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9
10 **IN THE MATTER OF ARBITRATION**

11 **AND**

12 **Claimants,**

13 **vs.**

14 **, and**

15 **Respondents.**

16 **NO. 15942**

17 **CASE NO. 70K563E**

18 **ORDER RE: RESPONDENTS' MOTION**
19 **FOR SUMMARY JUDGMENT**

20
21 **MOVING PARTIES: Respondents**

22 **, and**

23 **RESPONDING PARTIES: Claimants**

24 **and**

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29 **ORDER RE: RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This is an action for wrongful death alleging medical malpractice.¹ Claimants contend, in brief summary, that Respondents (moving parties) negligently treated their son, , by failing to perform brain imaging on a timely basis after diagnosis of testicular cancer which, they allege, would have led to an earlier diagnosis of metastatic testicular cancer.

Respondents' motion for summary judgment or in the alternative for summary adjudication of issues came on for telephonic hearing on January 29, 2020 before the Neutral Arbitrator. , Esq., of appeared on behalf of respondents. appeared in propria persona on behalf of claimants.

SUMMARY

After full consideration of the evidence, and the written and oral submissions by the parties, the Neutral Arbitrator finds that claimants failed to establish a triable issue of material fact as to respondents' compliance with the standard of care, and that respondents are entitled to judgment as a matter of law.²

Respondents' motion for summary judgment is supported by the expert declaration of , M.D. Dr. concludes that the care and treatment rendered by respondents was within the standard of care in the community and was not the cause of decedent's death. Because claimants failed to present admissible, expert evidence to

¹ The Demand for Arbitration is dated February 12, 2019.
² Having concluded that Claimants failed to establish a triable issue as to Respondents' compliance with the standard of care, the Neutral Arbitrator does not reach the question of causation.

1 controvert moving parties' showing that breach of the standard of care cannot be established,
2 summary judgment for respondents is proper.³

3 Alternatively, there is no triable issue of material fact as to claimants' cause of action for
4 medical negligence against respondent _____, because duty has not
5 been established, as it does not provide medical care and treatment.
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7 **LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT**

8 The purpose of a motion for summary judgment or summary adjudication "is to provide
9 courts with a mechanism to cut through the parties' pleadings in order to determine whether,
10 despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar v. Atlantic*
11 *Richfield Co.* (2001) 25 Cal.4th 826, 843.
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13 "A defendant moving for summary judgment must either negate a necessary element of
14 the plaintiff's case or establish a complete defense." *Munro v. Regents of University of*
15 *California* (1989) 215 Cal.App.3d 977, 881-882.
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17 A motion for summary judgment "shall be granted if all the papers submitted show that
18 there is no triable issue as to any material fact and that the moving party is entitled to judgment
19 as a matter of law." Code of Civil Procedure, section 437c, subd. (c).

20 Code of Civil Procedure, section 437c, subd. (o) provides as follows: "A cause of action
21 has no merit if either of the following exists: (1) One or more of the elements of the cause of
22 action cannot be separately established, even if that element is separately pleaded. (2) A
23 defendant establishes an affirmative defense to that cause of action."
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28 ³ See, Code of Civil Procedure, section 437c, subd. (p)(2).

1 Code of Civil Procedure, section 437c, subd. (p)(2) provides as follows: “A defendant ...
2 has met his or her burden of showing that a cause of action has no merit if that party has shown
3 that one or more elements of the cause of action, even if not separately pleaded, cannot be
4 established, or that there is a complete defense to that cause of action. Once the defendant ... has
5 met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more
6 material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely
7 upon the mere allegations or denials of its pleadings to show that a triable issue of material fact
8 exists but, instead, shall set forth the specific facts showing that a triable issue of material fact
9 exists as to that cause of action or a defense thereto.” See, Aguilar, supra, 25 Cal.4th at pp. 849-
10 852.
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12
13 “When the defendant moves for summary judgment and makes a prima facie showing
14 that one or more elements of plaintiff’s cause of action cannot be established, the burden shifts to
15 the plaintiff to make a prima facie showing that the element in question can be established.
16 (Code Civ. Proc., section 437c, subd. (c); Aguilar, supra, 25 Cal.4th at pp. 849-851.) If the
17 plaintiff cannot do so, summary judgment should be granted. (Code Civ. Proc., section 437c,
18 subd. (o)(1).)” *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463,
19 467.
20

