in connection with the trial court's denial of her new trial motion is that the trial court committed an error of law (Code Civ. Proc., § 657, subd. 7) when it failed to consider the effect of California Code of Regulations, title 16, former section 1735.2 (as amended operative October 19, 2011 (Register 2011, No. 38) (section 1735.2).[7] Schmidt argues section 1735.2 controls the quantity of compounded MPA a pain clinic can purchase and (1) "establishes a standard of care as a matter of law," (2) "illuminate[s] the absence of any evidence supporting defendant[s'] claim as to the standard of care," (3) "demonstrate[s] the insufficiency of Dr. Becker's declaration as to standard of care," and (4) "bears on the insufficiency of the 'informed consent' since it expresses the risk peculiar to [compounded] drugs and the critical role of time."

Ordinarily, an order denying a new trial motion is reviewed for an abuse of discretion. (*People v. Rices* (2017) 4 Cal.5th 49, 92; *People v. Navarette* (2003) 30 Cal.4th 458, 526.) Here, however, Schmidt argues the trial court ignored controlling law. Whether the regulation applies to the circumstances in this case

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[7] "A motion for new trial is appropriate following an order granting summary judgment. [Citations.] This is so, even though, strictly speaking, 'summary judgment . . . is a determination that there shall be no trial at all.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858; see *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 730 ["[a]n order granting summary judgment is properly challenged by a motion for a new trial"]; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176 [same].)

is a question we ordinarily would review de novo. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859-860; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176-1177.)

Schmidt, however, forfeited any argument based on section 1735.2 by failing to raise it in the trial court. (See *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920, fn. 3; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343.) Moreover, even if Schmidt had not forfeited the argument, the result would not change. Section 1735.2 is a regulation promulgated under the Pharmacy Law (Bus. & Prof. Code, § 4001). It applies to pharmacies and pharmacists, not to pain clinics. And UPM presented expert evidence, which Schmidt did not controvert, that UPM acquired an appropriate amount of MPA commensurate with the clinic's needs.[8]

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[8] Schmidt argues for the first time in her reply brief that the trial court's failure to continue the hearing on the motions for summary judgment was error. By failing without explanation to make this argument in her opening brief, however, she has forfeited it. (See *California Building Industry Assn. v. State Water Resources* (2018) 4 Cal.5th 1032, 1050; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 958, fn. 2.)

DISPOSITION

The judgments are affirmed. UPM and d'Amours are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.