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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

LYNN SCOTT JONES,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HEALTH  
PLAN, INC., et al.,

Defendants and Respondents.

E056219

(Super.Ct.No. CIVDS1008100)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco,  
Judge. Affirmed.

The Thomas Law Group, Stephen J. Thomas and Tim C. Lin for Plaintiff and  
Appellant.

La Follette, Johnson, Dehaas, Fesler & Ames, Bradley J. McGirr and John C.  
Lender for Defendants and Respondents.

On June 10, 2010, plaintiff, Lynn Scott Jones, filed a medical malpractice complaint against defendants, Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Southern California Permanente Medical Group, and Dr. Robert Yu, a Kaiser doctor (collectively, Kaiser).

On May 4, 2011, Kaiser filed a motion for summary judgment. The hearing on the motion was set for August 25, 2011.

On August 11, 2011, Jones filed a memorandum of points and authorities and a statement of undisputed material facts in opposition to the motion for summary judgment. The memorandum also requested a continuance “because essential evidence currently exists but cannot be presented at this time.” (Capitalization omitted.)

On August 22, 2011, Jones filed an ex parte motion to continue the August 25, 2011 hearing. Kaiser objected, but the motion was granted, and the hearing was continued until October 24, 2011.

On October 24, 2011, Jones requested a further continuance to obtain an expert medical opinion. The court denied the request and granted Kaiser’s summary judgment motion.

On November 3, 2011, Jones filed a motion for reconsideration. The motion was heard on January 18, 2012, and the motion for reconsideration was denied. Jones appeals from the ensuing judgment.

## ISSUES

On appeal, Jones presents two issues. First, he argues the trial court abused its discretion by denying a second continuance at the October 24, 2011 hearing and then granting the summary judgment motion. Second, he contends the trial court abused its discretion when it denied his motion for reconsideration on January 18, 2012.

### KAISER’S MOTION FOR SUMMARY JUDGMENT

The summary judgment motion, filed May 4, 2011, was based on the grounds that “this action has no merit and there is no triable issue of material fact . . . .” The motion was supported by the declarations of two doctors who determined that the treatment of Jones complied with the applicable standard of care. Dr. Howard Tung, a neurosurgeon, opined that the treatment of Jones at Kaiser was within the standard of care. Dr. Richard Johnson, a family practice physician, declared that the treatment of Jones at Kaiser “was, at all times, provided in a manner which complied with the standard of care in the community, and to a reasonable degree of medical probability was not the cause of any alleged injuries to Mr. Jones . . . .”

### JONES’S RESPONSE TO THE SUMMARY JUDGMENT MOTION

In response to the summary judgment motion, Jones argued that there were genuine issues of material fact that preclude summary judgment. To create such issues, and to support the contention that the treatment of Jones was below the standard of care, Jones relied on the declaration of David Payne, M.D., a “diplomate of the American

Board of Orthopaedic Surgery and a fellow of the American Academy of Orthopaedic Surgery.”

Dr. Payne’s declaration would normally be sufficient to raise triable factual issues. The problem for Jones was that Dr. Payne had not signed his declaration by August 11, 2011, the date of the opposition points and authorities. An unsigned version of the declaration was therefore filed.

The unsigned declaration recites that Dr. Payne is “a fellowship-trained spine surgeon,” who is “familiar with the standard of care for family practice physicians in the Southern California community.” He examined Jones on September 21, 2009. At that time, Jones was complaining of back and abdominal pain as a result of a 25- to 30-foot fall he had suffered on December 22, 2008. Dr. Payne opined that the treatment by Kaiser was below the standard of care “in that Mr. Jones should have received immediate surgical intervention to repair the multiple fractures in his back. Furthermore, to a reasonable degree of medical probability [Kaiser’s] failure to provide the proper standard of care caused additional harm and injury to [Jones].”

Since Dr. Payne’s declaration was still unsigned on August 11, 2011, the points and authorities submitted by Jones argued that “a continuance . . . should be granted because essential evidence currently exists but cannot be presented at this time.”

(Capitalization omitted.)

Jones renewed the request on August 22, 2011, by filing an ex parte motion under Code of Civil Procedure section 437c, subdivision (h),<sup>1</sup> to continue the August 25, 2011 hearing. The supporting declaration and accompanying exhibits establish that Dr. Payne's deposition was scheduled for September 5, 2011. Kaiser objected, but the motion was granted, and the hearing was continued until October 24, 2011.

#### THE OCTOBER 24 HEARING

On October 17, 2011, Kaiser filed a reply brief for the October 24, 2011 hearing, pointing out that Jones had still not provided any expert medical testimony in opposition to the motion for summary judgment. Accordingly, Kaiser argued that there were no disputed triable issues of material facts, and it was therefore entitled to summary judgment.

The trial court's tentative decision was to grant the motion for summary judgment. The court found that Jones "fail[ed] to set forth facts demonstrating the reason such [evidence] was not obtained sooner and why such evidence cannot be presented at this time, establishing a likelihood that controverting evidence may exist, and providing an estimate of the time necessary to obtain such evidence."