21 **PRINCIPLES IN MEDICAL MALPRACTICE CASES**

22 The elements of a cause of action for medical malpractice are: “(1) a duty to use such
23 skill, prudence, and diligence as other members of the profession commonly possess and
24 exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent
25 conduct and the injury; and (4) resulting loss or damage.” *Johnson v. Superior Court* (2006) 143
26 Cal.App.4th 297, 305. See also, *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.
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1 “The first element, standard of care, is the key issue in a malpractice action and can only
2 be proved by expert testimony, unless the circumstances are such that the required conduct is
3 within the layperson’s common knowledge.” *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959,
4 968, citing *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.
5

6 Opinion testimony from a properly qualified witness is generally necessary to
7 demonstrate the elements for a medical malpractice claim. *Barris v. County of Los Angeles*
8 (1999) 20 Cal.4th 101, 108, fn.1.

9 “Both the standard of care and defendant’s breach must normally be established by
10 expert testimony in a medical malpractice case.” *Avivi v. Centro Medico Urgente Medical*
11 *Center* (2008) 159 Cal.App.4th 463, 467; see also, *Borrayo v. Avery* (2016) 2 Cal.App.5th 304,
12 310.
13

14 “The standard of care in a medical malpractice case requires that physicians exercise in
15 diagnosis and treatment that reasonable degree of skill, knowledge and care ordinarily possessed
16 and exercised by members of the medical profession under similar circumstances.” *Munro v.*
17 *Regents of University of California* (1989) 215 Cal.App.3d 977, 983-984.
18

19 “The standard of care in a medical malpractice case requires that medical service
20 providers exercise that . . . degree of skill, knowledge and care ordinarily possessed and
21 exercised by members of their profession under similar circumstances. The standard of care
22 against which the acts of a medical practitioner are to be measured is a matter peculiarly within
23 the knowledge of experts; it presents the basic issue in a malpractice action” *Alef v. Alta*
24 *Bates Hospital* (1992) 5 Cal.App.4th 208, 215.
25

26 The California Supreme Court has stated: “And when the matter in issue is one within the
27 knowledge of experts only and not within the common knowledge of laymen, the expert
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1 evidence is conclusive. [Citations.] Negligence on the part of a physician or surgeon will not be
2 presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it
3 will be presumed that a physician or surgeon exercised the ordinary care and skill required of
4 him in treating his patient. [Citations.]” Engelking v. Carlson (1939) 13 Cal.2d 216, 221.

5
6 Expert evidence, if uncontradicted, is conclusive proof as to the prevailing standard of
7 care and the propriety of the particular conduct of the health care provider. Starr v. Mooslin
8 (1971) 14 Cal.App.3d 988, 999.

9
10 “When the moving party produces a competent expert declaration showing there is no
11 triable issue of fact on an essential element of the opposing party’s claims, the opposing party’s
12 burden is to produce a competent expert declaration to the contrary.” Bozzi v. Nordstrom, Inc.
13 (2010) 186 Cal.App.4th 755, 761-762.

14
15 “California courts have incorporated the expert evidence requirement into their standard
16 for summary judgment in medical malpractice cases. When a defendant moves for summary
17 judgment and supports his motion with expert declarations that his conduct fell within the
18 community standard of care, he is entitled to summary judgment unless the plaintiff comes
19 forward with conflicting expert evidence.” Munro v. Regents of University of California (1989)
20 215 Cal.App.3d 977, 984-985.

