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ARBITRATION ADMINISTERED BY

ADMINISTRATOR

guardian ad litem for	)	
	)	
Claimant,	)	
v	)	ORDER GRANTING SUMMARY
	)	JUDGMENT
Respondent	)	ARBITRATION AWARD

Justice James Lambden (Ret.) Arbitrator

BACKGROUND

Respondent's motion for summary judgment was originally scheduled to be heard on August 25, 2017. Claimants served opposition to the motion on August 11, 2017 and also moved to continue the hearing. Claimants argued that a continuance of the motion was mandatory under California Code of Civil Procedure §437(c)(h), which mandates a continuance if certain prerequisites are shown. (*Daniel v. Gold Mine Ski Associates Inc.* (1990) 218 Cal. App. 3d 111, 127).

Section 437(c)(h) required Claimants to show: (1) that the facts to be obtained by a continuance were essential to opposing the motion; (2) that there was reason to believe the facts existed; and (3) that there were reasons why additional time was needed to obtain those facts. (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal. App. 3d 1271,1280; *Coast-United Advertising, Inc. v. City of Long Beach* (1975) 51 Cal.App.3d 766, 771-772)).

The Arbitrator ruled that the materials Claimants submitted to support their request failed to justify a continuance because Claimants had been dilatory by failing to use the discovery

tools at their disposal to obtain the evidence they claimed was necessary to oppose the motion. A §437(c)(h) continuance request must be supported by a showing of diligence. (*A & B Painting and Drywall Inc. v. Superior Court* (1994) 25 Cal. App. 4th 349, 356-357; See also *FSR Brokerage Inc. v. Superior Court* (1995) 35 Cal. App. 4th 69, 76). Accordingly, the Arbitrator denied Claimants' request to continue the summary judgment motion as well as the accompanying motions to continue the Final Hearing and reopen discovery. (Arbitration Management Orders #2 and #3)

Thereafter the parties informed the Arbitrator that they were negotiating a resolution; and the Arbitrator did not rule on the summary judgment motion. The parties were unable to agree on the terms of a resolution; and Respondent requested that the motion be renewed. Claimants objected to the new date set by the Arbitrator on the grounds that it did not provide sufficient notice. The Arbitrator met with the attorneys and issued Arbitration Management Conference Order #4, which rescheduled the hearing of the summary judgment motion for January 22, 2018.

When the motion was renewed in October of 2017, discovery remained closed. However, the Arbitrator permitted certain additional but limited discovery, including the completion of four depositions the parties had agreed to schedule prior to the date previously set for the hearing of the summary judgment motion. Claimants did not make another formal motion to reopen discovery or to permit the filing of additional opposition to the motion for summary judgment[1] and the Arbitrator reiterated that discovery remain closed with the limited exceptions described above.

Thereafter, Claimants served arbitration demands on several additional doctors in their individual capacities and added them as named in a supplemental arbitration demand, alleging that they were involved their care and treatment of the minor Claimant. Respondent's attorneys were thus required to join the additional individual physicians in the motion, although he joinder of the additional individual physicians did not raise any new issues. Following the

[1] Certain of the emails sent to the Arbitrator by Claimants' attorney complained that more discovery was necessary. However, this arbitration is conducted under the provisions of the California Code of Civil Procedure and Claimants' attorney did not serve any compliant motion to reopen discovery after August of 2017.

addition of the new individual parties, Claimants served additional opposition to the motion for summary judgment including: a memorandum of points and authorities; Claimants' Separate Statement Of Undisputed Facts ("SSUF"); objections to the evidence submitted by Respondent; Claimants' request for judicial notice of portions of certain medical treatises; Claimants' index of evidence and exhibits; and a declaration by Claimants' attorney.

Oral argument was heard on January 22, 2018. , appeared for Claimants and appeared for Respondent. The Arbitrator took the matter under submission and after further consideration rules as follows:

DISCUSSION

Claimants have alleged a claim against Respondent for professional negligence (i.e. medical malpractice). It is undisputed that the testimony of an expert witness is required in every medical malpractice case in order to establish: (1) the applicable standard of care; (2) whether that standard was breached by Respondent; and (3) whether any negligence by the Respondent caused damages. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal. 4th 992,1001).

