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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CAROLYN MAY AMARAL et al.,

Plaintiffs and Appellants,

v.

LOMA LINDA UNIVERSITY MEDICAL
CENTER et al.,

Defendants and Respondents.

E054626

(Super.Ct.No. CIVSS801200)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S.

McCarville, Judge. Affirmed.

Carolyn May Amaral, John Amaral, Jason Amaral, and Katherine Amaral,

Plaintiffs and Appellants in pro. per.

La Follette, Johnson, De Haas, Fesler & Ames, Dennis K. Ames, Michael D. Reid,
and Jeffrey C. Cooper for Defendants and Respondents.

Dr. Sean Bush and other doctors at Loma Linda University Medical Center (Loma Linda) treated George Amaral for a rattlesnake bite. While still under treatment, George died.

George's widow, Carolyn May Amaral, and his adult children, John, Jason, and Katherine Amaral, then filed this action for malpractice against Dr. Bush and Loma Linda.¹ At trial, the court entered a directed verdict for Loma Linda; it ruled that there was no evidence of negligence by Loma Linda, and, while there was some evidence of negligence by Dr. Bush, there was no evidence that he was an actual or ostensible agent of Loma Linda. The jury then returned a special verdict unanimously finding that Dr. Bush had not been negligent.

In this appeal, the Amarals contend:

1. The trial judge erred by failing to recuse himself.
2. The trial court erred by failing to excuse four jurors who had various connections to Loma Linda.
3. The trial court erred by allowing a defense expert who had not practiced in California to testify.
4. The trial court erred by granting a directed verdict for Loma Linda.

We find no error. Hence, we will affirm.

¹ These were the parties and causes of action when the case went to trial; we disregard earlier versions of the complaint.

I

FACTUAL BACKGROUND

On March 16, 2007, around 3:30 p.m., a rattlesnake bit George in the right calf. Paramedics took him by ambulance to the emergency room at Loma Linda.

At the time, George was 71 years old. An ex-Marine, he was athletic, fit and healthy. He had diabetes, but he was not on insulin; he took other medication for it and checked his blood sugar regularly. Given his age, sex, and diabetes, however, it was “very likely” that he had asymptomatic coronary artery disease.

Blood clotting requires both fibrinogen and platelets. Prothrombin time (PT) is a measure of how long it takes a person’s blood to clot. Rattlesnake venom does several things that interfere with blood clotting: it reduces platelet count; it reduces fibrinogen; and it increases PT.

Lab results showed that, as of 5:50 p.m., George’s platelet count was 123,000. The reference range for platelets is 140,000 to 340,000. Thus, George’s platelet count was slightly abnormal.

His fibrinogen was 302. There was no testimony about the reference range for fibrinogen, but it appears that this was not cause for concern.

His PT was 15.3. The reference range is 12.2 to 15.7, so this was within normal limits.

George was treated with CroFab, an antivenom specific to rattlesnakes. At 9:50 p.m., after his initial treatment with CroFab, his platelet count had gone up to 194,000, which is normal. His fibrinogen had also gone up and was within normal limits. His PT was 16.7; thus, it was up and slightly above normal limits.

Dr. Bush was a nationally recognized expert on the treatment of snake bites, and specifically of rattlesnake bites. He treated George, off and on, along with other doctors, on March 17 and 18.

It was known that, after initial treatment with CroFab, a patient's symptoms could recur; this could include a delayed drop in platelet count. By the morning of March 18, 2007, George's platelet count was 63,000, which was outside the normal range and trending worse. His PT was 18.0, which was also outside the normal range and trending worse. However, his fibrinogen had gone up again, to 433, which was good.

Around 12:30 p.m. on March 18, 2007, George was discharged on Dr. Bush's orders. He was instructed to return within 24 to 48 hours.

On March 20, 2007, George returned to Loma Linda, as instructed; he arrived between 8:30 and 9:30 a.m. However, it was not until 1:00 p.m. that he was seen by Dr. Bush. Lab tests revealed that George's platelet count had fallen dramatically, to 4,000. His PT was 17.2, outside the normal range, though slightly better than when he was discharged. Dr. Bush ordered that he be given CroFab. However, the CroFab was not actually administered until 3:45 p.m.

Around 4:30 p.m., George was much weaker; he started to dry-heave. At 9:30 p.m., an electrocardiogram (EKG) revealed that he had had a heart attack. Around 11:30 p.m., he died.

