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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

MILDRED NOVAK,

Plaintiff and Appellant,

v.

PATRICK ST. PIERRE,

Defendant and Respondent.

E054380

(Super.Ct.No. RIC542929)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge.

Affirmed.

Cohen Law Group and H. Jason Cohen for Plaintiff and Appellant.

Davis, Grass, Goldstein, Housouer, Finlay & Brigham and Jeffrey W. Grass for
Defendant and Respondent.

In this action for medical malpractice, plaintiff appeals from a judgment that
resulted from the trial court's grant of defendant's motion for summary judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Undisputed Facts*

Plaintiff Mildred Novak fell while walking on April 15, 2009. She sustained bilateral olecranon fractures of both elbows as a result of the fall. On April 24, 2009, defendant Patrick St. Pierre, an orthopedist, operated on her left elbow and inserted a plate.

On April 25, 2009, plaintiff went to the emergency department at Eisenhower Medical Center because she had developed some bleeding at the incision site. She returned to defendant on April 27, 2009. He found that a bone fragment had dislodged from the plate. Accordingly, he scheduled surgery to remove the plate. Before that surgery, plaintiff was brought back to the doctor by her husband. Her husband reported that she was confused, had fevers, and had increased swelling around the incision in the preceding two days. Defendant decided she had an infection. He hospitalized her and operated on her the same evening. Defendant removed the plate, curetted the bone, irrigated the site, and inserted a Penrose drain.

On May 6, 2009, defendant requested a consultation from an infectious disease specialist to guide the treatment as to the administration of antibiotics. Other specialists were also consulted.

Plaintiff remained hospitalized until another surgery on May 8, 2009. At that time, defendant found that the wound had improved significantly, but he did not feel comfortable doing a final closure of the wound. A third surgery was performed on May

11, 2009. Defendant found the wound was much cleaner, with minimal drainage. He therefore performed the final closure of the wound. Plaintiff remained hospitalized until June 9, 2009, when she was transferred to a skilled nursing facility for further care.

B. *Plaintiff's Complaint*

On December 24, 2009, plaintiff filed a complaint, which alleged that the defendant's services fell beneath the standard of care and that he negligently failed to treat her. Plaintiff further alleged that, as a proximate result of defendant's negligence, she was physically and mentally injured.

C. *Defendant's Motion for Summary Judgment*

On February 4, 2011, defendant filed a motion for summary judgment. He contended that his treatment of plaintiff was within the requisite standard of care and that plaintiff could not, therefore, prove an essential element of her claim.

In support of the motion, defendant offered the declarations of two doctors. Dr. Steinmann was an orthopedic surgeon at the Mayo Clinic. After reviewing plaintiff's medical records, he opined that "to a reasonable degree of medical probability[,] the care and treatment rendered to Mildred Novak by Patrick St. Pierre, M.D. was in compliance with the requisite standard of care at all times. . . . [¶] The surgical procedure performed on April 24, 2009 was performed entirely appropriately and in compliance with the requisite standard of care." Dr. Steinmann found the further surgeries appropriate and concluded that "although the patient developed a loss of fixation and complication of infection, the care and treatment rendered by Dr. St. Pierre to Ms. Novak, as set forth in this declaration[,] was entirely appropriate and within the requisite standard of care."

Dr. Irving Posalski, an infectious disease specialist at UCLA School of Medicine, also submitted a declaration. After reviewing plaintiff's medical records in detail, he concluded, "It is my opinion, to a reasonable degree of medical probability, that the care and treatment rendered to Mildred Novak by Patrick St. Pierre, M.D. was in compliance with the requisite standard of care from an infectious disease standpoint."

D. *Plaintiff's Response to the Summary Judgment Motion*

Plaintiff filed a response to defendant's summary judgment motion in which she argued that Dr. Posalski's declaration was inadequate and should be disregarded. She faulted Dr. Posalski for failing to state the standard of care to be used, or the protocols to be followed, to prevent infection during the type of surgical procedure performed by defendant.

Plaintiff failed to attack the declaration of Dr. Steinmann in her response. Instead she argued, as she does here, that the doctrine of *res ipsa loquitur* is applicable.

