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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SHARON GAITHER, Individually and as Personal Representative, etc., of the Estate of Chaz Lamar Gaither, Plaintiff and Appellant, v. ALICIA MONTAÑEZ, M.D., Defendant and Respondent.	B271268 (Los Angeles County Super. Ct. No. BC532509)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Law Offices of Benjamin P. Wasserman and Benjamin P. Wasserman, for Plaintiff and Appellant.

Hulbert & Hulbert, Gregory M. Hulbert, and Donna P. Hulbert for Defendant and Respondent.

INTRODUCTION

Sharon Gaither, individually and as personal representative of the Estate of Chaz Lamar Gaither (appellant), appeals from a judgment dismissing a medical malpractice complaint against respondent Alicia Montañez, M.D., following the trial court's order granting respondent's motion for summary judgment. Appellant argues the court erred in granting summary judgment, as respondent's expert's opinion failed to meet respondent's burden to make a prima facie showing of the nonexistence of any triable issue of material fact. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. *The Medical Malpractice Complaint*

On or about May 15, 2015, appellant filed a second amended complaint (SAC) on a form complaint, alleging a single cause of action for medical malpractice-wrongful death. The SAC alleged that on October 1, 2012, Gaither's son, decedent Chaz Lamar Gaither, was admitted to the hospital complaining of shortness of breath. During decedent's hospital stay, respondent Montañez was one of several physicians who provided him with medical care. The SAC alleged that respondent breached her duty of care to decedent in failing to provide medical services "within an acceptable standard of medical care within the medical community." Her failure allegedly resulted in decedent's "unnecessary pain[] [and] suffering, severe emotional distress, and ultimately Decedent's untimely and unnecessary death."[1]

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[1] Decedent's minor daughter is a named plaintiff in the SAC, but is not a party to this appeal. Similarly, other defendants

B. *Respondent's Motion for Summary Judgment*

On September 2, 2015, respondent moved for summary judgment, arguing that she had complied with the requisite standard of care in her treatment of decedent, who was then 26 years old. In support, she submitted a declaration from Noel G. Boyle, M.D. In his declaration, Dr. Boyle stated he is a California licensed medical doctor and a cardiac electrophysiologist, with board certifications in Internal Medicine, Cardiovascular Disease and Clinical Cardiac Electrophysiology. He is currently director of the Electrophysiology Fellowship Program at UCLA, and co-director of the UCLA Cardiac Arrhythmia Center. Dr. Boyle stated he was familiar with the standard of care applicable to cardiac electrophysiologists as a result of his education, training and experience.

Dr. Boyle stated he had reviewed the relevant medical records, which showed the following. Decedent was admitted to the hospital on October 1, 2012. He had a history of congestive heart failure. Decedent stated he had longstanding Type 1 diabetes, hypertension, hyperlipidemia, and a history of myocardial infarction (heart attack) and shortness of breath. His shortness of breath had been worsening over the prior two weeks, and he was recently hospitalized following a fainting episode. Tests showed decedent had symptoms of severe non-ischemic heart disease, sinus tachycardia (irregular heart rate) with left atrial enlargement, and a low ejection fraction (heart's ability to pump blood).

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were named in the SAC, but are no longer in the case and are not part of this appeal.

Respondent was consulted for evaluation and placement of an Automatic Implantable Cardiac Defibrillator (AICD), a medical device used to treat ventricular tachycardia and ventricular fibrillation (heart contraction). Irregular tachycardia and fibrillation were believed to be the cause of the fainting episode and posed a severe risk of sudden cardiac arrest and premature death. The AICD, its potential benefits, and the potential risks and complications for implanting the AICD were explained to decedent. He signed a consent to the procedure. On October 4, 2012, the AICD was implanted "without incident." Subsequently, the device was unsuccessful in restoring decedent's regular heart rate and rhythm, and decedent "required rescue with external defibrillation." It was then decided to replace a lead (wire) in the AICD to allow for a "better defibrillation threshold." Decedent again was informed of the possible risks and signed a consent to the procedure. The replacement of the lead was accomplished "without complication." However, the device proved ineffective. Decedent again was rescued with external defibrillation. Shortly thereafter, decedent's blood pressure dropped to abnormally low levels, and he required advanced cardiac life support measures. Decedent could not be resuscitated and was pronounced dead approximately an hour and 15 minutes later.

