

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT RYAN KUNKEL et al.,

Plaintiffs and Appellants,

v.

UNIVERSAL HEALTH SERVICES OF
RANCHO SPRINGS, INC.,

Defendant and Respondent.

E053276

(Super.Ct.No. RIC542908)

O P I N I O N

APPEAL from the Superior Court of Riverside County. John Vineyard, Judge.

Affirmed.

Kinkle, Rodiger and Spriggs, Scott B. Springgs and Janine L. Highiet-Ivicevic for
Plaintiffs and Appellants.

Dummit, Buchholz & Trapp, Scott D. Buchholz and Moira S. Brennan for
Defendant and Respondent.

I. INTRODUCTION

Plaintiff Robert Ryan Kunkel (Kunkel) and his wife Brandee Kunkel appeal from an adverse judgment on their complaint against a hospital for negligence. After suffering a head injury while playing softball, Kunkel was transported by ambulance to the emergency department of Inland Valley Medical Center (IVMC), an acute care hospital operated by defendant Universal Health Services of Rancho Springs, Inc. (Universal), doing business as Southwest Healthcare Systems-Inland Valley Medical Center. In his complaint, Kunkel alleged that Universal was liable for the negligence of its emergency department nonphysician staff and physicians for their delayed assessment, care, and treatment of his injury, and that IVMC also had defective or insufficient facilities, equipment, and supplies to treat his injury. Brandee Kunkel alleged a derivative claim for loss of consortium.

The trial court granted Universal's motion for summary judgment after sustaining its objection to and excluding the declaration of plaintiffs' expert, David B. Martin M.D., under Health and Safety Code section 1799.110, subdivision (c) (hereafter section 1799.110(c).)¹ The statute applies to actions against a hospital involving or arising from a claim that a physician was negligent in providing emergency medical care or coverage (*Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 650-651 (*Jutzi*)) and requires that experts providing testimony in such actions have "substantial professional experience

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department” (§ 1799.110(c)). In his declaration, Dr. Martin did not indicate that he had any experience providing “emergency medical coverage in a general acute care hospital emergency department.” (*Ibid.*)

Plaintiffs contend the statute did not apply because their claims against Universal did not involve or arise from the negligence of any emergency department physician. (*Baxter v. Alexian Brothers Hospital* (1989) 214 Cal.App.3d 722, 726 (*Baxter*) [declining to apply § 1799.110(c) to a negligence action against a hospital for failing to provide essential hospital services].) Instead, they argue their claims against Universal are based on the negligence of its nurses and other nonphysician staff and on Universal’s failure to have adequate facilities, equipment, and supplies to properly and timely treat Kunkel’s injury.

While we agree with plaintiffs’ interpretation of the law and that *Baxter* has some applicability to the present facts, we nonetheless affirm the trial court’s granting of summary judgment. We conclude that to the extent Dr. Martin’s declaration dealt with the alleged negligence of attending physicians, it was properly disregarded pursuant to *Jutzi*. To the very limited degree the declaration dealt with the conduct of the nonphysician staff, the declaration was wholly insufficient to raise a triable issue of fact that they were negligent or that their alleged negligence was a contributing cause to Kunkel’s injury. Accordingly, we affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*²

At 10:33 p.m. on March 5, 2009, Kunkel, then age 35, arrived by ambulance at the emergency department of IVMC. Kunkel had been playing softball and was struck in the back of his head by a softball while running from third base to home plate. He fell face first to the ground and briefly lost consciousness.

At 10:45 p.m., registered nurse Juan Padilla and other nursing staff triaged Kunkel in the hallway of the emergency department in a C-collar and longboard. Kunkel was alert and oriented, and his vital signs were within normal limits. He complained of pain in the back of his head, tingling in his right arm, and nausea. At 10:55 p.m., he was medicated for nausea.

At 11:00 p.m., Taylor Fletcher, M.D. examined Kunkel and ordered a CT scan of Kunkel's brain, among other tests. Trauma surgeon Allen K. Chan, M.D. also saw Kunkel in the emergency department, and admitted Kunkel to the hospital. At 11:30 p.m., Kunkel returned from the CT scan with no change in his condition. At 11:50 p.m., Kunkel's right hand grip was noted to be stronger; otherwise there was no change in his condition. At 1:37 a.m., there was still no change in his condition.