Claimants argue that the only exception to the requirement for an expert opinion in a medical malpractice case, the principle of *res ipsa loquitur*, relieves them from the need to produce admissible expert testimony to show a breach of the professional standard of care. Since the standard of care for treatment in a medical malpractice case is beyond the experience of laypersons, application of that exception is not possible in this case. Even in those exceedingly rare cases where *res ipsa loquitur* might apply in a medical negligence case, there must be medical testimony to establish the probability of negligence in addition to the bare facts of the occurrence of an injury. (*Tomei v. Henning* (1967) 67 Cal. 2nd 319).

Claimants' contention that the case is subject to a *res ipsa loquitur* theory of recovery is unsupported. In order to prevail on the theory of *res ipsa loquitur*, a party must present sufficient evidence to establish each of the elements of the *res ipsa loquitur* doctrine (*Kennedy v. Modesto* (1990) 221 Cal. App. 3d 575). Those elements include: (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; and (3) it must not have been due to any voluntary act or contribution on the part of the plaintiff. (*Ybarra v. Spangard* (1944) 25 Cal. 2d 486, 489). In this case, a large ovarian cyst led the patient to experience intermittent ovarian torsion, which then led to ovarian necrosis and surgical removal of the affected tube and ovary. Thus, there were factual elements in play that were not under the exclusive control of the Respondent; and the undisputed nature of the injury was by no means within the understanding of laypersons.

Expert witness testimony is required in medical malpractice actions for the simple reason that the element of negligence can only be shown if the standard of care that prevails among doctors in the community was breached. (*Landeros v. Flood* (1976) 17 Cal. 3d 399, 408). The *res ipsa loquitur* exception to the general rule requiring expert testimony is only implicated when the issue of negligence can be shown to be within the common knowledge of laypersons. (*Lawless v. Callaway* (1944) 24 Cal. 2d 81, 86). The classic example of such an exception occurs when the evidence shows that an object such as a sponge or medical instrument has been left inside the closed incision of a surgical patient. Accordingly, this "common knowledge" exception is limited to situations where a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have been followed if due care had been exercised" and when the matter at issue is not a matter of common knowledge, expert evidence is conclusive and may not be disregarded. (*Danielson v. Roche* (1952) 109 Cal. App. 2d 832, 835).

Claimants must also prove that Respondent's negligence proximately caused the injury (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal. App. 3d 396, 402-403). Claimants are thus also required to present expert testimony that the injuries alleged were proximately caused by the acts of the Respondent (*Keen v. Prisinzano* (1972) 23 Cal. App. 3d 275, 279). This means that in order to oppose a motion for summary judgment, a party in a medical malpractice action must submit declarations of medical experts; and under CCP §437c(d), the declarations opposing the motion for summary judgment must: (1) be based upon personal knowledge of the declarant, (2) show affirmatively that the declarant is competent to testify to the matter stated; and (3) set forth admissible evidence.

Claimants' opposition to the motion does not present admissible expert evidence that Respondent breached the standard of care and proximately caused the minor Claimant's injury. Instead, Claimants rely on passages from medical treatises and texts to support bare conclusions such as: "over 40 hours from confirming imaging to surgery falls well outside the acceptable standard of care" (Claimants' Memorandum of Points and Authorities page 4: 23-24). The evidence offered by Claimants is insufficient because they have failed to present admissible evidence that Respondent's treatment fell below the standard of care and "to a reasonable degree of medical probability" caused injury to the minor. Claimants have not described any triable issue of fact by satisfying the requirements of CCP §437c.[2]

Claimants' opposition to the motion for summary judgment relies upon the declaration of their attorney to present hearsay excerpts from medical literature, unsubstantiated by any supporting declaration from a medical expert. Claimants initially presented selections from medical texts in opposition to the original August 2017 motion; and they supplemented their opposition in January of 2018 with additional excerpts. Respondent's objections to consideration of the declaration and its medical literature excerpts on grounds of relevancy, lack of foundation, lack of personal knowledge, hearsay and failure to meet the requirements of section 437c(d). Undoubtedly, the Arbitrator is required to disregard such evidence. Respondent have also requested the Arbitrator strike the declaration and treatise excerpts that purport to create a fact issue as to the standard of care. (*Martin v. Johnson* (1979) 88 Cal. App. 3d 595, 602).