Based upon his "review of the pertinent records" and his "education, knowledge, training and experience as a cardiac electrophysiologist," Dr. Boyle opined that the care and treatment of decedent by respondent "complied at all times with the standard of care at that time required of a physician specialized

in Clinical Cardiac Electrophysiology, under the circumstances presented."[2]

C. *Opposition to Summary Judgment Motion*

Appellant opposed the motion for summary judgment, contending that Dr. Boyle's opinion was "unsupported by reasons or explanation." Appellant raised no evidentiary objections to Dr. Boyle's declaration. Nor did they challenge his qualifications. Instead, appellant argued: "Dr. Boyle's declaration failed to address crucial issues in this case, which included: 1) why such an emergent surgery was necessary, without fully explaining viable alternative non-surgical treatment; 2) whether a reasonable cardiac electrophysiologist would have recognized the high medical probability of drug-induced cardiomyopathy; 3) the impact of cumulative drug-related adverse reactions; 4) whether the requisite three (3) month[s] of guideline directed optimal medical therapy before pursuing the risky and life-threatening invasive procedure of surgical implantation of an AICD would have mitigated the [decedent's] injury[;] and 5) . . . whether or not Dr. Montañez was negligent in performing the unnecessary and life-threatening surgical procedures." No counter-declaration from an expert was submitted.

D. *Trial Court's Ruling*

On January 13, 2016, the trial court granted respondent's motion for summary judgment. The court found Dr. Boyle's declaration was sufficient to carry respondent's burden to show no breach of the standard of care. It explained: "[Decedent] had significant health problems, including prior myocardial

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[2] The pertinent medical records, certified by the hospital's custodian of records, were lodged with the court.

infarctions. Defendants addressed the patient's problem by placement of an Automatic Cardiac Defibrillator to treat ventricular tachycardia and ventricular fibrillation. The placement had no complications, but it did not stabilize the patient's [cardiac] sinus rhythm. He had another cardiac episode resulting in his death. No further analysis is necessary . . . . The proposed treatment and surgery were performed within the standard of care. There was no unnecessary life-threatening surgery."

Judgment in favor of respondent and against appellant was entered January 28. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in granting respondent's motion for summary judgment. "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element *X*." (*Id.* at p. 853.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.) Following a grant of summary judgment, we review the record de novo for the existence of triable issues, and consider the evidence submitted in connection with the motion, with the exception of evidence to which objections were made and sustained. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) Furthermore, our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Cour*t (1970) 2 Cal.3d 557, 564, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239, italics omitted.) Under this principle, appellant bears the burden of establishing error on appeal, even though respondent had the burden of proving her right to summary judgment before the trial court. (*Frank and Freedus v. Allstate Ins. Co*. (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in appellant's brief. (*Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 125-126.)

Here, the SAC alleged a single cause of action for medical malpractice. "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess

and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.) The key issue in a medical malpractice case is the standard of care (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 (*Lattimore*). And the "'standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony.'" (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410, quoting *Sinz v. Owens* (1949) 33 Cal.2d 749, 753.) In her motion, respondent argued that appellant could not prove she breached her duty to use the skill, prudence and diligence commonly possessed and exercised by cardiac electrophysiologists. She did so through the declaration of an expert, Dr. Boyle, who opined that respondent's actions complied with the applicable standard of care for cardiac electrophysiologists.

In granting summary judgment, the trial court concluded that Dr. Boyle's declaration was sufficient to show there was no triable issue of fact as to breach of the duty of care and thus shifted the burden to appellant to demonstrate the existence of a triable issue of fact on that element of the medical malpractice claim. Because appellant did not submit an opposing expert declaration on the issue, the court granted respondent's motion for summary judgment. Appellant's sole contention on appeal is that Dr. Boyle's declaration was insufficient to carry respondent's burden on the motion for summary judgment. We reject the claim.

In *Bushling v. Fremont Medical* Center (2004) 117 Cal.App.4th 493 (*Bushling*), the appellate court determined that

a qualified expert's declaration concluding that the defendant doctor's actions had met the applicable standard of care was sufficient to establish a prima facie case in the doctor's favor. (*Id.* at p. 508.) Similarly, in *Lattimore*, the appellate court determined that a qualified expert's declaration stating that the expert had "reviewed [the decedent's] medical records and other materials" and "briefly summariz[ing] [the decedent's] treatment at [the hospital] before concluding that the applicable standard of care was met" was sufficient to meet the defendant doctor's initial burden on summary judgment. (*Lattimore*, *supra*, 239 Cal.App.4th at p. 969.)