At the hearing, Kaiser's attorney emphasized that the motion had been filed five months earlier, and Jones's counsel had still not obtained an expert declaration. Jones's counsel had also set a deposition for Dr. Payne on September 5, 2011, but it had not taken

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

place. Kaiser's attorney argued that Jones and his attorneys had not given any reason why the deposition did not go forward, nor had they explained why Dr. Payne had still not signed his declaration.

The trial court subsequently granted Kaiser's motion for summary judgment.

#### THE MOTION FOR RECONSIDERATION

On November 3, 2011, Jones filed a motion for reconsideration. The motion was based on the theory that he had now obtained Dr. Payne's signature on his declaration. Jones stated: "[Jones] could not previously present the declaration of Dr. Payne because [Jones] was unavailable largely due to his injuries and counsel has had ongoing difficulty communicating with Dr. Payne's office." Jones also stated that he had surgery on October 17, 2011, and "[s]ince the surgery, [Jones] has recovered and was able to retain an expert and obtain his declaration in opposition to [Kaiser's] motion for summary judgment." Since Dr. Payne's declaration established triable issues of material fact, Jones asked the court to reconsider the granting of the summary judgment motion "based on the new facts and circumstances presented."

Kaiser opposed the request for reconsideration on grounds that it was not new evidence. Kaiser's counsel pointed out that the signed declaration was dated either October 14 or 19. Thus, the declaration was signed at least five days before the October 24 hearing, and Jones did not explain why it had not been presented at the hearing.

Kaiser also argued that the declaration was inadequate to establish a violation of the standard of care by Kaiser.<sup>2</sup>

The motion for reconsideration was heard on January 18, 2012. Jones's attorney argued that the signed document was a new document because it was not previously considered by the court. Even though it was signed before the hearing, counsel stated that Jones's attorneys did not have custody of it because "[Dr. Payne] does not like attorneys."

The trial court subsequently denied the motion for reconsideration. Judgment was entered accordingly, and this appeal followed.

#### THE DENIAL OF THE SECOND MOTION FOR A CONTINUANCE

As noted *ante*, Jones argues that the trial court abused its discretion by denying a second continuance at the October 24, 2011 hearing and then granting the summary judgment motion.

Jones relies on section 437c, subdivision (h). That section states: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any

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<sup>2</sup> Jones had been treated by a non-Kaiser hospital for approximately three weeks after the accident. Dr. Payne's opinion was that Jones "should have been *immediately* recommended for surgical intervention to repair the multiple fractures in his spine." (Italics added.) Kaiser argued that this means that the non-Kaiser hospital was the entity that violated the standard of care.

other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.”

Jones cites *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246 (*Cooksey*). In that case, the plaintiff appealed from an order denying a continuance in the same context as this case. The court held that “the trial court’s denial of appellant’s request for a continuance under section 437c, subdivision (h) was not an abuse of discretion because appellant failed to make a good faith showing as to what facts essential to oppose summary judgment may have existed and why such facts could not have been discovered sooner. We further hold that in determining whether to grant to a party responding to a summary judgment motion a continuance for discovery under section 437c, subdivision (h), the trial court may consider whether that party has been diligent in completing discovery.” (*Id.* at p. 251.)

Applying the statute, the court said: “The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court’s

denial of appellant's request for a continuance for abuse of discretion. [Citation.]”  
(*Cooksey, supra*, 123 Cal.App.4th at pp. 253-254.)

Specifically, the court held that lack of diligence may be a ground for denying a request for continuance: “There must be a justifiable reason why the essential facts cannot be presented. An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. The statute itself authorizes the imposition of sanctions for declarations presented in bad faith or solely for purposes of delay. [Citation.] A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner.” (*Cooksey, supra*, 123 Cal.App.4th at p. 257.)

The trial court's tentative ruling in this case discusses a declaration submitted by Jones and found it inadequate to raise a triable issue of fact. Accordingly, the court found that Jones had failed to submit any opposing expert testimony “establishing, to a reasonable medical probability, a defendant's acts or omissions were a substantial factor in causing [Jones's] injuries. [Citation.]”

With regard to the continuance request, the court discussed Jones's statement that he was scheduled to have surgery on October 17, 2011, but it had been delayed. Jones argued that, as a result of his medical problems, he had been unable to hire an expert. The court found that the prior continuance was for the purpose of taking Dr. Payne's deposition. However, the deposition had not been taken, and Jones had not explained why the deposition had not been taken.