The California Supreme Court recently emphasized that the purpose of the 1992 and 1993 amendments to the California Code of Civil Procedure § 437c was to "liberalize the granting of summary judgment motions" (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal. 5th 536, 542, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 848). According to the Supreme Court, summary judgment is no longer called a "disfavored" remedy." Summary judgment is seen as a "particularly suitable means to test the sufficiency" of a plaintiff's, or a defendant's, case." (*Perry,* at page 542).

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[2] To the extent Claimants make a separate claim for medical negligence pertaining to the standard of care applicable to emergency room physicians, the Arbitrator's conclusion is the same: the absence of competent expert medical testimony regarding the standard of care is fatal to each and every claim presented by the Claimants.

The Supreme Court also ruled regarding admissibility of expert declarations. The Court held that "[a] party may not raise a triable issue of fact at summary judgment by relying on evidence that will not be admissible at trial". (CCP section 437c(c)). When the time for exchanging expert witness information has expired before a summary judgment is made, and a party objects to a declaration from an undisclosed expert, the admissibility of the expert opinion can and must be determined before the summary judgment motion is resolved." (*Perry* at page 543; overruling *Mann v. Cracchiolo* (1985) 38 Cal. 3d 18; also disapproving *Kennedy v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575). If the time for expert disclosure has expired and a party wishes to use an expert for summary judgment purposes (and the statutory criteria are otherwise satisfied) the party can seek relief. See CCP section 2034.610 [amendment of expert witness list] or section 2034.720 [relief from untimely disclosure] or perhaps request a continuance of the summary judgment motion pursuant to CCP section 437c(h) in order to do so. No such request or supplemental expert disclosure was made here.

FINDINGS AND DECISION

- Respondent's objections to Claimants' submission of evidence from medical treatises and texts are sustained and such evidence is stricken;
- Claimants' objections to the evidence offered by Respondent's are overruled;
- The Arbitrator has relied only upon admissible evidence to reach this decision;
- Claimants did not oppose the motion with admissible evidence sufficient to show a triable issue of fact pertaining to the breach of the applicable standard of care and proximate cause;
- Claimants' medical negligence claims and *res ipsa loquitur* claims therefore
- fail as a matter of law;
- Claimants having failed to show any triable issue of fact, summary judgment must be granted in favor of the Respondent and against Claimants. (CCP sections 437c(o)(1) and 437c(p)(2))

ORDER AND AWARD

Respondent's motion for summary judgment is GRANTED and Claimants shall recover nothing on their claims. Respondent are the prevailing parties after a hearing of oral argument conducted by telephonic conference and based on documentary evidence. The parties shall each bear their own attorney fees and costs. All claims in this proceeding are thus resolved.

Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Healthcare.

Dated: January 25, 2018

James R. Lambden

Hon. James Lambden (Ret.) Arbitrator

Justice James Lambden (Ret.)
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Claimant,	)	
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Justice James Lambden (Ret.) Arbitrator

Oral argument of Respondent's Motion for Summary Judgment was heard by telephonic conference on January 18, 2018. , Esq, of , appeared for Respondent. appeared *in propria persona.* Both sides submitted timely briefs and supporting documents.

