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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JERRY DUNCAN,

Plaintiff and Appellant,

v.

BRUCE MCCORMACK,

Defendant and Respondent.

A138211

(San Francisco City & County  
Super. Ct. No. CGC-09-490457)

In this medical malpractice action, Jerry Duncan appeals from a judgment of dismissal following the court's order granting respondent Dr. Bruce McCormack's motion for nonsuit. Duncan contends that the court erred in precluding him from eliciting expert opinion testimony from Dr. McCormack and Dr. Edward Eyster on the ground that they were non-retained expert witnesses. He also argues that the court erred in granting the motion for nonsuit because there was substantial evidence establishing that Dr. McCormack breached the standard of care and failed to obtain an informed consent to perform a foraminotomy. We affirm.

**I. FACTUAL BACKGROUND**

In late 2007 and early 2008, Duncan began experiencing numbness and pain in his hands and arms. The Veterans Administration Medical Center (the VA) referred him to Dr. Paul Larson, a neurosurgeon. Dr. Larson recommended an operation to decompress Duncan's spine and stabilize his vertebrae utilizing an anterior procedure through the front of the neck. Duncan sought a second opinion from Dr. McCormack.

In April 2008, Duncan met with Dr. McCormack. Duncan had severe spinal cord compression and was in urgent need of decompression to prevent paralysis from the neck down. He was experiencing impaired movement and numbness in his limbs.

Dr. McCormack recommended a laminectomy—decompression of the spinal cord and removal of the back portion of the vertebral discs to alleviate pressure. Dr. McCormack told Duncan that because he was a smoker, an anterior surgery would result in a more difficult recovery, and that the laminectomy was a simpler, less intrusive procedure.

Dr. McCormack testified that a foraminotomy is the part of the laminectomy procedure which involves decompression of the spinal cord and nerve roots.<sup>1</sup> Nerve root damage and paralysis are inherent risks of a foraminotomy. Dr. McCormack testified that he reviewed the risks of the surgery with Duncan.

Duncan testified that Dr. McCormack told him that it would be harder for him to recover from the surgery because he was a smoker and that he would not experience as much pain with the posterior approach. He denied that Dr. McCormack advised him of the risks.

Dr. McCormack performed the surgery on Duncan on April 25, 2008. Dr. Eyster, a neurological surgeon assisted him in the surgery. Dr. McCormack performed a “fairly aggressive foraminotomy” to decompress the nerve roots in the spinal cord. He went further out to the lateral right side of the spinal cord in order to free up the nerve roots. It was a routine surgery that went well. Dr. McCormack saw Duncan after the surgery in the recovery room. Duncan was able to move all four extremities.

Duncan was discharged from the hospital four days after the surgery. He claimed that he could not move his right arm when he was discharged.

Dr. Eyster saw Duncan on May 7, 2008, for the postoperative follow-up. He removed the staples from Duncan’s incision and found no evidence of infection. Eyster noted that Duncan’s right arm was weak and that he had C5 palsy with primary loss of

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<sup>1</sup> A foraminotomy is a surgical procedure for widening the area where the spinal nerve roots exit the spinal column.

deltoid—the ability to raise the right arm. He had some weakness in the biceps. There was no deficit in his flexion or extension of his thumb or fingers. Eyster opined that Duncan had suffered a C5 nerve root contusion during the foraminotomy. He ordered a scan and placed Duncan on steroids. He notified Dr. McCormack of his findings. He did not know that Duncan had fallen two days before the appointment. Duncan had slipped and fallen on his right side.

Dr. McCormack evaluated Duncan on May 16, 2008. The CT scan showed some narrowing around some of the nerve root on the right of Duncan’s spinal cord; Duncan was very weak in his deltoid and had weakness in the biceps. He also had significant right shoulder weakness. Dr. McCormack recommended a second surgical procedure to alleviate the impingement on the nerves. In essence, he recommended the same surgery that had been recommended by the VA.

Dr. McCormack performed the second surgery going through the front of the neck, removed two intervertebral discs, and stabilized the vertebrae with a bone graft and a plate. The surgery did not result in much improvement in Duncan’s arm in the immediate post-operative period. Duncan’s right proximal arm remained weak. In addition, he suffered from right shoulder pain. Duncan was subsequently evaluated by an orthopedist, who ruled out a rotator cuff injury. Another orthopedist noted that Duncan had some capsulitis inflammation of the shoulder. Surgery was not recommended for the shoulder. Dr. McCormack did not know the cause of Duncan’s right arm weakness.