² The facts described in this section are based on the declaration of Richard F. Clark, Jr., M.D. submitted in support of Universal's motion, and on IVMC's medical records for Kunkel. The record includes a copy of Universal's separate statement of undisputed facts in support of its motion, but does not include a copy of plaintiffs' responsive statement of disputed and undisputed facts. In any event, the record indicates that the facts described in this section are essentially undisputed.

The CT scan showed a left parietal acute epidural hematoma with depressed skull fracture. At 2:15 a.m., Dr. Spicer, a neurosurgeon, examined Kunkel in the emergency department and noted he was slow to answer questions. At 2:40 a.m., registered nurse Jeremy Fleenor summoned Dr. Spicer to Kunkel's bedside because his condition was deteriorating. Kunkel was confused, his pupils were unequal, and he was having possible seizure activity in his right arm. He was intubated and started on a propofol drip.

At 3:15 a.m., doctors attempted to transfer Kunkel to Loma Linda University Medical Center, but Mercy Air would not transport him. Dr. Spicer determined that further delay in reducing the hematoma could result in a poor outcome, and accordingly determined that Kunkel should be immediately taken to the operating room at IVMC.

At 3:45 a.m., Kunkel was evaluated for anesthesia, and anesthesia was begun at 4:25 a.m. Dr. Spicer commenced the surgery at 4:55 a.m., and performed an emergent left parietal hematoma evacuation. The surgery was "uneventful," and Kunkel was directly transferred to the intensive care unit (ICU) at IVMC.

In the ICU, Kunkel continued to have seizure activity and was on pentobarbital and propofol drips. On March 10, his temperature spiked to 104 degrees. On March 13, his condition improved with no evidence of seizures, and he was extubated. On March 20, he was transferred to the "Med/Surg Unit" from the progressive care unit, where he began taking a regular diet without difficulty, ambulating, and working with physical therapy. He was discharged on March 21.

B. Kunkel's Negligence Claims Against Universal and Others

In his operative first amended complaint, Kunkel alleged several causes of action denoted “negligence” or “professional negligence” against Universal and several of its emergency department physicians and nonphysician staff, including registered nurses Padilla and Fleenor and Drs. Fletcher and Chan, but not Dr. Spicer, the attending neurosurgeon. Kunkel alleged that the physicians and nonphysician staff failed to timely assess his injuries following his arrival at IVMC, failed to timely review and relay the results of his brain CT scan to the appropriate physicians, failed to timely request that he be transported to a facility “suitable” to treat his injuries, and failed to timely inform appropriate physicians, including Dr. Spicer, of his worsening condition. In addition, Kunkel alleged that Universal had “[u]nsuitable and [d]efective [f]acilities, [e]quipment and [s]upplies” to treat his condition, and was vicariously liable for the negligent failure of its emergency department physicians and nonphysician staff to timely assess and attend to his condition.³

³ Universal was named as a defendant in a total of seven causes of action, which were respectively denoted negligence (first); negligent supervision (second); negligent hiring (third); professional negligence—inadequate attendance to patient’s needs (fifth); professional negligence—failure to notify physician of patient’s worsening condition (sixth); professional negligence—unsuitable and defective facilities, equipment, and supplies (seventh); and professional negligence—against hospital for negligence of physicians employed by hospital (eighth).

C. Universal's Motion for Summary Judgment

Universal moved for summary judgment on the grounds Kunkel could not establish the duty, breach, or causation elements of any of his negligence claims. Universal claimed it was not liable for any negligent care or treatment of its emergency department physicians because the physicians were independent contractors, not hospital employees, and presented evidence that the physicians were independent contractors. Universal also claimed that its “non-physician staff,” including registered nurses Padilla and Fleenor, properly assessed, treated, and attended to Kunkel, and submitted the declaration of Richard F. Clark, Jr., M.D. in support of this claim.

Dr. Clark was board certified in emergency medicine and medical toxicology, and had been practicing emergency medicine in the emergency department at UCSD Medical Center in San Diego and La Jolla for 18 years. For over 22 years, Dr. Clark had supervised and directed the care provided by emergency department staff at several hospitals. Based on IVMC's medical records for Kunkel, plaintiffs' complaint, and his education, training, and experience, Dr. Clark opined that the care provided “by the nonphysician staff” at the emergency department of IVMC was appropriate and within the standard of care, and to a reasonable degree of medical probability no act or omission by the nonphysician staff was a direct or proximate cause of Kunkel's alleged injuries.

