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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

HAYDEN CANTRELL, a Minor, etc.,

Plaintiff and Appellant,

v.

SUTTER NORTH MEDICAL GROUP et al.,

Defendants and Respondents.

C075443

(Super. Ct. No. CVCS110692)

Plaintiff Hayden Cantrell and his twin were born prematurely at 28 weeks gestation. It was a monochorionic (one placenta) pregnancy complicated by Twin to Twin Transfusion Syndrome (TTTS) which caused the twins to have blood volumes that were too high and too low, respectively. Plaintiff's twin died less than two days after birth and plaintiff suffered a severe brain injury causing spastic quadriplegia and other disabilities. Plaintiff, by and through his mother as guardian ad litem, sued Sutter North Medical Group (Sutter), Aparna Kareti, M.D., and Penny Larson, M.D. (collectively

defendants), and others for medical malpractice. Defendants successfully moved for summary judgment on the basis that plaintiff could not show causation.

On appeal, plaintiff contends the trial court erred in granting summary judgment. He contends the court erred in failing to consider the declarations of his expert which created a triable issue on the material fact of causation.

As we explain in more detail *post*, the expert declarations that plaintiff provided contain numerous errors and inconsistencies. Further, they fail to define many medical terms, and neither clearly explains complicated medical conditions nor directly and specifically addresses the facts that defendants contend are undisputed. Nonetheless, liberally construing these declarations, as we must, we find they are sufficient to raise a triable issue of fact as to two of the three defendants. Accordingly, although we shall affirm the summary judgment as to Dr. Larson, we reverse the grants of summary judgment as to Dr. Kareti and Sutter.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants' Care and Plaintiffs' Birth

Plaintiff's action against defendants is based on defendants' care and treatment of his mother in the month before his birth. His mother, Jessica Cantrell (Cantrell), was 23 years old, married, in the Air Force, and pregnant when she was transferred from Arkansas to Beale Air Force Base. Cantrell first saw Dr. Kareti on November 3, 2008, when Cantrell was 24 weeks pregnant with plaintiff and his twin (Twin A). Dr. Kareti ordered an ultrasound test. Cantrell returned two days later with a complaint of vaginal bleeding; Dr. Kareti's examination revealed no bleeding.

The ultrasound was performed on November 18, 2008, when the pregnancy was at 26 weeks. The ultrasound showed a live twin pregnancy. No membrane separating the fetuses was identified; a dividing membrane indicates whether there are one or two placentas. The amount of amniotic fluid for each twin appeared normal. Twin A had a fetal heart rate of 136 beats per minute (bpm) and weighed 739 grams (one pound 10

ounces). Plaintiff had the same fetal heart rate and weighed 850 grams (one pound 14 ounces).

On November 24, 2008, Cantrell was admitted to Fremont Hospital with complaints of left flank pain, nausea, vomiting, and contractions every one and a half to two minutes. The contractions subsided and Cantrell was discharged.

Early in the morning of December 3, 2008, Cantrell was again admitted to the hospital for pre-term labor. The on-call obstetrician, Dr. Penny Larson, was notified of Cantrell's complaints and of a questionable spontaneous rupture of membranes (water breaking). Dr. Larson ordered hydration and medications to stop the labor. About an hour later, she ordered an ultrasound. The ultrasound showed the size of the bladders of both twins as within normal limits.

Dr. Kareti was called at 8:14 a.m. and arrived shortly before 9:00 a.m. She examined Cantrell and found clear and light pink fluid indicating one of the amniotic sacks had ruptured. Dr. Kareti consulted with a perinatologist in Sacramento and ordered Cantrell transferred to Sutter Memorial Hospital in Sacramento. Cantrell was admitted to Sutter Memorial Hospital just before noon. Twin A had a fetal heart rate of 120 bpm and significant oligohydramnios (a lower than normal level of amniotic fluid). Plaintiff had a heart rate of 120-130 bpm and significant polyhydramnios (excess amniotic fluid). Cantrell complained of acute abdominal pain and her uterus was significantly tender and tense. The delivering physician suspected a placental abruption (meaning the placenta separating from the uterine wall) and TTTS. Twin A's heart rate dropped and a Caesarian section was performed. Twin A died on day two. Plaintiff was delivered at 28 weeks gestation. He has been diagnosed with PVL (periventricular leukomalacia, a type of brain damage) and spastic quadriplegia (a motor disorder) and is developmentally delayed, relying on a feeding tube for nutrition. He is on medication to control seizures and assist with his enlarged heart.

