

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PATRICIA C. BECERRA,

Plaintiff and Appellant,

v.

GUS G. HALAMANDARIS et al.,

Defendants and Respondents.

H052238

(Monterey County

Super. Ct. No. 22CV003374)

Appellant Patricia C. Becerra sued respondents Gus G. Halamandaris, M.D. and Monterey Spine & Joint, P.C. (collectively, defendants) for medical negligence after she had lumbar spine surgery and later developed a severe infection. The trial court granted defendants' motion for summary judgment after excluding the declaration from Becerra's expert and denying Becerra's request to submit a supplemental expert declaration. As we will explain, summary judgment was proper here because Becerra has not demonstrated a triable issue of material fact as to causation. We will therefore affirm.

I. BACKGROUND

Becerra suffers from severe back pain in the lumbar region of her spine. Halamandaris, a board-certified neurosurgeon, performed a lumbar spine decompression, reconstruction, and implantation surgery on Becerra in December 2020. She developed a postoperative, non-cloudy fluid pocket known as a seroma at her surgery site. Halamandaris drained the seroma in December 2020 and again in January 2021 and prescribed an antibiotic after the seroma spontaneously drained in March 2021. An

examination two weeks later due to continued wound drainage revealed a small skin tag in her lumbar wound perforating the surgery site incision. Halamandaris became concerned about the possible involvement of Becerra's lymphatic system and recommended exploratory surgery of the wound. He also discussed with Becerra the possibility of an underlying infection despite lack of fever or purulence, and refilled the antibiotic prescription. According to Halamandaris, Becerra reported the drainage had resolved over the next few days and she agreed the proposed exploratory surgery would not proceed.

Becerra saw her primary care physician for back pain in May and June 2021 with no documented complaints about the lumbar wound. When she saw Halamandaris for swelling in her leg in July 2021, he did not note any lumbar wound fluid drainage. Halamandaris scheduled Becerra for a lumbar MRI to evaluate her leg pain, and the MRI also showed no infectious process or collection of fluid. Becerra saw a new primary care physician in July 2021, who noted tenderness in the lower back sciatic notch but did not document any issues with the lumbar wound. In September 2021, Becerra obtained a second opinion for her lumbar spine issues from another neurosurgeon. The neurosurgeon reviewed imaging and did not note any documented abnormalities with the lumbar wound after completing a physical exam.

Becerra saw Halamandaris in late September 2021 for pain near her buttock, and Halamandaris suspected a perirectal abscess after a visual examination. Her lumbar wound was clean and dry. Becerra saw her primary care physician the following day about the cyst on her buttock. Becerra informed her primary care physician that the problem had started four days earlier, and the physician ordered antibiotics for suspected cellulitis. A few days later, Becerra went to the emergency room, complaining of fever and an abscess on her back. A physical examination and CT scan revealed a draining abscess in the lumbosacral area just above her gluteal cleft with gas locules extending down to the gluteal crease. Becerra tested positive for bacterial cocci. Further testing

and examination by a surgeon diagnosed sepsis and necrotizing fasciitis, and Becerra underwent surgical treatment.

Becerra sued defendants for medical negligence, alleging failure to possess and exercise reasonable knowledge and skill in Becerra's surgery and follow-up care, resulting in necrotizing fasciitis. Defendants moved for summary judgment, arguing there was no triable issue of material fact as to breach of duty, causation, and damages. In support of their motion, defendants filed an expert declaration from neurosurgeon Paul Edward Kaloostian, M.D. Kaloostian opined Halamandaris complied with the standard of care and did not cause Becerra's necrotizing fasciitis. He discussed the many months between the lumbar surgery and abscess development, the different locations of both, the intervening medical visits and imaging showing no signs of a lumbar wound infection, and the aggressive nature of the bacteria found within the abscess that he attributed to poor personal hygiene. Becerra opposed the motion with an expert declaration by neurosurgeon Farr Ajir, M.D. Ajir opined that Halamandaris breached his duty by failing to culture the lumbar wound fluid because the four-month drainage period was a sign of infection. He also opined Halamandaris's failure resulted in the six-month delayed identification of Becerra's chronic infection. Defendants objected to Ajir's opinions as conclusory and lacking foundation.