Dr. Clark explained that the nonphysician staff at IVMC properly assessed and triaged Kunkel, complied with all physician orders, performed all evaluations, and provided all appropriate care to Kunkel throughout his admission. Dr. Clark also

explained that nonphysician staff do not determine the etiology of a patient's condition, do not determine whether to transfer a patient, do not provide orders for the treatment or transfer of a patient, and do not order patients to the operating room. Instead, these determinations and orders may only be made by a licensed physician. Additionally, nonphysician staff do not supervise physicians, who are not hospital employees but independent contractors who maintain privileges to practice in the hospital setting. Dr. Clark did not offer an opinion concerning whether Drs. Fletcher and Chan, or any of the other physicians who examined Kunkel at IVMC, were negligent in their care and treatment of Kunkel.

D. Dr. Chan's Motion and Dismissal

Dr. Chan also moved for summary judgment on plaintiffs' complaint. The hearings on Dr. Chan's and IVMC's motions were scheduled for hearing the same date, March 16, 2011. At the outset of the March 16 hearing, the parties stipulated to dismiss Dr. Chan from the action, and his motion was taken off calendar.

E. Plaintiffs' Opposition and Dr. Martin's Declaration

Plaintiffs submitted the declaration of Dr. Martin in opposition to both Dr. Chan's and Universal's motions. Dr. Martin was licensed to practice medicine in California and Washington, and was the former chief of staff at Tri-State Memorial Hospital and its 2011 chief of staff elect. From 2005 to 2009, Dr. Martin was employed as a physician at the Beaver Medical Group in Redlands. In March 2011, he was the owner of Martin

Family Medicine, LLC in Clarkston, Washington, where he continued to practice medicine.

Dr. Martin opined that “to a reasonable degree of medical certainty” “[t]here was an unreasonable delay in providing evaluation and treatment” to Kunkel at IVMC, and the standard of care was not met. According to Dr. Martin, the care and management provided by Dr. Chan and the nonphysician staff at IVMC was “not . . . consistent with how other reputable trauma doctors and emergency room staff would have evaluated, treated and managed such a patient under similar circumstances,” and exacerbated Kunkel’s condition, causing postincident memory loss, cognitive dysfunction, and seizure disorder.

More specifically, in Dr. Martin’s opinion it was “medically inappropriate” (1) for nurse Padilla to fail to perform an initial triage evaluation of Kunkel upon his arrival at IVMC and his transfer from ambulance personnel; (2) for the CT scan of Kunkel’s head to remain unviewed by Dr. Chan or any other physician until Dr. Spicer arrived and reviewed the CT scan at 2:15 a.m., more than three hours after the CT scan was taken at 11:30 p.m., and more than three and one-half hours after Kunkel arrived at the emergency department by ambulance; (3) to wait until 3:15 a.m. to attempt to transfer Kunkel to another facility; (4) for Dr. Chan to have “no further involvement” with Kunkel’s care until after Dr. Spicer arrived and Kunkel’s condition began to deteriorate, four hours after Kunkel arrived in the emergency department; and (5) for Dr. Chan to fail to review the

CT scan which was completed 45 minutes after Kunkel arrived in the emergency department.

F. IVMC's Objections to Dr. Martin's Declaration, and Reply Papers

IVMC objected to the entirety of Dr. Martin's declaration on the grounds (1) it was not executed under penalty of perjury (Code Civ. Proc., § 2015.5); and (2) Dr. Martin was not qualified to provide testimony related to the care and treatment provided in the emergency department of an acute care hospital (Health & Saf. Code, § 1799.110(c)).

Universal also objected to several of Dr. Martin's statements and opinions on the grounds they lacked foundation, were conclusory, called for speculation, and assumed facts not in evidence. The challenged statements were that (1) there was an unreasonable delay in providing evaluation and treatment of Kunkel at IVMC and the standard of care was not met; (2) it was medically inappropriate for nurse Padilla to fail to perform an initial triage or evaluation of Kunkel; and (3) it was medically inappropriate to wait until 3:15 a.m., four and one-half hours after Kunkel's arrival in the emergency department, to attempt to transfer him to another facility for treatment.