After birth, there was no evidence of placental abruption. The pathology report on the placenta noted “ ‘preterm twin placenta and two trivascular umbilical cords (fused placental disc). Impression was that of monochorionic diamniotic twin placenta.’ ”¹ The discharge summary indicates the physicians believed there was TTTS, leading to the compromise of Twin A and polyhydramnios on plaintiff’s side.

The Lawsuit

Plaintiff brought suit against defendants and others for medical malpractice. Plaintiff alleged defendants were negligent in the care and treatment of his mother during her pregnancy, labor and delivery, negligently managed his care, and failed to monitor and supervise his care. As a result of defendants’ negligence, plaintiff suffered severe and permanent physical injuries, including brain damage.

Defendants’ Motion for Summary Judgment

Defendants moved for summary judgment on the basis that there was no triable issue of fact that the care and treatment they provided “is not the medically probable cause of Plaintiff’s injuries.” They argued that plaintiff’s injuries “were caused by nature itself,” not negligent medical care. Their statement of undisputed material facts was drawn from the declarations of two experts, setting forth the causes of plaintiff’s injuries, the high probability of a poor outcome given plaintiff’s condition, the unavailability of

¹ “Diamniotic” means there were two amniotic sacs. (2 Schmidt, Attorneys’ Dict. of Medicine (2011) p. 80-106.) Although this fact appears significant, especially to plaintiff’s contention that the amniotic fluid index (amount of fluid in each sac, also AFI) should have been measured, none of the experts discuss or even define the term. This is one of many examples of the lack of care in preparing the parties’ expert declarations. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 10:128, p. 10-55 [“extraordinary care is required in preparing your declarations!”]) We have included parenthetical explanations for medical terms not defined by the declarations where we are able to do so without controversy.

treatment options, and the conclusions that defendants' care and treatment were not the cause of plaintiff's injuries.

Gilbert Martin, M.D., a board certified neonatologist and pediatrician, had reviewed the medical records and concluded the November 18 ultrasound, which found no sign of a membrane separating the fetuses, indicated a monochorionic diamniotic placentation. Dr. Martin explained that a monochorionic pregnancy occurs when a single egg is fertilized and a signal is sent for a placenta for a singleton pregnancy. But then the egg divides and there are two embryos in the single placenta, with either one or two amniotic sacs. This occurs in 10 percent of twin pregnancies; 40 percent of monochorionic twin pregnancies have "poor to severe outcomes." When two fetuses share the same placenta, one attaches the umbilical cord near the center and the other attaches the umbilical cord closer to the edge. The fetus attached at the center generally receives more of the nutrients and benefits of the placenta.

Another complication of a shared placenta is that the blood vessels supplying the fetuses can grow into each other, causing unequal blood pressure. This complication is TTTS. The blood is transferred disproportionately from one fetus (the donor) to the other (the recipient). This unequal blood transfer results in decreased blood volume, retarding growth and development, and decreased urinary output leading to a lower than normal level of amniotic fluid (oligohydramnios) to the donor fetus. The consequence of TTTS to the recipient fetus is increased blood volume and increased urinary output, which leads to excess amniotic fluid (polyhydramnios). Because there is no mechanism to rid the body of blood cells, the recipient fetus has more concentrated blood and the heart has to pump harder; accordingly, the recipient fetus will develop an enlarged heart.

Dr. Martin described the staging system for TTTS as containing five stages. At stage two, an ultrasound would be unable to identify the bladder in the donor twin. Because the ultrasounds of November 18 and December 3 showed both twins' bladders were within normal range, he concluded plaintiff's case had not advanced past stage one

of TTTS. Treatment for TTTS includes (1) expectant management, the equivalent of zero intervention; (2) serial amniocentesis to remove amniotic fluid periodically; and (3) laser surgery to interrupt the placental vessels that allow the exchange of blood between the fetuses. Dr. Martin declared that even if the imbalance in amniotic fluid had been detected and amniocentesis begun, the chance of a poor outcome was still present with the best of care and it was impossible to say plaintiff's injuries were medically probably caused by the failure to perform amniocentesis between weeks 26 and 28. The third possible treatment, laser surgery, was performed at only three locations in California, and this case did not meet the treatment protocol of any of these facilities. Even with surgery, the chance of a neurologic injury to the surviving twin was still very high.