The court found that the statements in Jones's declaration were inadequate because he failed to set forth facts demonstrating the reason why the evidence was not obtained sooner, why such evidence could not be presented at the hearing, and did not show a likelihood of the existence of controverting evidence, together with an estimate of the time necessary to obtain such evidence.<sup>3</sup>

Thus, the trial court was amply justified in finding that the submitted declaration of Jones failed to make the necessary showing under section 437c, subdivision (h). No explanation was given for the continued failure of Dr. Payne to sign the declaration, and no reason was given for the cancellation of Dr. Payne's deposition on September 5, 2011. It therefore appeared that no action had been taken from the time of the first continuance (August 25, 2011) to the time of the continued hearing (October 24, 2011).

As discussed *ante*, *Cooksey* states: "A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner." (*Cooksey, supra*, 123 Cal.App.4th at p. 257.) In the present case, no justification was found for not obtaining Dr. Payne's signature in a

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<sup>3</sup> Jones hinders our review by not including in the record the points and authorities it filed on October 11, 2011, and a copy of Jones's declaration. The opening brief references are to a declaration of Jones, but the document cited is actually a declaration of Mr. Thomas in support of the motion for reconsideration.

The opening brief also argues that the trial court abused its discretion when it denied Jones's second request for an extension, but it cites a declaration of Dr. Payne that was submitted as part of the Thomas declaration filed on November 3, 2011. It also cites a declaration that was submitted as part of the first request for a continuance.

The reply brief again argues that the denial of the second continuance request was error, but cites the Thomas declaration, which was submitted in support of the subsequent motion for reconsideration.

timely manner or failing to take his deposition. Accordingly, the trial court did not abuse its discretion in denying a further continuance and proceeding to decide the summary judgment motion on the documents before it.

#### THE MOTION FOR RECONSIDERATION

As described *ante*, the motion for reconsideration was filed on November 3, 2011. It relies on section 1008, which authorizes such a motion when a party claims new or different facts, circumstances, or law to justify reconsideration of the prior order.<sup>4</sup>

In seeking reconsideration, Jones relies on *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389 (*Bahl*). In that case, the plaintiff requested a continuance of a summary judgment motion hearing because discovery was continuing. (*Id.* at p. 392.) The defendant filed an opposition to the continuance and then produced over 600 pages of documentation. (*Ibid.*) The trial court denied the request for a continuance and granted the motion for summary judgment. (*Ibid.*) The appellate court reversed, holding that “[p]ublic policy dictates that disposition on the merits be favored over judicial efficiency.” (*Ibid.*)<sup>5</sup>

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<sup>4</sup> Section 1008, subdivision (g), states: “An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order.”

<sup>5</sup> *Bahl* was criticized in *Cooksey* over the relevance of the party’s diligence. We agree with *Cooksey* that lack of diligence may be grounds for denying a request for a continuance. (*Cooksey, supra*, 123 Cal.App.4th at pp. 256-257.)

The court found that ““an opposing party can compel a continuance of a summary judgment motion’ by making a declaration meeting the requirements of section 437c, subdivision (h). [Citation.]” (*Bahl, supra*, 89 Cal.App.4th at pp. 395-396.) This means that the party must show that facts essential to justify opposition may exist. (*Id.* at p. 397.) “When lack of diligence results in a party’s having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion. [Citations.]” (*Id.* at p. 398)

Of course, *Bahl* is not a case involving a motion for reconsideration. Under section 1008, the moving party must show new facts or information. The only new fact alleged here is that Dr. Payne had signed his declaration. However, as Kaiser pointed out, the signed declaration is dated more than five days prior to the continued summary judgment motion hearing. It was therefore not new evidence. The unsigned version of Dr. Payne’s declaration had also been submitted to justify the first continuance on August 11, 2011, and the ex parte request for a continuance filed on August 22, 2011.

“The party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time.” (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) Thus, a motion for reconsideration was properly denied when the moving party failed to provide an adequate explanation for his failure to depose an important witness. (*Jones v. P.S. Development*

*Co., Inc.* (2008) 166 Cal.App.4th 707, 725, overruled on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.)

The trial court cited *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674. In that case, the court referred to the need to show a satisfactory explanation for failing to provide the evidence sooner. (*Id.* at p. 690.)

The only argument made in support of the motion for reconsideration was that Dr. Payne had now signed his declaration. The accompanying declaration, filed by Stephen Thomas, one of Jones's attorneys, recites Jones's medical difficulties and concludes by saying, "[s]ince the surgery, Mr. Jones has recovered and was able to retain Dr. Payne as an expert and obtain his declaration in opposition to [Kaiser's] motion for summary judgment."

But as Kaiser pointed out: "It is the responsibility of [Jones's] attorney to obtain the necessary experts, and obtain declarations to oppose a motion for summary judgment." Jones and his attorneys simply failed to do so, and their failure provided ample grounds for the trial court to exercise its discretion and conclude that "[i]n [Jones's] Reply there is no discussion of any of the above issues which are certainly significant and should have been addressed. The failure to do so is fatal to [Jones's] present motion. As such [Jones] has failed to meet his burden and his motion shall be denied." We agree.

DISPOSITION

The judgment, including the order denying reconsideration, is affirmed.

Respondents to recover their costs on appeal.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.