G. The Trial Court's Ruling

On March 15, the day before the hearing on Universal's motion, plaintiffs filed an amended declaration of Dr. Martin signed under penalty of perjury but otherwise identical to his original declaration. At the March 16 hearing, the court acknowledged

that Dr. Martin had signed his amended declaration under penalty of perjury. The court took the matter under submission and later granted the motion.

In a written ruling on the motion, the court concluded that Universal met its initial burden of proof and shifted the burden of establishing a triable issue of material fact to Kunkel. The court concluded that Kunkel did not meet his burden, however, because Dr. Martin's amended declaration was inadmissible under section 1799.110(c). The court found "the admissible evidence establishe[d] that [Universal] rendered emergency medical coverage as described in . . . section 1799.110," and the statute applied to Kunkel's claims against Universal. The court entered judgment in favor of Universal,⁴ and plaintiffs appealed.

III. DISCUSSION

A. *Standard of Review*

Summary judgment is properly granted if all the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action or shows that one or

⁴ The trial court did not rule on Universal's other objections to Dr. Martin's declaration at the March 16 hearing or in its subsequent ruling. Apparently in reference to the section 1799.110(c) objection, the court's March 16 minute order states that "[t]he objection" to Dr. Martin's "[a]mended [d]eclaration" was sustained. By contrast, the judgment states that Universal's evidentiary objections to the amended declaration were sustained "in their entirety." Even if the trial court did not specifically rule on each of Universal's objections, the objections are preserved for the present appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 533.)

more elements of each cause of action cannot be established. (*Id.*, subd. (o); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*)). As the moving party, the defendant bears an initial burden of producing evidence sufficient to make a prima facie showing that no triable issue of material fact exists. If the defendant meets this burden, the burden shifts to the plaintiff to demonstrate a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at pp. 850-851.)

““On appeal, this court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. [Citations.] We examine the evidence and independently determine its effect. [Citation.]”” (*Clarendon America Ins. Co. v. North American Capacity Ins. Co.* (2010) 186 Cal.App.4th 556, 565 [Fourth Dist., Div. Two].)

In independently reviewing the evidence, we apply the same three-step analysis as the trial court. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) We first identify the issues framed by the pleadings; second, we determine whether the moving party has established facts justifying judgment in its favor; finally, if the moving party has carried its initial burden, we determine whether the nonmoving party has demonstrated the existence of a triable material issue of fact. (*Ibid.*) Any doubts concerning the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

B. *Universal Met Its Initial Burden*

We first consider whether Universal met its initial burden of making a prima facie evidentiary showing that Kunkel could not establish one or more elements of his negligence claims against Universal. For purposes of summary judgment, a prima facie showing is “‘evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not’ [Citation.]” (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 353.) We conclude that Universal met this burden.

The elements of a cause of action for negligence are: (1) a legal duty to use due care; (2) a breach of such legal duty; and (3) the breach as the proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Though some of Kunkel’s causes of action were labeled “negligence” and others “professional negligence,” there is no distinction between “ordinary” and “professional” negligence for purposes of determining the applicable standard of care. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998.) Indeed, negligence is simply “‘conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.’ [Citation.]” (*Id.* at p. 997.) Denoting a cause of action professional rather than ordinary negligence “does not transmute its underlying character,” but “merely serves to establish the basis by which ‘ordinary prudence’ will be calculated and the defendant’s conduct evaluated.” (*Id.* at p. 998.)

A hospital is negligent if it does not use reasonable care toward its patients, and the amount of care it must exercise depends upon the nature of the patient's condition and the circumstances of the particular case. (*Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 469.) More specifically, a hospital must monitor a patient's condition (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302 ["defendant [hospital] . . . was under a duty to observe and know the condition of a patient"]) and provide an adequate number of trained, qualified personnel at critical times (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 367 ["the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent"]); *Wood v. Samaritan Institution* (1945) 26 Cal.2d 847, 852 ["A hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse."]). In sum, a hospital must "provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients." (CACI No. 514 (Duty of Hospital).)