The trial court found Becerra raised a triable issue of material fact as to breach of duty but not as to causation. It sustained defendants' objections to Ajir's causation opinions as conclusory and lacking evidentiary value. The trial court reasoned that Ajir assumed the lumbar surgery caused a chronic infection without discussing how the infection continued after drainage ceased or explaining the cause of the necrotizing fasciitis. Observing that the underlying facts remained the same, the trial court denied Becerra's request to submit a supplemental expert declaration.

II. DISCUSSION

Summary judgment is appropriate when there is no triable issue of material fact as to one or more elements of a particular cause of action such that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (p)(2).) In a medical malpractice action, the plaintiff must establish: (1) a professional's duty to use the skill, prudence, and diligence other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606 (*Hanson*).) Unless the negligence is obvious to a layperson, parties must rely on expert testimony to prove or disprove a defendant performed in accordance with the standard of care. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

Becerra argues the trial court improperly weighed the evidence and did not resolve ambiguity in her favor when it excluded Ajir's opinions on causation and ultimately granted summary judgment. She also challenges the denial of her request for leave to submit a supplemental declaration from Ajir.

A. NO ERROR IN EXCLUDING THE AJIR EXPERT DECLARATION

When a party moving for summary judgment produces a competent expert declaration showing there is no triable issue of fact on an essential element of the claim, the opposing party must produce a competent, admissible expert declaration to the contrary. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761–762 (*Bozzi*).) The opposing expert's declaration must be based on reliable matter with evidentiary support and reasoned conclusions, although the reasoned explanation in the opposing expert's declaration need not be as detailed as expert testimony presented in support of the motion. (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 155–156 (*Sanchez*); *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 189 (*Garrett*).) As a gatekeeper of expert testimony, the trial court

must exclude speculative expert opinion without choosing between competing expert opinions, weighing an opinion's probative value, or substituting its own opinion for the expert's opinion. (*Garrett*, at pp. 186–187.) The trial court on summary judgment must also liberally construe opposition evidence when ruling on admissibility. (*Id.* at p. 189.) We review a trial court's evidentiary rulings on summary judgment for abuse of discretion. (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 951 (*Jones*).)

Ajir opined that Becerra experienced a chronic infection after her lumbar surgery. Becerra argues that the trial court's exclusion of Ajir's opinion as based on an "assumption of chronic infection" reflects improper weighing of the evidence in defendants' favor. According to the trial court, Ajir "failed to cite to any evidence" and "did not articulate how or why it was more likely than not that the chronic infection, which was assumed based upon the drainage continuing for almost four months post-surgery, continued after the drainage ceased." The trial court reviewed the underlying medical evidence and then relied on Kaloostian's contrary opinions in determining that Ajir's theory of chronic infection was not supported by the evidence. (Cf. *Garrett, supra*, 214 Cal.App.4th at pp. 186–187.)

Ajir made clear that his conclusions were based on his experience as a neurosurgeon and his review of Becerra's medical records showing that the lumbar wound drainage continued for four months after surgery. Drawing all inferences in Becerra's favor, there is adequate foundation for Ajir's opinion that, as of April 2021, Becerra was experiencing an ongoing post-surgical infection. (*Garrett, supra*, 214 Cal.App.4th at p. 189.) This is in contrast to Ajir's opinion on causation. While not required to be as detailed as those offered by Kaloostian, Ajir's opinion on causation is inexplicably thin in light of the detail in Kaloostian's declaration. (*Ibid.*) After describing Becerra's condition as an intermittent and recurring chronic infection, Ajir then presumed the necrotizing fasciitis was caused by a flare-up of that chronic infection. But importantly, although he stated he reviewed all of Becerra's medical files and her