Based on plaintiff's laboratory values at birth, Dr. Martin found no indication of a hypoxic injury (indicating lack of oxygen supply to the brain). Instead, he declared the ultrasound of plaintiff's head at birth showed pre-existing changes in the brain that had been present hours to days before delivery. He declared the evidence did not support hypoxic injury due to a delay in delivery. The medically probable cause of plaintiff's injury was the monochorionic pregnancy itself--40 percent of which have poor outcomes without other complications--complicated here by TTTS, combined with PVL and prematurity. Dr. Martin concluded the care and treatment provided by defendants were not the medically probable cause of plaintiff's injuries.

Jerome Barakos, M.D., a board certified neuroradiologist, similarly described a monochorionic pregnancy and its risks, and also declared plaintiff's injuries were not caused by the care provided by defendants. Rather, Dr. Barakos declared, the monochorionic pregnancy, TTTS, PVL, and prematurity were the medically likely causes of plaintiff's injuries. The sonogram of plaintiff's brain, done on the day of birth, showed PVL, which he described as significant changes in the deep ventricular white matter of the brain. PVL occurs in the absence of any hypoxic injury and can be made worse if correlated with other morbidities, such as TTTS. The TTTS was in existence hours to

days before delivery and caused changes to plaintiff's brain and heart. The condition evolved, suggesting it occurred more than a day before birth.

Plaintiff's Opposition

Plaintiff opposed the motion for summary judgment, asserting there was a triable issue as to causation. In support of the opposition, and to dispute defendants' facts, plaintiff submitted the declaration of Stephen Glass, M.D., a child neurologist board certified in pediatrics and neurology. In his opinion, delay in delivering plaintiff was a substantial factor in causing his injuries. He declared that plaintiff had suffered a substantial neurologic injury during labor and delivery. He opined that if plaintiff had been delivered a week or 10 days earlier or immediately upon admission to Fremont Rideout Medical Center, plaintiff's injuries would have been substantially less serious.

Dr. Glass recounted the history of defendant's care, based on the medical records. He noted the November 18 ultrasound showed that plaintiff was 15 percent larger than his twin, 850 grams (one pound 14 ounces) versus 739 grams (one pound 10 ounces).² He opined that neither twin presented evidence of a congenital anomaly to explain their neurologic deficits. The twins suffered from TTTS, producing irreversible hypoxic-ischemic brain injury in plaintiff. The phenomenon of TTTS is known to complicate eight to 10 percent of twin pregnancies having monochorionic-diamniotic placentation and is identified and addressed through careful ante partum surveillance.

Plaintiff set forth substantial portions of Dr. Glass's declaration in a statement of undisputed material facts.

Defendants' Reply and Plaintiff's Supplemental Declaration

In reply, defendants argued that plaintiff failed to meet his burden to defeat summary judgment because the declaration of Dr. Glass was inadmissible and did not

² As we explain *post*, in his supplemental declaration Dr. Glass explained that discordancy in weight suggests TTTS.

create a triable issue of fact. In responding to plaintiff's statement of undisputed facts, defendants claimed the difference in the twins' weight was irrelevant as it was not part of a reasoned opinion on causation. They objected to the declaration of Dr. Glass as an improper expert opinion, urging that it contained no reasoning or application of the facts. They asserted the declaration was speculative and conclusory.

After the trial court expressed concerns about the foundation for Dr. Glass's opinions, it allowed plaintiff to submit a supplemental declaration. The supplemental declaration initially repeats but then expands on the first declaration. Dr. Glass opined that plaintiff's injuries were not due to prematurity by itself. He noted that large population studies indicated that the risk of a child born at 28 weeks with cerebral palsy or a clinically significant grade II IVH, or both, was about 10 percent.³ Dr. Glass declared there were many modalities, both electronic and radiological, available to vigilantly monitor pregnancies such as Cantrell's to determine if the fetuses are at risk of developing the complications suffered by plaintiff and none were used by defendants.