The Amarals called Dr. Jeffrey Suchard, an expert in emergency room medicine and medical toxicology. According to Dr. Suchard, Dr. Bush's act of discharging George on March 18 fell below the standard of care. Although George's lab results, in themselves, were not at dangerous levels, they were trending in the wrong direction. By the time George returned on March 20, "his lab test abnormalities were pretty severe."

If George had not been discharged, further lab tests would have been performed and would have revealed that his condition was worsening. As a result, he would have been given more CroFab and possibly also more platelets and more intravenous fluids. However, because George was not given more CroFab, he developed anemia, which, in turn, contributed to his heart attack. Thus, in Dr. Suchard's opinion, the timing of the discharge was a substantial factor in causing George's death.

Dr. Suchard agreed, however, that in all other respects, Dr. Bush acted within the standard of care. He also agreed that the only person who fell below the standard of care was Dr. Bush.²

² The Amarals had many other complaints about George's care and treatment, including that: Dr. Bush ignored possible symptoms of a heart attack; George was not given CroFab for several hours; George was discharged before he was able to walk by himself; George's family was not told how to care for him after his discharge; after his discharge, George had increased swelling, dark stools, and decreased urination; when George returned to Loma Linda, he had to wait about four hours before he was seen; and, once again, George was not given CroFab for several hours after that.

[footnote continued on next page]

The Amarals also called Dr. Stanley Wishner, an expert cardiologist. In Dr. Wishner's opinion, the cause of death was a pulmonary embolism — i.e., a blood clot blocking the pulmonary artery — possibly associated with a heart attack. He explained that George had coagulopathy, “which ironically causes bleeding in some places and clotting in others.” George's symptoms, including weakness, rapid heartbeat, and low blood pressure, not accompanied by shortness of breath, were consistent with a pulmonary embolism. Moreover, as Dr. Wishner read George's EKG, it was consistent with a pulmonary embolism and inconsistent with a heart attack.

Dr. Wishner testified that the pulmonary embolism was “preventable and treatable.” However, he did not testify that the failure to prevent or treat it fell below the standard of care.³ He also admitted that he could not tell when the embolism first occurred.

Dr. Suchard, by contrast, did not see any evidence of a pulmonary embolism. He testified that it would be “unusual” for a patient with a platelet count of 4,000 to develop a pulmonary embolism.

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There was no expert testimony, however, that any of this fell below the standard of care. (See part V, *post.*)

³ The trial court had previously ordered that Dr. Wishner could testify only regarding the cause of death and not regarding the standard of care.

Dr. Eric Lavonas testified as the defense expert in emergency room medicine and medical toxicology. According to Dr. Lavonas, Dr. Bush's treatment conformed with the applicable standard of care.

In particular, discharging George with instructions to return within 24 to 48 hours for further lab tests was within the standard of care. Although George's lab results immediately before his discharge were abnormal, they did not indicate any risk of spontaneous bleeding, and they did not suggest that George needed to stay in the hospital. Moreover, treatment with additional CroFab would not necessarily have made George's platelet count go back up and stay up.

The defense called Dr. Daniel Wohlgernter as an expert on cardiology. He testified that sometime in the morning of March 20, George had a massive heart attack. It was caused by a blood clot blocking a coronary artery. The heart attack was not predictable. In hindsight, however, the snake bite could have caused the clot and thus the heart attack. After the heart attack, there was nothing that could have been done to save George's life. He saw no evidence of a pulmonary embolism.

II

JUDICIAL BIAS

The Amarals contend that the trial judge erred by failing to recuse himself even though — as he disclosed before trial — his wife was associated with Loma Linda.⁴

⁴ The Amarals assert that the trial judge's wife worked for Loma Linda as a supervisory registered nurse in the Transplant Department. The record, however, does not show exactly how she was associated with Loma Linda.

The Amarals forfeited this contention by failing to file a disqualification motion below. (Code Civ. Proc., § 170.3, subd. (c); *People v. Farley* (2009) 46 Cal.4th 1053, 1110.)

In any event, we cannot consider this contention in this appeal. “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court’s order determining the question of disqualification.” (Code Civ. Proc., § 170.3, subd. (d).) The Amarals never filed such a writ petition.

III

FAILURE TO EXCUSE BIASED JURORS

The Amarals contend that the trial court erred by failing to excuse four jurors who had various connections to Loma Linda.