deposition transcript, he did not address the non-purulent seromas, Becerra's examination by three other physicians who did not note any lumbar wound issues between May and October 2021, the intervening lumbar MRI showing no fluid or signs of infection around the surgical wound, or the different locations of the surgical wound and the perirectal abscess. Nor did he address Kaloostian's opinions regarding poor hygiene and the aggressive nature of the abscess bacteria. (See *Sanchez, supra*, 8 Cal.App.5th at p. 166; see also *Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal.App.5th 119, 124–125 (*Lowery*).) These omissions support the trial court's decision that Ajir's opinion was conclusory and lacked reasoned foundation. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) Without a reasoned explanation in Ajir's declaration connecting the full facts to his ultimate conclusion on causation (see *Sanchez*, at pp. 155–156), the trial court did not abuse its discretion by excluding the declaration. (*Jones, supra*, 230 Cal.App.4th at p. 951.)

B. NO ERROR IN DENYING LEAVE TO SUPPLEMENT THE AJIR DECLARATION

A party opposing summary judgment must be afforded a continuance to permit additional affidavits or discovery if “it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that *facts* essential to justify opposition may exist but cannot, for reasons stated, be presented.” (Code Civ. Proc., § 437c, subd. (h), *italics added*.) The opposing party may also file an *ex parte* motion for a continuance on or before the opposition due date. (*Ibid.*) A continuance is not mandatory when a party fails to submit an affidavit providing a good faith showing that additional time is needed to obtain facts essential to justify opposition. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253–254.)

As an alternative to proceeding under the statute, the party may seek a continuance under the traditional good cause standard applied to continuance requests. “ ‘[I]n deciding whether to continue a summary judgment to permit additional discovery courts consider various factors, including (1) how long the case has been pending; (2) how long

the requesting party had to oppose the motion; (3) whether the continuance motion could have been made earlier; (4) the proximity of the trial date or the 30-day discovery cutoff before trial; (5) any prior continuances for the same reason; and (6) the question whether the evidence sought is truly essential to the motion.’ ” (*Hamilton v. Orange County Sheriff’s Dept.* (2017) 8 Cal.App.5th 759, 765 (*Hamilton*).) We review the trial court’s ruling on a continuance request for abuse of discretion. (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643.)

At the summary judgment hearing, Becerra sought leave and additional time in order to file a supplemental declaration from Ajir articulating more explicit conclusions regarding causation to counter the shortcomings identified by defendants and embraced by the trial court. Becerra proffered Ajir would specifically opine that the lumbar surgery caused a continuing low grade infection despite the absence of drainage for several months, evaluation by multiple doctors, and the intervening MRI. Becerra requested a continuance to obtain a supplemental declaration only after it became apparent the trial court would exclude Ajir’s opinions and grant defendants’ motion. She had not submitted an affidavit providing a good faith showing that Ajir would opine on essential facts that could not have been presented with her initial opposition, nor did she otherwise make the requisite showing for a continuance under Code of Civil Procedure section 437c, subdivision (h). (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 101–102.) A continuance is not required under these circumstances: Ajir had all the necessary factual information when initially forming his opinions, but neither offered a foundation for his causation theory nor answered Kaloostian’s specific points. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, 398–399.)

In denying Becerra’s request to continue the hearing, the trial court noted the long time Becerra already had to respond to the motion. The court also emphasized that the underlying evidence refuting causation would remain the same, regardless of any new opinion Ajir might state in a supplemental declaration based on the same factual record.

Even after liberally construing Ajir’s declaration, the trial court ultimately determined that the desire to present a supplemental declaration merely supplying foundation for an already-stated conclusion did not meet the standard of good cause to continue the hearing. (See *Hamilton, supra*, 8 Cal.App.5th at p. 765.) On this record, the trial court did not abuse its discretion by denying the request to submit a supplemental declaration. (See *Lowery, supra*, 49 Cal.App.5th at pp. 125–126 [finding no abuse of discretion in denying last-minute continuance request].)