Dr. Glass gave his opinion, to a reasonable degree of medical certainty, that given the growth discordance identified on the prenatal ultrasound and the birth weights, the twins had a growth discordance that was highly suggestive of TTTS. If it had been measured, a clinically significant discordancy in amniotic fluid volume would have been found, which would have required delivery at least seven to 10 days earlier. He noted that while the November 18 ultrasound reported a normal amount of amniotic fluid, it did not report the amniotic fluid index (AFI). The ultrasound performed hours before delivery described the amniotic fluid volume as " 'generous' " and reported an AFI of

³ Dr. Glass did not define IVH. We assume he means intraventricular hemorrhage. (See 3 Schmidt, Attorneys' Dict. of Medicine (2011) p. I-184.) He does not mention PVL; instead, he refers to IVH, without explaining how it affected plaintiff's injuries. As we discuss *post*, this is one of the weaknesses in his declarations which defendants argue caused the declarations to be deficient.

23.55 centimeter. Dr. Glass noted the AFI was “recorded on ‘the twin B side of the report’ ” (which was plaintiff’s side) and stated that given the anatomy of the twins, this amniotic fluid could be attributed to only one twin, indicating excess amniotic fluid for that twin and raising the question of the AFI of the other twin.

In Dr. Glass’s opinion, if plaintiff had been delivered seven to 10 days earlier, he would not suffer from the devastating neurologic injuries. Based on the risk of cerebral palsy in a child delivered at 26 or 27 weeks, with TTTS, Dr. Glass declared the failure to deliver plaintiff earlier “deprived him of a greater than 50 percent chance of not suffering from cerebral palsy.”

Dr. Glass also opined that there was no evidence of a congenital abnormality that would account for plaintiff’s injuries. The failure to follow up on the noted growth discordancy was an important issue in this case. If the AFI had been measured and monitored, TTTS would have been diagnosed and delivery commenced earlier, which would have prevented plaintiff’s current disabilities.

Defendants responded that the supplemental declaration did not address the primary issue of what caused plaintiff’s injuries. They claimed no facts supported the conclusion that delivery seven to 10 days earlier would have prevented injury. They asserted the supplemental declaration was conclusory, as well as contradictory and inaccurate. Since TTTS could occur at any time during a pregnancy, they claimed it was impossible to know when the amniotic fluid became imbalanced and it was “simply speculation to state otherwise.”

The trial court overruled the motion to exclude Glass’s declaration but granted defendants’ motion for summary judgment and entered judgment for defendant. Plaintiff timely appealed.

DISCUSSION

I

Summary Judgment

“The motion for summary judgment shall be 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 a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence” (Code Civ. Proc., § 437c, subd. (c).) Here, the court overruled defendants’ objection to the declaration of Dr. Glass, so we consider his declarations in determining if there is a triable issue of material fact.

“A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(2).)

“In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. [Citation.] In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court’s determination of a motion for summary judgment. [Citation.]” (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. omitted.)

“The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant’s personal knowledge and competency to testify,

state facts and not just conclusions, and not include inadmissible hearsay or opinion. [Citations.]” (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.) In considering the declarations of the parties’ experts, we strictly construe those of the moving party and liberally construe those of the opponent and resolve any doubts as to the propriety of granting the motion in favor of the plaintiff. (*Ibid.*; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126 (*Powell*).

“The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact. [Citation.]” (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143-1144.)

II

Causation in Medical Malpractice

“In a medical malpractice action, a plaintiff must prove the defendant’s negligence was a cause-in-fact of injury. [Citation.] ‘The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical “probability” and a medical “possibility” needs little discussion. There can be many possible “causes,” indeed, an infinite number of circumstances [that] can produce an injury or disease. A possible cause only becomes “probable” when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]’ [Citations.]” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 (*Jennings*).

To prove causation in a medical malpractice case, the plaintiff must produce sufficient evidence “to allow the jury to infer that in the absence of the defendant’s negligence, there was a reasonable medical probability the plaintiff would have obtained

a better result. [Citations.]” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216 (*Alef*).

III

Sufficiency of the Declarations of Dr. Glass to Create Triable Issue of Causation

Plaintiff contends the successive declarations of Dr. Glass give rise to a triable issue of fact on causation.⁴ “A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert’s opinion will assist the trier of fact. (Evid. Code, § 801, subd. (a).) Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. [Citation.] Moreover, 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. [Citations.]” (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*).