They forfeited this contention by failing to challenge these jurors for cause and accepting the panel instead. “A challenge to an individual juror may only be made before the jury is sworn.” (Code Civ. Proc., § 226, subd. (a).) A challenge for cause cannot be raised for the first time on appeal. (See *People v. Moreno* (2011) 192 Cal.App.4th 692, 706 [challenge to juror’s qualifications] [Fourth Dist., Div. Two].)

Separately and alternatively, this contention must fail because the Amarals did not exercise all of their peremptory challenges. “As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because . . .

a litigant retains the power to remove the juror by exercising a peremptory challenge. Thus, to preserve this claim for appeal we require, first, that a litigant actually exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory challenges allotted by statute and hold none in reserve. Finally, counsel . . . must express to the trial court dissatisfaction with the jury as presently constituted.’ [Citations.]” (*People v. Whalen* (2013) 56 Cal.4th 1, 41-42, fn. omitted.) The Amarals did none of these things.

IV

THE “SAME OR SIMILAR LOCALITY” REQUIREMENT OF HEALTH AND SAFETY CODE SECTION 1799.110

The Amarals contend that the trial court erred by allowing Dr. Lavonas to testify, because he had never practiced in California.

A. *Additional Factual and Procedural Background.*

During trial, the Amarals filed a motion to exclude Dr. Lavonas’s testimony based on the “same or similar locality” requirement of Health and Safety Code section 1799.110.⁵ The trial court deferred ruling on the motion until after Dr. Lavonas testified about his qualifications.

⁵ Health and Safety Code section 1799.110, subdivision (c) provides: “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

[footnote continued on next page]

Dr. Lavonas proceeded to testify that from 1992 to 1995, he did a residency in emergency medicine in Minnesota. From 1995 to 1999, he was in private practice in emergency medicine at an unspecified location. From 1999 to 2001, he had a fellowship in medical toxicology in North Carolina. From 2001 to 2008, he taught emergency medicine in North Carolina. Thereafter, he practiced emergency medicine in Denver, Colorado. Thus, since 1995, he had “worked in hospitals as an emergency room physician”

Dr. Lavonas was the associate director of the Rocky Mountain Poison and Drug Center in Denver. This was the largest poison and drug center in the United States, as well as the designated poison control center for five western states (Colorado, Montana, Idaho, Nevada, and Hawaii).

Dr. Lavonas was board-certified in emergency medicine and medical toxicology. Board certification is conferred by the American Board of Emergency Medicine, “an independent nationally recognized body” He was one of the board’s oral examiners. Thus, he was “familiar with the standard of care of emergency medicine generally.”

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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 occur[r]ed.” (Italics added.)

Dr. Lavonas was also the chairman of the toxicology section of the American College of Emergency Physicians. He had “work[ed] with a group of experts around the country to derive a single unified baseline treatment algorithm for the management of venom[ous] snake bites in the United States.”

Dr. Lavonas admitted that he had never practiced emergency medicine in California.

Based on this testimony, the trial court overruled the Amarals’s objections.

B. *Analysis.*

In reviewing a trial court’s ruling that an expert is qualified, “an appellate court . . . may reverse only for an abuse of discretion, and must uphold the ruling unless ““the evidence shows that a witness *clearly lacks* qualification as an expert”” [Citation.]” (*People v. Dowl* (2013) 57 Cal.4th 1079, 1089.)

At one time, in medical malpractice cases generally, the standard of care required “that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality” (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86.) “[T]he theory supporting the rule that the expert must be familiar with the degree of care used in the particular locality where the defendant practices ‘is that a doctor in a small community or village, not having the same opportunity and resources for keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities.’ [Citation.]” (*Sinz v. Owens* (1949) 33 Cal.2d 749, 754, italics

omitted.) More recently, however, “the Supreme Court has formulated the standard of care as that of physicians in similar *circumstances* rather than similar *locations*. [Citations.]” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 468-469.)

The “same or similar locality” requirement of Health and Safety Code section 1799.110 was “intended to ensure that the performance of an emergency room physician sued for alleged malpractice in rendering emergency room treatment is evaluated under a standard of care essentially equivalent to that prevailing in emergency rooms at the time in the locality where the alleged negligence took place.” (*Miranda v. National Emergency Services, Inc.* (1995) 35 Cal.App.4th 894, 905.)

We have not found any case law construing the “same or similar locality” requirement of Health and Safety Code section 1799.110. In light of its purpose, however, we believe that it must be construed in accordance with the nonstatutory standard of care rule in malpractice cases generally. In other words, two localities are “similar” within the meaning of Health and Safety Code section 1799.110 if they feature similar circumstances and thus similar standards of care.