Plaintiff submitted the declaration of Dr. William Schwartzman as part of her opposition to defendant's summary judgment motion. Dr. Schwartzman was an infectious disease specialist who, like Dr. Posalski, was an associate clinical professor of medicine at UCLA School of Medicine. He reviewed plaintiff's medical records and concluded, ". . . I can state with a reasonable degree of medical probability that the patient's infection occurred at the time of her initial surgery at DOC, that it originated in the operating room environment, that it was probably preventable and was temporally and probably causally related to her subsequent profound neurological decline and loss of function." He concluded, "This infection and the repeated surgeries and exposures to

general anesthesia were subsequently associated with her neurological decline and related disabilities and loss of function.”

E. *The Trial Court’s Decision*

The summary judgment motion was heard on June 15, 2011. In his argument, plaintiff’s counsel did not mention Dr. Steinmann’s declaration, conceding that plaintiff was not arguing that defendant performed the surgeries incorrectly from an orthopedic viewpoint. On appeal, plaintiff reiterates this concession.

Plaintiff therefore focused on the infection issue, arguing that it was sufficient to show that the infection occurred during the initial surgery and that subsequent treatment of the infection was negligent. Defendant replied by arguing that, except in the most egregious cases, *res ipsa loquitur* still requires expert testimony to establish that it would not have occurred in the absence of someone’s negligence.

The trial court rejected plaintiff’s argument, finding Dr. Schwartzman’s declaration inadequate because it did not say anything about the standard of care. It noted that the declaration did not say that the infection would not have occurred in the absence of someone’s negligence. It therefore rejected the argument that *res ipsa loquitur* applies to this case. Accordingly, it granted the motion for summary judgment.

II

SUFFICIENCY OF DEFENDANT’S DECLARATIONS

IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Code of Civil Procedure section 437c, subdivision (c) states, “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 . . . and all inferences reasonably deducible from the evidence”

Defendant cites *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297: “A defendant moving for summary judgment has the burden of presenting facts to negate an essential element of each cause of action or to show there is a complete defense to each cause of action. [Citation.] Where, as here, the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding it was more likely than not that the material fact was true. [Citation.] ¶ In this case, plaintiff has the burden of proving by a preponderance of the evidence that defendants’ treatment fell below the standard of care. To be entitled to summary judgment in their favor, defendants were required to present evidence that would preclude a reasonable trier of fact from finding it was more likely than not that their treatment fell below the standard of care. Only if defendants were successful in meeting this burden does the burden shift to plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] Unless the moving party meets its burden, summary judgment cannot be ordered, even if the opposing party does not respond sufficiently or at all. [Citation.]” (*Id.* at pp. 304-305.)

Since defendant moved for summary judgment here, the initial question is whether his expert declarations were sufficient to show that the cause of action has no merit or

that one or more elements of the cause of action cannot be established. (Code Civ. Proc. Sec. 437c, subd. (p)(2).)

The question of the sufficiency of defendant's expert declarations was at issue in *Johnson*, and the court began its analysis by discussing the need for expert testimony to negate an element of the cause of action: "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage. [Citation.] ¶ 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 [*sic*] of care' unless the negligence is obvious to a layperson. [Citation.] However, the expert testimony must be based on such matters as may be reasonably relied upon by an expert in forming an opinion on the subject. [Citation.] With regard to a standard of care derived from a professional practice 'the induction of a rule from practice necessarily requires the production of evidence of an ascertainable practice.' [Citation.]" (*Johnson v. Superior Court, supra*, 143 Cal.App.4th at pp. 305-306.)

The *Johnson* court went on to find that the defendant's declarations did not meet this test: they were "conclusory, thus insufficient to establish the nonexistence of any triable issue of material fact. Not having met this initial burden, defendants are not

entitled to a judgment as a matter of law.” (*Johnson v. Superior Court, supra*, 143 Cal.App.4th at p. 308.)

Plaintiff argues that defendant’s expert declarations were conclusory, but her argument is directed only at the declaration of Dr. Posalski.