Bushling, *supra*, 117 Cal.App.4th at page 497, is particularly instructive. There, the plaintiff began experiencing pain in his left shoulder the morning following surgery to remove his gall bladder. He sued the surgeon (Dr. Rosson) and anesthesiologist (Dr. Caruso) who performed the surgery, alleging that their conduct fell below the applicable standard of care and resulted in his shoulder injury. Both doctors filed motions for summary judgment asserting that they had met the applicable standard of care. In support of the surgeon's motion, he produced a declaration from Dr. Luther Cobb, a board certified general surgeon. Dr. Cobb stated that based on "his familiarity with the standard of care in general surgery," including having performed over 500 gall bladder surgeries, and "his review of the records in the case," "Dr. Rosson's treatment was within the applicable standard of care." (*Id.* at p. 500.) In support of the anesthesiologist's motion, he submitted a declaration from Dr. Ritu Jain, a board certified anesthesiologist who had served as the anesthesiologist on more than 100 gall bladder surgeries. Dr. Jain declared that "[b]ased on her experience, together with her

review of all the records in the case and the deposition testimony of [a doctor who had consulted on plaintiff's shoulder pain], it was her opinion that Dr. Caruso met the standard of care in all his actions." (*Id.* at p. 498.)

The appellate court determined that the opinions of Drs. Cobb and Jain were not conclusory. It explained: "To state that one has experience in certain medical procedures and has reviewed pertinent medical records and that based on that experience and that review, the declarant has found nothing to support a claim of medical malpractice and therefore concludes that there was none is not an improper conclusion for an expert witness. The expert has given an explanation for that expert's conclusion that defendants are not guilty of medical malpractice: Based on the expert's experience and the patient's medical records, there is no evidence to support a claim of negligence as a cause of injury. The reason for the opinion is the absence of evidence of medical malpractice." (*Bushling*, *supra*, 117 Cal.App.4th at p. 509.)

Here, Dr. Boyle is an expert who is qualified to opine whether a doctor has met the standard of care expected of a cardiac electrophysiologist. He directs the Electrophysiology Fellowship Program at UCLA, and co-directs the UCLA Cardiac Arrhythmia Center. He is board certified in Internal Medicine, Cardiovascular Disease and Clinical Cardiac Electrophysiology. Indeed, appellant does not dispute Dr. Boyle's qualifications.

Dr. Boyle stated he reviewed the pertinent medical records, and his declaration adequately described the relevant facts. Decedent had significant health problems, including congestive heart failure and a prior heart attack. He suffered from longstanding Type 1 diabetes, hypertension, hyperlipidemia, and

shortness of breath. His shortness of breath, which caused him to faint, had been worsening and had resulted in his recent hospitalization. Multiple tests performed at the hospital revealed symptoms of severe heart disease. His heart was beating irregularly and not pumping blood normally. The irregular heart rate and rhythm were believed to be the cause of the fainting episode and posed a severe risk of sudden cardiac arrest and premature death. Implantation of an AICD was recommended to address some of the heart problems.

The procedure, its potential benefits, and the potential risks and complications were explained to decedent, and he signed a consent to the procedure. The initial implantation of the AICD was without incident, but because the device failed to restore regular heart rate and rhythm, it was recommended that a lead (wire) be replaced in the AICD to improve its effectiveness. Decedent again was informed of the possible risks and signed a consent to the procedure. The replacement of the lead was accomplished without complication. After the device again proved ineffective, decedent was rescued with external defibrillation. When decedent's blood pressure then dropped to abnormally low levels, advanced cardiac life support measures were taken, but decedent could not be resuscitated.

Dr. Boyle opined that the care and treatment of decedent by respondent "complied at all times with the standard of care at that time required of a physician specialized in Clinical Cardiac Electrophysiology." Dr. Boyle's opinion was based on his "review of the pertinent records" and his "education, knowledge, training and experience as a cardiac electrophysiologist." Dr. Boyle's opinion is indistinguishable from the expert opinions found sufficient in *Bushling*. Like those experts, he stated that he had

"reviewed pertinent medical records and that based on [his] experience and that review, [he] found nothing to support a claim of medical malpractice." (*Bushling*, *supra*, 117 Cal.App.4th at p. 509.) Similarly, like the declarations found sufficient in *Lattimore*, Dr. Boyle's declaration confirmed that he had "reviewed [the decedent's] medical records and other materials" and "summarized [the decedent's] treatment at [the hospital] before concluding that the applicable standard of care was met." (*Lattimore*, *supra*, 239 Cal.App.4th at p. 969.)