C. BECERRA HAS NOT ESTABLISHED A TRIABLE ISSUE REGARDING CAUSATION

When a defendant has prevailed on summary judgment below, we review the record de novo to determine whether the defendant as the moving party has carried its burden of persuasion to conclusively negate a necessary element of the plaintiff’s case or to show that under no hypothesis is there a material issue of fact requiring trial. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If the defendant makes a prima facie showing that there is no triable issue of material fact and it is entitled to judgment as a matter of law, the plaintiff must then meet its burden of production to make a prima facie showing of a triable issue of material fact. (*Aguilar*, at p. 850.) In a medical malpractice suit, a defendant who supports the motion with an expert declaration that the defendant’s conduct fell within the applicable standard of care is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 (*Powell*).)

In determining whether the parties have met their respective burdens, the court must consider all evidence except that to which objections have been made and sustained. (Code Civ. Proc., § 437c, subd. (c).) The court may not weigh the evidence in reaching its decision, and must liberally construe the evidence and resolve any doubts in favor of the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 856; *Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493, 497.) We will affirm summary judgment if

it is correct on any ground asserted below, regardless of the trial court's stated reasons. (*Garrett, supra*, 214 Cal.App.4th at p. 181.)

To prevail in her medical negligence suit, Becerra must prove breach of duty, causation, and actual loss or damage. (*Hanson, supra*, 76 Cal.App.4th at p. 606.) Defendants supported their motion for summary judgment with the expert declaration of Kaloostian, who opined that to a reasonable degree of medical probability Halamandaris met the standard of care and did not cause Becerra's necrotizing fasciitis. Kaloostian reviewed Becerra's medical records and deposition transcript and Halamandaris's declaration. He opined that Halamandaris complied with the standard of care because the wound did not appear infected and had stopped draining. He also opined that Becerra's necrotizing fasciitis was the result of an unrelated abscess that developed nine months after the surgery and in a different location. Kaloostian discussed intervening medical visits and imaging showing no signs of a lumbar wound infection, and he noted the aggressive nature of the bacteria found within the new abscess, which he attributed to poor personal hygiene. We conclude the Kaloostian declaration has satisfied defendants' burden to negate the breach of duty and causation elements of a medical negligence action; Becerra has not rebutted defendants' prima facie showing by producing conflicting expert evidence raising a triable issue regarding causation. (See *Powell, supra*, 151 Cal.App.4th at p. 123.) Although Becerra argues that the Ajir declaration raises a triable issue, the court is required to liberally construe only admissible evidence. (*Bozzi, supra*, 186 Cal.App.4th at p. 761.) As we have found no error in excluding Ajir's opinions on causation, Becerra provided no admissible evidence demonstrating the lumbar surgery caused her abscess and necrotizing fasciitis.

We reach our conclusion based on an independent review of the record without deferring to the trial court's analysis of the evidence. (*Saelzler, supra*, 25 Cal.4th at p. 767; *Aguilar, supra*, 25 Cal.4th at p. 856.) Indeed, we acknowledge that the trial court may have engaged in weighing the evidence when excluding the Ajir declaration. But we

find no prejudice because even if the declaration were properly considered (as offered or as supplemented according to counsel's offer of proof), it would not raise a triable issue as to causation. As we have discussed, Ajir's declaration was adequate to support the existence of a months-long post-surgical infection. But as a response to Kaloostian's very detailed opinion, Ajir's declaration failed to make any causal connection between that infection and the development of necrotizing fasciitis several months later. (*Powell, supra*, 151 Cal.App.4th at p. 123.) Nor would the proffered supplemental declaration create a triable issue as to causation. The purpose of the requested continuance was not to amplify the available medical evidence, but rather to amplify Ajir's opinion that Becerra experienced lingering infection as a result of the lumbar surgery. Such an amplification—based on the same medical evidence—still would not have linked the post-surgical infection to the acute necrotizing fasciitis. (*Ibid.*) Granting summary judgment was not improper on this record.

III. DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal by operation of California Rules of Court, rule 8.278(a).

Grover, J.

WE CONCUR:

Greenwood, P. J.

Lie, J.

H052238

Becerra v. Halamandaris et al.