BACKGROUND

Claimant , (hereinafter "Claimant") alleges that his surgeon was negligent during in the course of surgery and treatment to correct contracture resulting from Dupuytren's disease. Claimant contends that the surgeon extended the surgical incision unnecessarily and created a scar that Claimant refers to as "surgical graffiti." Claimant otherwise concedes that the surgery was successful and that he suffered no postsurgical complications. Respondent contends that Claimant's treatment and the surgical technique used to treat the contracture in Claimant's finger were conducted within the appropriate standard of care. Respondent moved for entry of summary judgment, arguing that there is no evidence to support Claimant's allegations of breach of the professional standard of care.

Claimant consulted and was evaluated on three occasions by Dr. (Separate Statement of Undisputed Facts (SSUF) numbers 3, 4, 5, and 6). The surgery was conducted on November 28, 2016 without complications. However, during the course of the surgery, Dr. discovered that abnormal tissue extended beyond the proximal end of the incision. In order to avoid the risk of additional nerve damage associated with removing the constricting cord within the initial incision, Dr. lengthened the incision approximately one centimeter. After the surgery, Dr. advised Claimant that the incision was extended to avoid the complication of aggravated nerve damage. (SSUF numbers 6, 7 and 8.) Following the surgery, Dr. , who also advised him that the excision had been extended to avoid nerve damage. Dr. examined Claimant's hand several times and reported that Claimant's recovery was successful (SSUF numbers 9, 10, 11, 12, 13 and 14).

Claimant does not dispute that the surgery successful reduced the contracture and that he suffered no complications. He also agrees that the primary purpose of the surgery was to extend his finger and that he achieved a good result in that regard. However, he claims he was not informed of that he might have scar on his right-hand little finger as long as 3 centimeters after the surgery. Claimant claims, apparently for aesthetic reasons, that the extended scar entitles him to damages, although he has submitted no evidence regarding damages other than his own statements. Respondent has submitted evidence to show that the care and treatment provided to Claimant was within the standard of care applicable in the community (SSUF 15, 16, 17 and 18).

DISCUSSION

Summary judgment is appropriate where there are no triable issues of fact. California Code of Civil Procedure §§ 437c(a), 473c(f)(1). A defendant/respondent moving for summary judgment can prevail by showing that one or more elements of the claimant's cause of action cannot be established or that there is a complete defense to a particular cause of action. To obtain a summary judgment "all that the [respondent] need do is show that the [claimant] cannot establish at least one element of the cause of action ... The [claimant] need not... conclusively negate any such element." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 853). Once such a showing has been made, the burden shifts to the claimant to show that a triable issue of one or more material facts exists as to that cause of action (*Aguilar* at page 849). If the claimant

is unable to make such a showing, summary judgment of the entire claim, or alternatively summary adjudication of any particular cause of action, is appropriate in favor of the defendant/respondent.

The California Supreme Court recently emphasized that the purpose of the 1992 and 1993 amendments to the California Code of Civil Procedure § 437c was to "liberalize the granting of summary judgment motions" (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal. 5th 536, 542, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 848). According to the Supreme Court, summary judgment is no longer a "disfavored remedy." Summary judgment is now seen as a "particularly suitable means to test the sufficiency" of a plaintiff's (or a defendant's) case." (*Perry,* at page 542).

The Supreme Court also ruled regarding admissibility of expert declarations. The Court held that "[a] party may not raise a triable issue of fact at summary judgment by relying on evidence that will not be admissible at trial". (CCP section 437c(c)). When the time for exchanging expert witness information has expired before a summary judgment is made, and a party objects to a declaration from an undisclosed expert, the admissibility of the expert opinion can and must be determined before the summary judgment motion is resolved." (*Perry* at page 543; overruling *Mann v. Cracchiolo* (1985) 38 Cal. 3d 18; also disapproving *Kennedy v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575). If the time for expert disclosure has expired and a party wishes to use an expert for summary judgment purposes (and the statutory criteria are otherwise satisfied) the party can seek relief. See CCP section 2034.610 [amendment of expert witness list] or section 2034.720 [relief from untimely disclosure] or perhaps request a continuance of the summary judgment motion pursuant to CCP section 437c(h) in order to do so.