Appellant's reliance on *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 (*Kelley*) is misplaced. There, the plaintiff was admitted for laceration of a forearm. After the laceration was stitched, he was discharged and given some pain medication. The following day, Dr. Trunk, who was temporarily filling in for the plaintiff's primary care doctor (Dr. Berkowitz), prescribed more of the same pain medication. The next day, the plaintiff called Dr. Trunk to complain that even with the medication, he was still in pain. Dr. Trunk advised him to visit Dr. Berkowitz when the doctor returned several days later. The plaintiff visited Dr. Berkowitz several times and eventually had surgery to address the pain. Subsequently, the plaintiff sued the two doctors for medical malpractice. (*Id*. at p. 521.)

Dr. Trunk moved for summary judgment. In support of his motion, he submitted a declaration from Dr. Herndon. The declaration recited Dr. Herndon's credentials and listed the medical records he had reviewed. Dr. Herndon then briefly summarized the facts and stated: "'At all times . . . Trunk acted appropriately and within the standard of care under the circumstances presented.'" (*Kelley*, *supra*, 66 Cal.App.4th at p. 522.) The plaintiff opposed the motion and submitted a

declaration from Dr. Karns, who opined there was medical malpractice. (*Ibid*.) The trial court granted the motion for summary judgment, and the appellate court reversed on several grounds. (*Id*. at pp. 523.) It first noted that the Herndon declaration was inadmissible for lack of foundation "because it did not disclose the matter relied on in forming the opinion expressed," although this deficiency was waived by the plaintiff's failure to object. The court then stated the declaration was conclusory because it failed to address the critical issues of the case, principally, whether a reasonable doctor would have recognized that the plaintiff's continued pain even after taking medication was not the result of healing from the laceration, but of some other medical condition requiring additional diagnosis and possible intervention. Finally, the court held that "even if Herndon's opinion standing alone had been sufficient to support summary judgment, in this case a well-credentialed expert presented an opposing opinion, giving rise to a material issue of fact for trial." (*Id.* at p. 524, italics omitted.)

The instant case is distinguishable from *Kelley*. First, Dr. Boyle's declaration did not lack foundation, as it described the matters relied on in forming the opinion expressed. Dr. Boyle stated his opinion was based on his "education, knowledge, training and experience as a cardiac electrophysiologist" and his review of the pertinent medical records, which were separately submitted to the court. Appellant raised no evidentiary objections to Dr. Boyle's declaration. Second, Dr. Boyle's opinion was not conclusory. As the *Bushling* court explained: "The expert has given an explanation for that expert's conclusion that defendants are not guilty of medical malpractice: Based on the expert's experience and the patient's medical records, there is no

evidence to support a claim of negligence as a cause of injury. The reason for the opinion is the absence of evidence of medical malpractice." (*Bushling*, *supra*, 117 Cal.App.4th at p. 509.) As to appellant's argument that Dr. Boyle's declaration was insufficient because it failed to address alternate treatment plans, we reject it. Appellant produced no evidence that those treatment plans were viable or that the failure to recommend or implement them was contrary to the applicable standard of care. Moreover, Dr. Boyle's declaration adequately explained decedent's medical treatment. As the trial court properly found, decedent had significant health problems, and those problems were addressed by placement of an AICD. "The placement had no complications, but did not stabilize the patient's sinus rhythm. He had another cardiac episode resulting in his death. No further analysis is necessary . . . ." (See also *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 608, fn. 6 [declining suggestion in *Kelley* that "even on summary judgment, an expert's declaration must set forth in excruciating detail the factual basis for the opinions stated therein"].) Finally, unlike in *Kelley*, no contrary expert declaration was submitted.

In sum, Dr. Boyle's declaration was sufficient to establish the nonexistence of a breach of the applicable standard of care. The burden thus shifted to appellant to demonstrate a triable issue of material fact on that element of the medical malpractice claim. Appellant failed to submit an opposing expert declaration and thus failed to carry their burden. Accordingly, the trial court properly granted respondent's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to her costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.