Defendants contend Dr. Glass failed to raise a triable issue of fact as to any of the defendants because his opinions were speculative and conclusory.

An expert opinion is speculative where it is based on an assumption that certain facts existed and there is no evidence such facts did exist. In *Bushling*, the plaintiff had shoulder pain after abdominal surgery and his experts opined plaintiff’s shoulder injuries

⁴ We note that unlike the usual review of a summary judgment we cannot simply focus on the separate statements of undisputed material facts. This is because the trial court permitted plaintiff to file a supplemental declaration (to which defendants filed a reply) and facts from the supplemental declaration are not included in plaintiff’s opposition to defendants’ separate statement or in plaintiff’s separate statement. Because the separate statements of both parties consist largely of excerpts (often verbatim) from the expert declarations, we focus on the declarations themselves to determine if a triable issue of material fact exists.

were caused by the defendants' negligence in that " 'more probably than not' plaintiff had been dropped, his arm had been improperly positioned during surgery, or his arm had been stretched." (*Bushling, supra*, 117 Cal.App.4th at p. 510.) There was no evidence that any of those things had happened. The court found the experts' opinions were speculative because they were "nothing more than a statement that the injury could have been caused by defendants' negligence in one of the ways they specify. But, 'an expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist' [citation], has no evidentiary value. [Citation.]" (*Ibid.*)

An expert opinion is also speculative where it is equivocal or ambiguous and opines only as to *possibility* not *probability*. In *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, the expert's opinion was speculative because he had no expertise in the relevant subject matter (the effect of methane gas) and he only had a "feeling" that the leak of gas "probably aggravated [plaintiff's] respiratory problems" because he did " 'not know of any more medically probable cause.' " An opinion that a stroke " 'was *more* probably a complication' " from a cardiac procedure " 'than a *coincidence,*' " is speculative and conjecture and fails to meet the probability standard of proximate cause. (*Id.* at p. 1485; *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 532-533.) Expert opinion that that there was "a reasonable medical possibility" (less than a 50-50 chance) that the drug contributed to the development of plaintiff's condition or that the drug "may have been a contributing factor for the progression of" the disease was insufficient to raise a triable issue of fact as to proximate cause. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402, 401.)

An expert opinion is conclusory when it fails to set forth reasons or an explanation. In *Jennings, supra*, 114 Cal.App.4th 1108, the court struck as conclusory the testimony of a doctor that bacteria growing around the retractor were a cause-in-fact of the infection. "Dr. Miller never articulated why or how it was more likely than not

that the bacteria, after multiplying without any clinical symptoms that ordinarily accompany peritonitis, migrated from the nidus within the peritoneal cavity through the sutured peritoneal wall, the transversalis fascia, the muscle group and the rectus fascia, finally settling into the subcutaneous tissue, while leaving the peritoneal wall intact and leaving behind no trail of inflamed or infected tissue evidencing this migration. Instead, Dr. Miller substituted a conclusion in place of an explanation, opining ‘[i]t just sort of makes sense. We have that ribbon retractor and [it’s] contaminated, he’s infected.’ That opinion is too conclusory to support a jury verdict on causation.” (*Id.* at p. 1120, fn. omitted.) The court explained, “the expert must provide some articulation of how the jury, if it possessed his or her training and knowledge and employed it to examine the known facts, would reach the same conclusion as the expert.” (*Id.* at p. 1120, fn. 12.)

In *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, the plaintiff lacerated his arm and subsequently required surgery; the court granted summary judgment to the defendant physician who treated the plaintiff in the days before the surgery. The defendant had provided an expert declaration that recited the facts of his care and treatment of the plaintiff and opined that the defendant “acted appropriately and within the standard of care under the circumstances presented.” (*Id.* at p. 522.) The appellate court reversed for three reasons. First, the declaration failed to disclose what matter relied on in forming the opinion, although this ground had been forfeited by failure to object. Second, there were no reasons or explanation given for the opinion; it failed to address crucial issues, such as the nature of plaintiff’s condition, what symptoms should have been observable, whether the possibility of severe complications should have been recognized, whether earlier intervention would have mitigated the injury. Third, a well-credentialed expert presented an opposing opinion. (*Id.* at p. 524.)