Here, it was reasonably inferable from Dr. Lavonas’s testimony that Denver and Southern California have similar emergency care customs and practices, particularly with regard to the treatment of snake bites. His own training had proved readily transferable, first from Minnesota to North Carolina, and then from North Carolina to Colorado. He was board-certified by a nationally recognized emergency medicine board. Thus, he

testified that he was “familiar with the standard of care of emergency medicine generally.”

Dr. Lavonas worked at a poison control center that was the designated poison control center for five western states — states that have a mix of extremely urban areas, including Denver and Las Vegas, and extremely rural areas, including the Idaho and Montana backwoods. He and a group of experts from around the country had been able to come up with “a single unified baseline treatment algorithm for the management of venom[ous] snake bites in the United States.”

Indeed, this whole issue probably would have gone away if only defendants’ counsel had gotten an answer to one of his questions. He asked, “Are the standards with respect to emergency medicine as well as management of venomous snake bites, is it a national standard?” Dr. Lavonas answered, “I’m sorry, I don’t think I understand that question.” Defendant’s counsel did not rephrase the question nor ask a similar one. Nevertheless, based on the remainder of Dr. Lavonas’s testimony, the trial court could reasonably conclude that there was essentially a national standard, so that Denver and Southern California were similar with regard to the standard of care in the practice of emergency medicine.

DIRECTED VERDICT ON GROUNDS THAT LOMA LINDA
WAS NOT DIRECTLY OR VICARIOUSLY NEGLIGENT

The Amarals contend that the trial court erred by granting a directed verdict for Loma Linda on the grounds that (1) there was no evidence of negligence on the part of Loma Linda, rather than Dr. Bush, and (2) there was no evidence that Loma Linda was vicariously liable for Dr. Bush's negligence.

“A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]’ [Citation.] The trial court’s ruling is reviewed de novo. [Citation.]” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1293, fn. 4, petn. for rev. filed Dec. 9, 2013.)

The Amarals point to three respects in which, they contend, there was evidence that Loma Linda was negligent.

First, they note that on March 20, when George returned to the Loma Linda emergency room, there was an unexplained delay before he was seen. The Amarals’s expert, however, Dr. Suchard, never testified that this delay was below the standard of care. “““The standard of care against which the acts of a physician are to be measured is

a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.” [Citations.]’ [Citations.]” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Thus, in the absence of any such testimony by Dr. Suchard, there was no evidence that this delay constituted negligence.

Second, they point to the delay on March 20 of almost three hours between the time when Dr. Bush ordered more CroFab and the time when the CroFab was actually administered. Once again, however, Dr. Suchard never testified that this fell below the standard of care.

Third, they argue that Loma Linda discharged George prematurely. Admittedly, the gist of Dr. Suchard’s opinion was that the timing of George’s discharge fell below the standard of care and caused his death. Moreover, John Amaral testified that, when he brought George back to Loma Linda, the triage nurse told him, “[W]e discharge people as early as we can because it is very expensive to have them admitted in the hospital.” However, it was undisputed that it was Dr. Bush who ordered the discharge. When Dr. Suchard was asked, “[T]he only one you could say was below the standard of care was Dr. Bush, correct?,” he answered, “The only person I was able to identify was yes, Dr. Bush.” There was no evidence that Loma Linda was responsible for George’s discharge.

In addition to arguing that Loma Linda was negligent, the Amarals argue in a single sentence that the trial court “may have erred” by “failing to consider . . . agency by estoppel, or apparent authority” (Bolding omitted.) However, they do not discuss the law regarding apparent authority, nor do they discuss how it applies to the facts of this case. “[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citations.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

The trial court based its ruling, at least in part, on Exhibit 1-16. This exhibit was described as a document signed by George stating that he understood that all physicians were independent contractors and not employees. This would appear to preclude any claim of apparent authority. In any event, the Amarals have not included the exhibit in their appendix and have not had it transmitted to us; hence, we must presume that it fully supports the trial court’s ruling.

Finally, we also note that the jury ultimately found Dr. Bush not liable. Thus, even assuming the trial court erred by ruling that Loma Linda was not vicariously liable for the negligence of Dr. Bush, the error clearly was not prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

VI

DISPOSITION

The judgment is affirmed. Defendants shall recover costs against the Amarals.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.