A hospital also has a duty to screen and periodically evaluate the physicians to whom it grants staff privileges in order to ensure the adequacy of the medical care provided at its facilities. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 345-346 ["the hospital is in best position to evaluate the competence of physicians it, in its discretion, allows to perform surgery and to practice within its premises"].) Thus, "[a] hospital is negligent if it does not use reasonable care to select and periodically evaluate

its medical staff so that that its patients are provided adequate medical care.” (CACI No. 516 (Duty of Hospital to Screen Medical Staff).)

Universal made a prima facie evidentiary showing that Kunkel could not establish that Universal breached the applicable standard of care in assessing and treating Kunkel’s condition. As alleged in the complaint, the issues were (1) whether any of Universal’s emergency department nonphysician staff employees were negligent in assessing, attending, and treating Kunkel’s condition; (2) whether Universal had defective or inadequate facilities, equipment, or supplies to treat Kunkel’s condition; and (3) whether Universal was vicariously liable for any negligent care or treatment provided to Kunkel by any emergency department physicians.

Dr. Clark opined that the care provided at the emergency department “by the non-physician staff” was appropriate and within the standard of care, and to a reasonable degree of medical probability no act or omission by the nonphysician staff was a direct or proximate cause of Kunkel’s alleged injuries. Dr. Clark explained that the nonphysician staff properly assessed and triaged Kunkel, complied with all physician orders, performed all evaluations, and provided all appropriate care to Kunkel throughout his admission. In expressing these opinions, Dr. Clark effectively refuted Kunkel’s allegation that Universal had inadequate facilities, equipment, and supplies to treat his condition. In sum, Dr. Clark refuted each of the ways Kunkel alleged that Universal or its nonphysician staff was negligent in their care and treatment of Kunkel.

By contrast, Dr. Clark did not offer an opinion whether Drs. Fletcher, Chan, or any of the other physicians who were involved in Kunkel's care at IVMC were negligent in their care and treatment of Kunkel. Instead, Universal argued it was not liable for the negligence of any of its emergency department physicians because the physicians were independent contractors, not hospital employees, and presented evidence that the physicians were independent contractors. This was appropriate because Kunkel did not allege that Universal negligently failed to screen or periodically review the qualifications of its emergency department physicians, but instead alleged that Universal was vicariously liable for Dr. Chan's and several other physicians' negligent care and treatment of him. By presenting evidence that all of its physician staff were independent contractors, not employees, Universal made a prima facie showing that Kunkel could not establish a negligence claim against it based on the negligence of any of the emergency department physicians involved in assessing and treating Kunkel's condition.

After Universal made its prima facie evidentiary showing, the burden shifted to plaintiffs to raise a triable issue of material fact on the duty, breach, and causation elements of its negligence claims against Universal. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851.) At this step of the analysis, the trial court excluded the declaration of Dr. Martin under section 1799.110(c), and concluded that plaintiffs did not raise a triable factual issue because they presented no admissible evidence to support their negligence claims against Universal.

We now address plaintiffs' contention that section 1799.110(c) does not apply to their negligence claims against Universal.

Section 1799.110(c) declares: "In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court shall admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department. For purposes of this section, 'substantial professional experience' shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred." (Fn. omitted.)

Section 1799.110 was enacted in 1978 as former section 1768 and as part of a larger statutory enactment on Good Samaritans. (Stats. 1978, ch. 130, §§ 2, 8, pp. 342, 345; *James v. St. Elizabeth Community Hospital* (1994) 30 Cal.App.4th 73, 80-81.) The Good Samaritan statutes, including former section 1768, were intended "to promote 'the development, accessibility, and provision of emergency medical services to the People of the State of California.' [Citation.]" (*James v. St. Elizabeth Community Hospital, supra*, at p. 81.) Section 1799.110 was specifically intended "to encourage the provision of emergency medical care by preventing malpractice claims based on the assertion that an emergency room physician fell below the standard of care which could have been

provided by a specialist in the particular field acting under nonemergency conditions” (*Jutzi, supra*, 196 Cal.App.3d at p. 651.)