To the extent that *Kelley* requires that an expert’s declaration “set forth in excruciating detail the factual basis for the opinions stated therein,” at least one appellate court has declined to follow it. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 608, fn. 6.)

In *Hanson*, the plaintiff suffered complications after surgery to relieve spinal compression. In opposing the defendant surgeons' motion for summary judgment, plaintiff provided an expert declaration that identified specific factual breaches of duty--phrased as things that "should" have been done--during the surgery and the post-operative care, and opined such care was "a substantial factor or cause in bringing about" plaintiff's current injuries. (*Id.* at pp. 605-606.) The court held this declaration was sufficient to create a triable issue of fact on causation. The favorable inferences to be drawn from the declaration permitted a reading of the declaration to state the plaintiff's injury was caused by the conduct of defendants which fell below the standard of care. (*Id.* at pp. 607-608.) "Nothing more was needed." (*Id.* at p. 608.)

In *Powell, supra*, 151 Cal.App.4th 112, the court noted the *Kelley* requirement of a reasoned explanation for expert declarations applied to declarations *in support of* summary judgment. Declarations opposing summary judgment were entitled to a liberal construction, so less was required. (*Id.* at p. 128.)

A review of the authority we have just set forth reveals that--although flawed in the manner we have described *ante*--the declarations of Dr. Glass do not suffer from the manner of defects that courts have found render an expert opinion inadmissible or insufficient to raise a triable issue of fact. Defendants did not challenge Dr. Glass's credentials or his expertise to opine on the cause of plaintiff's injuries. Dr. Glass set forth the materials he relied on in reaching his opinions--the medical records, his training and experience, and medical literature. As to the *cause* of plaintiff's injuries, Dr. Glass did not dispute that plaintiff's injuries were due to the monochorionic-diamniotic pregnancy, TTTS, and prematurity. Rather than providing a different medical cause of plaintiff's injuries, Dr. Glass opined that plaintiff's injuries could have been *prevented or lessened* if defendants had taken certain measures.

Construed liberally, as we must, we read Dr. Glass's declarations to convey the opinion that because the November 18 ultrasound showed the twins were of different

sizes, defendants should have suspected possible TTTS and, given the undisputed potential destructiveness of this diagnosis, undertaken vigilant monitoring therefor. If such monitoring had been done, including measurement of the AFI, in Dr. Glass's opinion to a reasonable degree of medical probability, TTTS would have been diagnosed earlier. An earlier diagnosis would mean plaintiff would have been delivered earlier, lessening the severity of his ultimate injuries. Although not carefully designated as such, Dr. Glass did identify *conduct* that fell below the standard of care: the failure to suspect TTTS, begin vigilant monitoring, measure the AFI, and deliver the twins earlier. His opinion that an earlier delivery would have eliminated or reduced plaintiff's injuries was based on his experience and review of the literature, particularly the known risks of developing cerebral palsy at certain ages with certain conditions.⁵ Dr. Glass opined plaintiff had a less than 40 percent risk of developing cerebral palsy and an earlier delivery would have *decreased* that risk. We note defendants' experts based their opinions that plaintiff's injuries were caused "by nature" on the statistically high risk of poor outcomes in certain situations. Dr. Martin declared 40 percent of monochorionic pregnancies have a poor outcome and TTTS makes the risk higher, but did not quantify the risk. Thus, the experts had different opinions on the risk of serious injury plaintiff faced and whether an earlier delivery would have lessened that risk.

Expert opinion that proper fetal monitoring would have detected fetal distress and timely intervention would probably have prevented brain damage is sufficient evidence for the jury to conclude negligent monitoring caused the plaintiff's injuries. (*Alef, supra*, 5 Cal.App.4th at p. 217.) Here, as in *Alef*, plaintiff's expert provided the required opinion

⁵ The opinion that an earlier delivery would have reduced or eliminated plaintiff's injuries was also supported by the opinions of defendants' experts that TTTS was present hours to days before plaintiff's delivery.

that more vigilant monitoring would have detected the problem and mitigated the resulting damage.