Duncan filed a second amended complaint on February 2, 2010, alleging medical malpractice. He alleged that the negligence of Drs. McCormack and Eyster resulted in Duncan losing the use of his dominant right arm.<sup>2</sup> Prior to trial, Dr. McCormack moved in limine to preclude Duncan from offering any expert testimony regarding the standard of care for medical negligence of a neurosurgeon or the cause of Duncan’s shoulder weakness on the ground that Duncan failed to designate or disclose any experts to testify

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<sup>2</sup> The complaint against Dr. Eyster was dismissed with prejudice on September 22, 2011.

on these issues as required by Code of Civil Procedure<sup>3</sup> section 2034.260, subdivisions (b) and (c). The court granted the motion. The court ruled that Duncan could only question non-retained experts about their care and treatment of him; he could not pose hypothetical questions to non-retained experts.

The case proceeded to a jury trial on January 30, 2013. At the close of Dr. McCormack's case he moved for a nonsuit on the ground that Duncan had failed to meet his burden of proof on his claim of medical malpractice. Dr. McCormack argued that there had been no testimony to establish that his actions fell below the standard of care in performing the surgery. He also asserted that there had been no expert testimony establishing that he fell below the standard of care in obtaining Duncan's informed consent to the surgeries. The trial court granted the motion, finding that Duncan failed to prove his causes of action for negligence and medical malpractice.

## **II. DISCUSSION**

### ***1. Expert opinion testimony***

Duncan contends that the trial court abused its discretion in precluding him from eliciting expert opinion testimony from Drs. McCormack and Eyster. He argues that the court's ruling prevented him from establishing that Dr. McCormack's violation of the standard of care caused his injury. We review the court's ruling on the admissibility of expert testimony for abuse of discretion. (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 25.)

Section 2034.210, subdivision (a), provides: "After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent: [¶] (a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial." If the expert is "a party or an

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<sup>3</sup> All further statutory references are to the Code of Civil Procedure.

employee of a party,” the designation of that witness is to include an expert witness declaration, pursuant to section 2034.260. (§ 2030.210, subd. (b).) These sections require a party to “ ‘ “disclose the *substance* of the facts and the opinions to which the expert will testify, either in his witness exchange list, or in his deposition, or both.” [Citation.]’ [Citation.]” (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 778, original italics (*Easterby*).)

The purpose of these provisions is “ ‘to give fair notice of what an expert will say at trial.’ ” (*Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1522 (*Dozier*).) Failure to submit a required declaration may result in exclusion of the expert opinion. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34 (*Schreiber*).) Section 2034.300 provides: “[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court *shall* exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).”<sup>4</sup>

As we have described, the expert witness disclosure statutes apply to parties who are designated as experts. (*County of Los Angeles v. Superior Court* (1990) 224 Cal.App.3d 1446, 1457.) Duncan failed to disclose any retained experts as required by section 2034.230 and proceeded to trial without retaining an expert to testify on the standard of care or causation. Instead, he designated both Drs. McCormack and Eyster as non-retained experts, but he did not comply with the discovery statutes, section 2034.210 et seq., and thus was properly precluded from questioning them about their opinions and impressions.

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<sup>4</sup> Section 2034.260 governs the timing and content of exchange of expert witness information.

Duncan contends that the defendants were his treating physicians and therefore may be cross-examined as to their expert opinions, citing *Schreiber*. But in *Schreiber* the treating physicians were not defendants in the action. (*Schreiber, supra*, 22 Cal.4th at p. 33.) This is a critical distinction given that the attorney-client and work product privileges would be implicated in the defendant physicians' opinions regarding causation and standard of care. (See *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 690 [attorney-client privilege and work product protection apply prior to point at which it is reasonably certain an expert will testify].) Indeed, in *Schreiber* the court pointedly noted that the identity and opinions of "treating physicians are not privileged." (*Schreiber, supra*, at p. 38.)

Additionally, "[a] treating physician is not consulted for litigation purposes, but rather is qualified to testify about the plaintiff's injuries and medical history because of his or her underlying expertise as a physician and his or her physician-patient relationship with the plaintiff. A retained expert, on the other hand, is engaged for the purpose of forming and expressing an opinion in anticipation of the litigation based at least in part on information obtained outside the physician-patient relationship, for the purpose of the litigation rather than the patient's treatment. [Citation.]" (*Dozier, supra*, 199 Cal.App.4th at p. 1520.) Here, Drs. McCormack and Eyster were treating physicians, but were also party defendants and were not designated as defense experts.<sup>5</sup> Although non-party treating physicians may testify as to their opinions regarding causation and standard of care if those issues are inherent in their work (*Schreiber, supra*, 22 Cal.4th at p. 39), unless they are designated as experts they cannot give after-the-fact opinions on those subjects. (*County of Los Angeles v. Superior Court, supra*, 224 Cal.App.3d at pp. 1456-1457.) Here, although Duncan attempted to designate the defendant physicians as experts, they could not so testify because Duncan failed to comply with the statutory predicates for presenting that testimony. (§ 2034.210, subd. (b).)

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<sup>5</sup> Dr. Eyster was dismissed from the case well before trial, but was represented by counsel for Dr. McCormack.