In addition to *Johnson*, plaintiff cites *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499: “[A]n expert’s conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the [fact finder].’ [Citations.]” (*Id.* at p. 508.) In *Shugart*, the declaration of plaintiff’s expert, Dr. Ostergard, was in issue. The court said. “[W]hile Dr. Ostergard’s declaration is not a model of specificity, it is sufficient to raise a triable issue of fact as to whether Dr. Warren’s medical care of Christine met the standard of care in the medical community and whether that care caused or contributed to Christine’s alleged damages. [Citations.]” (*Id.* at p. 506.)

Plaintiff also cites *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 and *Powell v. Kleinman* (2007) 151 Cal.App.4th 112. In *Kelley*, the court held that a declaration that was not supported by reasons or explanations did not establish the absence of a material fact issue for trial. (*Kelley*, at p. 524.) The declaration was inadmissible because it did not disclose the matter relied on in forming the opinion expressed. (*Ibid.*) The court concluded, “Summary judgment is appropriate in every case where the statutory standard is met, and the absence of material issues for trial established. However, that standard is

not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation.” (*Id.* at pp. 524-525.)

In *Powell*, the court interpreted *Kelley* as follows: “The court in *Kelley* was considering the sufficiency of the declaration of the defendant’s expert *in support* of the defendant’s motion for summary judgment. In such cases, the defendant ‘bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.’ [Citation.] Thus, the *Kelley* court was considering the burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. To meet such a burden, the *Kelley* court concluded the declaration of the defendant’s expert had to be detailed and with foundation. [Citation.]” (*Powell v. Kleinman, supra*, 151 Cal.App.4th at p. 125.) In other words, the *Powell* court found that *Kelley* required a reasoned explanation for expert declarations in support of a motion for summary judgment. (*Powell*, at p. 128.) After examining a declaration in that case, the *Powell* court found *Kelley* inapplicable because the declaration was in opposition to the motion for summary judgment and, in such cases, the declaration is construed liberally. (*Powell*, at p. 128.)

The question thus presented in this case is whether Dr. Posalski’s declaration contains a sufficient reasoned explanation for his conclusions.

Dr. Posalski’s declaration is six pages long. It first states his qualifications as an expert in infections and infectious diseases. He specifically states that he is “generally familiar with the standard of care required of physicians in treating infections in the Southern California community for all times relevant to this action.” He then reviews the

plaintiff's medical history. After doing so, he offers the opinion that the treatment by defendant was, from an infectious disease standpoint, entirely appropriate and consistent with the standard of care.

Dr. Posalski goes on to explain that (1) defendant administered an antibiotic before the first surgery to avoid the development of an infection; (2) defendant concluded that plaintiff had an infection on May 5, 2009, immediately hospitalized plaintiff for treatment, and operated on her on the same day; (3) successive operations to clean out the infected material were appropriate; (4) defendant obtained a consultation with an infectious disease specialist, and (5) the subsequent antibiotic therapy was appropriate. Dr. Posalski concluded that “. . . Dr. St. Pierre's care and treatment of the patient at all times was appropriate and within the standard of care from an infectious disease standpoint.”

We agree with defendant that Dr. Posalski sufficiently explained the basis for his opinion and provided a sufficient reasoned explanation of the basis for his opinion. Accordingly, defendant met his burden of establishing the nonexistence of any triable issue of material fact.

The burden therefore shifted to plaintiff to submit expert declarations demonstrating the existence of a material fact on the standard of care. In this regard, plaintiff argues that the declaration of Dr. Schwartzman raised the requisite factual issues.

III

SUFFICIENCY OF DR. SCHWARTZMAN'S DECLARATION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff argues that the issue presented is whether she was infected during the initial surgery. The trial court commented, "That seems rather obvious." It found that Dr. Schwartzman's declaration was inadequate because there was no statement that defendant was negligent or caused the injury and no statement that his treatment of plaintiff was below the standard of care. Nor was there any statement that such an infection does not happen but for someone's negligence.

In response, plaintiff argues that Dr. Schwartzman found that (1) the infection occurred during the original surgery, (2) it originated in the operating room environment, (3) it was probably preventable, and (4) it was causally related to plaintiff's neurological decline and loss of function. Plaintiff also notes that Dr. Schwartzman closes by repeating his conclusion that the infection was introduced into the elbow joint at the time of surgery.