Defendants raise several specific objections to Dr. Glass's declarations. First, they contend no facts or evidence support the opinion that more monitoring would have detected an imbalance in amniotic fluid and led to an earlier delivery. Defendants rely on the finding that the twins' bladders were within normal limits on the day of delivery, but Dr. Glass focused the amount of amniotic fluid for each twin and the failure to measure the AFI. Defendants claim no treatment option was available, but Dr. Glass claimed there was one--earlier delivery.

Defendants point to the many inconsistencies and errors in Dr. Glass's declarations, including erroneous dates and fetal weights, as well as a change in opinion (without any acknowledgment thereof) as to when delivery would need to have occurred to avert the catastrophic result achieved. While we do not condone such carelessness, we find the errors do not render the declarations inadmissible or an inadequate basis to find a triable issue of fact. There are errors as to the date of the November ultrasound and the fetal weights, but these are also stated *correctly* elsewhere in the declaration, so it does not appear these errors affected the expert's opinion. In the added portion of the supplemental declaration, Dr. Glass opined multiple times that delivery should have been seven to 10 days before the actual December 3 date of delivery. Earlier in the declaration, he opined that it should have been "a week to ten days before [the delivery date of] December 3, 2008 and/or immediately upon admission to Fremont Rideout Medical Center."

We construe Dr. Glass's supplemental and final opinion as his true opinion. Accordingly, since Dr. Larson, the on-call obstetrician, was involved in the case for only three hours early on December 3 and thus played no relevant part in the timing of plaintiff's delivery, there is no triable issue of fact that her care and treatment caused

plaintiff's injuries. She is entitled to summary judgment.⁶ However, this refinement of his opinion as to the ideal timing of the twins' delivery does not affect the case against the remaining two defendants.

At the end of his supplemental declaration, Dr. Glass, for the first time, suggests that selective amnioreduction could have been utilized to remove excess amniotic fluid. We agree there is no foundation for this opinion and therefore we disregard it in determining whether there is a triable issue of fact.

Dr. Glass repeatedly refers to plaintiff as suffering from IVH and cerebral palsy. Defendants take issue with these references, contending the record does not support either. As to IVH, we agree; as we have noted *ante*, there is no mention of IVH in the record and Dr. Glass fails to explain what it is. As to cerebral palsy, the issue is one of terminology. Cerebral palsy is a broad term describing a number of motor disorders, including spastic quadriplegia. (The Merck Manual (17th ed. 1999) p. 2416.) The record *does* mention cerebral palsy. Plaintiff's neonatal examination noted a high risk of cerebral palsy and he was later referred to a Neurodevelopment Clinic where there was a comprehensive team approach to patients with cerebral palsy. Indeed, in discussing the treatment options for TTTS, Dr. Martin mentioned the risk of cerebral palsy associated with serial amniocentesis and laser surgery. Of course, careful drafting of the declaration would have either used the term "spastic quadriplegia," the specific motor condition plaintiff actually suffered, or indicated that the broader term "cerebral palsy" included spastic quadriplegia and avoided this problem entirely. But this varied use of terminology is not significant to the validity of Dr. Glass's opinion on causation.

⁶ At oral argument, counsel for plaintiff conceded that Dr. Larson was entitled to summary judgment.

Defendant argues throughout his briefing that Dr. Glass failed to provide any facts--and apply those facts to the care provided in this case--to support his opinion that careful monitoring would have disclosed the amniotic fluid imbalance and led to an earlier delivery, thereby significantly improving the outcome. This case does not provide such facts because the monitoring was not undertaken. That monitoring would have disclosed the fluid imbalance is based on Dr. Glass's experience and his review of the medical literature, just as defendants' experts relied on the same in discussing the treatment options available and the risks involved. We agree the declaration failed to spell out and explain the medicine as clearly as it should have, but "the declaration is not deficient for purposes of summary judgment. If respondents had desired to do so, they could have deposed Dr. [Glass] in an attempt to demonstrate his opinions had no basis in fact or science. [Citation.]" (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 718.)

Finally, defendants contend the declarations of Dr. Glass do not comply with Code of Civil Procedure section 2015.5 because they did not state they were executed within California or under the laws of California. Defendants failed to raise this contention in the trial court and therefore have forfeited it. (*Fuller v. Goodyear Tire & Rubber Co.* (1970) 7 Cal.App.3d 690, 693.)