A claim for medical malpractice is a claim alleging negligence and requires a showing of the usual negligence elements: duty, breach, causation, and harm. Summary judgment in a medical negligence case is appropriate where a claimant cannot prove one of the essential elements particular to a professional negligence claim: breach of the applicable professional standard of care, and proximate causation. Claimant must show that there has been a breach of the applicable standard of care in the medical community in which the claim arose as well as causation. (*Brantley v. Pisaro* (1996) 42 Cal. App. 4th 1591). The standard of care in such a

medical malpractice case requires a physician to exercise the reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances. (*Munro v. Regents of University of California* (1989) 215 Cal. App. 3d. 977, 982). The standard of care against which the acts of a physician are to be measured is a matter necessarily within the knowledge of experts and can only be proved by expert testimony. The only significant exception to the requirement for expert testimony to support a claim of the breach of standard of professional care requires the application of the theory of *res ipsa loquitur*, which has not been asserted as a theory of recovery in this Arbitration.

Thus Claimant can only prevail on his medical malpractice claim if he affirmatively establishes a breach of the duty of care required to be exercised by a physician in similar circumstances. A finding of medical negligence can only be based on a determination that the provider breached the applicable community standard of care; and that determination must be based on the expert testimony. (*Galvez v. Frields* (2001) 88 Cal. App. 4th 1410, 1420). "Negligence on the part of a physician and surgeon will not be presumed, it must be affirmatively proved." (*Savala v. Board of Trustees* (1993) 16 Cal. App 4th 1755, 1764). "Expert testimony is required unless it is a matter of common knowledge what conduct is required under the particular circumstances of the case," (See Landeros v. Flood (1976) 17 Cal. 3d 399, 410 [see reference to *res ipsa loquitur*, supra]). Accordingly, a malpractice claim that a physician failed to act with the requisite skill and knowledge can only be established with the testimony of medical experts. (*Selden v. Dinner* (1993) 17 Cal. App. 4th 166, 174 [medical malpractice claim not viable without expert testimony establishing the appropriate standard of care]; *Munro*, supra, at 984 [when a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within with community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence]).

In this Arbitration, Claimant has presented no expert testimony establishing that there was a breach of the standard of care. Respondent has submitted the declarations of Dr. and Dr. to show that the care and treatment they provided was within the appropriate standard of care. Claimant's opposition essentially consists of the following statements: "At this time, I have completed two (two) orthopedic examination of my hands. However, I have not

received a copy of my first orthopedic examination. I have enclosed for your review a copy of Dr. 's… October 7, 2017 evaluation of my right and left hands…[a]s well as photographs of the three-centimeter incision of my right hand's little finger. I do believe that I will have my case ready for [final hearing]" (Claimant's Opposition in letter form dated October 31, 2017). The evaluation by Dr. [1] is attached to Claimant's opposition and states that "The incision healed with good range of motion, but with some reduced sensation in the finger. The incision was longer than he had anticipated." Dr. also states: "Today he was focused on the length of incision for right hand [sic]. He expressed his concern that the incision was made longer than anticipated. I explained that I cannot speculate on whether incision is longer than necessary. In general, incisions are made to a length appropriate to address the condition" (report dated 10/16/2017, attached to Claimant's Opposition)

FINDINGS, ORDER AND AWARD

The Arbitrator finds that Respondents have submitted competent evidence to establish that Claimant cannot present a triable issue of fact on the element of breach of the standard of professional care and that Claimant has failed to show any breach of the standard of care by the submission of competent evidence. Accordingly, pursuant to the provisions of the California Code of Civil Procedure and the Rules for (Rule 38):

- Respondent's motion for summary judgment is GRANTED;
- Claimant shall take nothing on his claim(s) and Respondent is the prevailing party;
- The parties shall bear their own fees and costs; and
- Claimant is notified as follows: **Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Healthcare.**

Dated: Jan. 25, 2018

James R. Lambden

Hon. James Lambden (Ret.), Arbitrator

[1] There was no foundation laid for the letter and it is obviously hearsay.