In excluding Dr. Martin’s declaration under section 1799.110(c), the trial court relied on *Jutzi*. There, an emergency department physician treated the plaintiff, a 30-year-old woman, for a broken ankle in the emergency department of Los Angeles County USC Medical Center. (*Jutzi, supra*, 196 Cal.App.3d at pp. 643-644.) The physician placed the plaintiff’s ankle in a full leg cast, and released the plaintiff to go home with instructions. (*Id.* at p. 644.) The plaintiff later developed complications leading to the amputation of her leg below her knee (*id.* at pp. 644-645) and sued the County of Los Angeles, but not the emergency department physician, for her injuries (*id.* at pp. 643, 649). At trial, the court precluded two of the plaintiff’s expert medical witnesses from testifying that the emergency department physician’s treatment of the plaintiff’s ankle fell below the standard of care, under section 1799.110(c). (*Jutzi, supra*, at p. 646.) On appeal, the plaintiff claimed the statute did not apply because she named only the hospital and not the allegedly negligent physician as a defendant in her action. (*Id.* at p. 649.)

The court in *Jutzi* concluded that section 1799.110(c) applied to any and all “actions for damages which involve a claim of negligence against a physician or, in other words, actions which arise from a claim that a physician was negligent in providing emergency medical care.” (*Jutzi, supra*, 196 Cal.App.3d at p. 650.) This interpretation, the court reasoned, “has the benefit of hinging application of the section on the relevant consideration of the nature of the claim involved, rather than on the fortuitous

circumstance of which particular parties have been named in the suit.” (*Ibid.*)

Accordingly, the court concluded that section 1799.110(c) applies to actions “involv[ing] a claim of negligence” by an emergency department physician, and is not limited to actions against physicians. (*Jutzi, supra*, at pp. 650-651.) As stated: “[I]t would [be] illogical for the Legislature to seek to achieve that result by shielding the physician from personal liability . . . while allowing the hospital . . . to be sued under the doctrine of respondeat superior.” (*Id.* at p. 651.)

Plaintiffs maintain that *Jutzi* does not apply to their negligence claims or action against Universal, and the trial court should have instead applied *Baxter*, which distinguished *Jutzi* and concluded that section 1799.110(c) did not apply to the plaintiff’s negligence action against a hospital. (*Baxter, supra*, 214 Cal.App.3d at p. 726.) The plaintiff in *Baxter* presented at a hospital emergency room, pregnant, with severe abdominal pain and had been coughing blood. The emergency physician on duty knew the plaintiff was pregnant but assumed she was having a miscarriage and left her in the treatment room for two and one-half hours, returning periodically to examine her abdomen and take her blood pressure. (*Id.* at p. 724.) The plaintiff’s mother called the plaintiff’s personal physician, who examined the plaintiff in the emergency room and concluded she needed immediate surgery to remove a suspected ruptured fallopian tube as a result of an ectopic pregnancy. (*Ibid.*) When the plaintiff’s personal physician sought to operate on the plaintiff at the hospital, he was told that no anesthesiologist was available and it would take too long to assemble a surgical backup team to assist in the

surgery. (*Ibid.*) The plaintiff was taken by ambulance to another hospital where her personal physician performed the surgery. (*Ibid.*)

The plaintiff sued the hospital, alleging it was negligent in failing to have surgical staff available for emergency surgery. (*Baxter, supra*, 214 Cal.App.3d at p. 724.) The plaintiff did not sue the emergency physician or allege the physician was in any way negligent in his care and treatment of her. The trial court entered a default judgment in favor of the hospital, after excluding the testimony of the plaintiff's medical expert under section 1799.110. (*Baxter, supra*, at pp. 724-725.) On appeal, the plaintiff claimed that section 1799.110(c) did not apply because her action against the hospital did not involve or arise from the negligence of an emergency physician. (*Baxter, supra*, at p. 725.)

The *Baxter* court agreed with the plaintiff and reversed the judgment, pointing out that “the action here, unlike that of *Jutzi*, does not arise from an allegation of negligence by the emergency room physician who treated [the plaintiff]; it involves a claim that the hospital failed to provide essential services: a backup surgical team and an anesthesiologist. The legislative purpose underlying section 1799.110 is not furthered by restricting claims against a hospital which do not implicate the performance of the treating physician. We conclude, therefore, that the court erred in applying this section where there was no allegation of negligent care by an emergency physician.” (*Baxter, supra*, 214 Cal.App.3d at p. 726.)