## 2. *Standard of Care*

Duncan contends that the trial court erred in granting a nonsuit because the evidence showed that Dr. McCormack breached the standard of care by contact with a nerve root during the foraminotomy.

A motion for nonsuit allows a defendant to test the sufficiency of a plaintiff's evidence before presenting his own case to the jury. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838 (*Carson*).) It constitutes a demurrer to the evidence and thus presents a question of law—whether the evidence offered by the plaintiff could support a judgment. (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 272.) A nonsuit may only be granted if no evidence supports a jury verdict in the plaintiff's favor. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.)

In reviewing a trial court's grant of nonsuit, we must evaluate the evidence in the light most favorable to the plaintiff. “ ‘The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.’ [Citations.]” (*Carson, supra*, 36 Cal.3d at p. 839.)

In a medical malpractice case, the plaintiff must establish: “(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. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) [¶] Because the standard of care in a medical malpractice case is a matter ‘peculiarly within the knowledge of experts’ [citation], expert testimony is required to ‘prove or disprove that the defendant performed in accordance with the standard prevailing of care’ unless the negligence is obvious to a layperson. [Citation.]” (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

Here, Duncan relied on the testimony of Dr. Eyster to support his claim that Dr. McCormack breached the standard of care. He chose to proceed to trial without retaining an expert to testify on the standard of care or causation. While Dr. Eyster

testified that he initially believed that the cause of the weakness in Duncan's right arm was a nerve root contusion during the foraminotomy, he based that opinion on Duncan's complaint during his post-operative appointment without knowing that Duncan had fallen down a couple of days before the appointment. Had he known about the fall, he would have considered it an important factor in the etiology of Duncan's weakness and would have opined that he had suffered a stretch injury to his brachial plexus—the nerve roots attaching to the muscles in the shoulder and arm—or that there was some other cause.

Moreover, both Drs. McCormack and Eyster testified that the surgery was routine. Dr. McCormack testified that the surgery went well and that there were no complications. Dr. Eyster testified that the surgery was a "typical laminectomy." He stated that Dr. McCormack did a "very complete job," explaining that with a foraminotomy, neurosurgeons try to be aggressive to be sure that they have taken enough bone so that the patient does not have to undergo another surgery. Dr. Eyster also explained that in performing a foraminotomy, the objective is to remove the impinging bone without damaging the nerve root. Yet there was no evidence that Dr. McCormack damaged the nerve root during the surgery. Neither Drs. McCormack or Eyster testified that Duncan's nerve root was injured during the procedure. Dr. McCormack, in fact, adamantly testified that Duncan's nerve root was not cut, and if it had been, it would have been repaired during the surgery. Duncan simply failed to present any expert testimony that Dr. McCormack breached the standard of care in performing the surgery.

### ***3. Informed Consent***

Finally, Duncan argues that his injuries were caused by Dr. McCormack's failure to obtain an informed consent to performing the foraminotomy because he was not warned that an inherent risk of the procedure was C5 nerve root contusion and paralysis. He asserts that he would not have agreed to the foraminotomy had he known of the inherent risk of paralysis. He also urges that the trial court erred in precluding him from cross-examining Dr. Eyster on what risks he should have disclosed concerning the surgery.

A physician has a duty to disclose to the patient “the available choices with respect to proposed therapy and . . . the dangers inherently and potentially involved in each.” (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243.) When the surgery “inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. . . .” (*Id.* at p. 244.) The physician has a duty to disclose all material information—“ ‘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’ ”—to allow the patient to make an informed decision regarding a proposed treatment. (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1305.)

A physician is liable for failure to obtain informed consent only when the failure to disclose causes the injury. (*Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 657.) “ ‘There must be a causal relationship between the physician’s failure to inform and the injury to the plaintiff. *Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given.*’ [Citation] . . . [C]ausation must be established by an *objective* test: that is, the plaintiff must show that reasonable ‘prudent person[s]’ in the patient’s position would decline the procedure if they knew all significant perils. [Citations.]” (*Ibid.*, original italics.)

Here, Duncan concedes that no reasonable person would have declined the laminectomy to decompress the spinal cord, but asserts that he would have declined the foraminotomy had he been advised of the risk of nerve root damage. But both Drs. McCormack and Eyster testified that the foraminotomy was “part and parcel of the same operation” as the laminectomy and was necessary to decompress the spine. And, they testified that the risks for both procedures were the same, C5 nerve root injury was an inherent risk. Moreover, Dr. McCormack advised Duncan that failure to have the surgery could result in paralysis. In light of the fact that both procedures presented the identical risks and that the failure to have the surgery could potentially have resulted in paralysis

from the neck down, no reasonable person would have declined the procedure. The court properly granted the nonsuit motion.

### III. DISPOSITION

The judgment is affirmed.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.