While Dr. Schwartzman appears well qualified as a specialist in infectious diseases, it is significant that he does not conclude that defendant violated the applicable standard of care. In fact, the declaration does not even use the term "standard of care." After reviewing plaintiff's medical records, Dr. Schwartzman finds that "the patient's infection occurred at the time of her initial surgery at DOC, that it originated in the operating room environment, that it was probably preventable and was temporally and

probably causally related to plaintiff's subsequent profound neurological decline and loss of function."

Rather than attributing any of these problems to defendant, Dr. Schwartzman discusses the risk of postoperative infection and the possibility that the infecting organism may have come from a number of sources, including "airborne organisms that are not removed by the operating suite ventilating system, contaminated surgical instruments, failure of adequate hand hygiene on the part of staff, contaminated surgical gowns or drapes and others." He also discusses the prevention of such infections by an active infection control program at the facility. Dr. Schwartzman concludes that the infection should not have happened, given plaintiff's relatively low risk of infection at the time of surgery.

Despite the allegedly low risk of infection, the infection occurred. However, we agree with the trial court that Dr. Schwartzman does not state that defendant was negligent in any way, that the infection was attributable to anything defendant did or didn't do, that defendant violated the standard of care in any way, or that defendant did anything to cause plaintiff's subsequent medical problems. We therefore agree that, even liberally construed, Dr. Schwartzman's declaration is insufficient to raise a question of material fact requiring a trial.

IV

APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR

Plaintiff attempts to fill the evidentiary gaps in her argument by relying on the res ipsa loquitur doctrine. Under Evidence Code section 646, the doctrine is a presumption

affecting the burden of producing evidence. Under Evidence Code section 604, “[t]he effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence without regard to the presumption.”

“The presumption arises when the evidence satisfies three conditions: “(1) the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.” [Citation.]” (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.)

Although not cited by the parties, we find our case of *Elcome v. Chin* (2003) 110 Cal.App.4th 310 dispositive. In that case, plaintiff awoke from surgery with severe pain in her right elbow, right shoulder, and right arm. (*Id.* at p. 314.) She sued her doctors, and the doctors filed motions for summary judgment. (*Id.* at p. 313.) Faced with the declarations of the doctors, plaintiff relied on the res ipsa doctrine to establish a material issue of fact. (*Id.* at pp. 314-315.)

We found that the doctors’ declarations met their initial burden of producing evidence that they did not breach the standard of care and did not cause the plaintiff’s injuries. The burden then “shifted to plaintiff to raise a triable issue of material fact on the issues of negligence and causation. Plaintiff could have met this burden either by (1)

producing direct evidence of each defendant's negligence and causation, or (2) producing evidence of the three elements of res ipsa loquitur." (*Elcome v. Chin, supra*, 110 Cal.App.4th at p. 318.)

We further found that the plaintiff had failed to produce evidence of the first two elements of res ipsa loquitur. (*Elcome v. Chin, supra*, 110 Cal.App.4th at p. 318.) The same is true here. First, plaintiff did not produce evidence that the infection would not have occurred in the absence of someone's negligence. Second, plaintiff did not show that the injury was caused by an instrumentality in the exclusive control of defendant.

In his declaration, Dr. Schwartzman explained the various instrumentalities that could have caused the infection, including "airborne organisms that are not removed by the operating suite ventilation system, contaminated surgical instruments, failure of adequate hand hygiene on the part of staff, contaminated surgical gowns or drapes and others." Dr. Schwartzman also mentioned the surgical center's failure to have an active infection control program. These possibilities were not all under the exclusive control of defendant and, for this reason, the doctrine of res ipsa loquitur could not be used to impute negligence to defendant.

As we held in *Elcome*, "[t]his is not a case where a foreign object was left in plaintiff's body following an operation, for which there is *no explanation* other than that someone failed to exercise due care. There can be numerous etiologies for plaintiff's neck and upper extremity injuries which are totally unrelated to the surgery and which do not suggest the probability that one of the defendants or anyone else was negligent.

Therefore, the ‘common knowledge’ exception does not apply.” (*Elcome v. Chin, supra*, 110 Cal.App.4th at p. 318.)

Since plaintiff failed to meet her burden of producing evidence of a factual issue requiring a trial, the trial court properly granted defendant’s motion for summary judgment.

V

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.