In their operative first amended complaint, plaintiffs do not distinctly separate the charging allegations of negligence against the physicians from those against the

nonphysicians. For example, in paragraph 23, the complaint alleges that the physician and nonphysician defendants “failed to transfer Plaintiff . . . to a proper facility in a timely manner and also failed to properly observe, diagnose and treat Plaintiff. . . .” The joint nature of the charging allegations continues throughout the entirety of the complaint. While Dr. Martin’s declaration is clearly insufficient to implicate the physician defendants under *Jutzi*, we agree with plaintiffs that under *Baxter* the court may consider the declaration for purposes of determining whether it raised a triable issue of fact as to the negligence of the hospital and the nonphysician defendants.

As discussed, Dr. Clark’s declaration was sufficient to carry Universal’s initial burden of production as to the nonphysician defendants and shift the burden to plaintiffs to create a triable issue of fact. (*Teselle v. McLoughlin* (2009) 173 Cal. App.4th 156, 172 [“The complaint measures the materiality of the facts tendered in a defendant’s challenge to the plaintiff’s cause of action.”].)

In response to Dr. Clark’s declaration, plaintiffs’ expert specifically opined as follows:

“3. It is my opinion to a reasonable degree of medical certainty that:

“a. There was an unreasonable delay in providing evaluation and treatment to [Kunkel] at the Southwest Healthcare System/Inland Valley Medical Center, and the requisite standard of care was not met;

“b. It was medically inappropriate for Mr. Padilla to fail to perform an initial triage evaluation of [Kunkel] upon his arrival and upon the transfer of the patient from Ambulance personnel.

“c. It was medically inappropriate for the CT Scan of Mr. Kunkel’s head which was completed at 2330 hours, 45 minutes after his arrival in the emergency room to remain unviewed by Dr. Chan or any other doctor until Dr. Spicer arrived and reviewed the CT Scan at 0215 hours, 3 hours 5 minutes after the CT Scan was taken and 3 1/2 hours after Mr. Kunkel arrived at the emergency room by way of ambulance.

“d. It was medically inappropriate [to] wait until until 0315 hours or 4 1/2 hours after his arrival in the Emergency Room . . . for the first time attempt to transfer Mr. Kunkel.

“e. It was medically inappropriate for Dr. Chan after calling Dr. Spicer who was not at the medical facility to leave the care of Mr. Kunkel with no further involvement until after Dr. Spicer arrived and after Mr. Kunkel’s condition began to deteriorate 4 hours after Mr. Kunkel’s arrival in the Emergency Room.

“f. It was medically inappropriate for Dr. Chan to fail to review the CT Scan as he should have which was completed 45 minutes after Mr. Kunkel’s arrival in the emergency [room].”

In viewing each of these averments, save and except paragraph b., it would appear that each of them reference physician negligence and are not directed at the nonphysician defendants. As such, they are inadmissible under *Jutzi*.

To the extent they are admissible under *Baxter* as to the nonphysician defendants, they do create triable issues of fact in the face of Dr. Clark's declaration. The overall sense of Dr. Martin's criticism is the inordinate time delay as it relates to the treatment of Kunkel. Nowhere, however, does Dr. Martin specifically attribute any of the time delays to the nonphysicians as opposed to the physicians. Further, as to his criticism of Padilla in paragraph b., there is no explanation as to how Padilla's failure to perform an initial triage evaluation contributed to Kunkel's injuries.

While plaintiffs' evidence is entitled to all favorable inferences, there still must be some evidentiary value to the evidence. "Cases dismissing expert declarations in connection with summary judgment motions do so on the basis that the declarations established that the opinions were either speculative, lacked foundation, or were stated without sufficient certainty. . . .' '[A]n 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.'" (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.)

Here, Dr. Martin's declaration provides absolutely no basis for concluding that triable issues exist. As to the issue of time delay as it relates to Kunkel's treatment, there is absolutely no specificity as to how much of the time delay was due to nonphysicians as opposed to physicians. It is left to total conjecture. Relative to Padilla's failure to perform an initial triage evaluation, we are left to speculate as to how that had any causal relationship to the medical outcome in the present case. In sum, Dr. Martin's declaration

simply did not create a triable issue of fact that Universal or any of its employees, the nonphysician defendants, were negligent.

IV. DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P.J.

RICHLI
J.