21
22 “To qualify a witness as a medical expert, it must be shown that the witness (1) has the
23 required professional knowledge, learning and skill of the subject under inquiry sufficient to
24 qualify him to speak with authority on the subject; and (2) is familiar with the standard required
25 of a physician under similar circumstances; where a witness has disclosed sufficient knowledge
26 of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge
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1 goes more to the weight of the evidence than to its admissibility.” [Citation.] Evans v.
2 Ohanesian (1974) 39 Cal.App.3d 121, 128.

3 “A person is qualified to testify as an expert if he has special knowledge, skill,
4 experience, training, or education sufficient to qualify him as an expert on the subject to which
5 his testimony relates. Against the objection of a party, such special knowledge, skill, experience,
6 training, or education must be shown before the witness may testify as an expert.” Evidence
7 Code, section 720, subdivision (a).

9 “A witness’ special knowledge, skill, experience, training, or education may be shown by
10 any otherwise admissible evidence, including his own testimony.” Evidence Code, section 720,
11 subdivision (b).

13 “[W]itnesses may testify as experts only if they have ‘special knowledge, skill,
14 experience, training, or education’ sufficient to qualify them as experts on the subject to which
15 their testimony relates. (Evidence Code, section 720, subd. (a).) An expert’s qualifications must
16 be related to the particular subject on which he or she is giving expert testimony.” Jackson v.
17 Deft, Inc. (1990) 223 Cal.App.3d 1305, 1319.

19 “It is for the trial court to determine, in the exercise of a sound discretion, the
20 competency and qualification of an expert witness to give his opinion in evidence [citation], and
21 its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.”

22 [Citations.] Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal.App.4th 234, 274.

24 **RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT**

25 Respondents’ motion for summary judgment, or in the alternative summary adjudication
26 of issues, was filed on September 27, 2019. Respondents contend that there are no triable issues
27 of material fact with respect to respondents’ compliance with the applicable standard of care and
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1 treatment of _____, and that respondents committed no negligent act or omission that
2 caused or contributed to decedent's death. Alternatively, respondent
3 _____
4 alleges it is entitled to summary adjudication because no duty exists, as it does not
5 provide medical care.⁴

6 **Respondent's evidence: Declaration of _____, M.D.,**
7 **dated September 9, 2019**

8 Respondents motion for summary judgment is supported by the Declaration of
9 _____, M.D., who reviewed decedent's ambulatory and hospital records from
10 _____ and _____ Dr.
11 _____ opines that the care and treatment rendered to _____ was within the
12 standard of care and did not cause his death.
13

14 Dr. _____ states at paragraph 1: "I am Board Certified in Internal medicine
15 and Medical Oncology. I obtained my medical degree from Albert Einstein School of Medicine
16 and did my Residency at Bronx Memorial Hospital and Fellowship in Clinical Oncology and
17 Pharmacology at the Yale School of Medicine. I am currently licensed to practice in the State of
18 California. A true and correct copy of my C.V. is attached as Exhibit "A" to this declaration."⁵
19

20 Dr. _____ states at paragraph 2: "Based on my education, training, and
21 experience, I am familiar with the standard of care for treating patients in circumstances similar
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25 ⁴ Respondents also filed and served a Separate Statement of Undisputed Material
26 Facts. Claimants have not submitted a Separate Statement of Disputed and Undisputed Facts.
27 See, Code of Civil Procedure, section 437c, subd. (b).

28 ⁵ The Neutral Arbitrator's copy of Dr. _____'s Declaration did not have
his C.V. attached. Respondents' counsel provided Dr. _____'s C.V. to the Neutral
Arbitrator on February 6, 2020.

1 to those in this matter. I make this declaration of my own personal knowledge, and if called as a
2 witness to testify to the following, I would and could do so competently.”

3 Dr. states at paragraph 3: “I was asked by Respondent’s counsel to
4 review and analyze the medical care and treatment rendered to Claimants’ Decedent,
5 , by Respondents and to determine whether there was a breach in the applicable standard of
6 care and to determine whether any negligent care or omission was the cause of Decedent’s
7 death.”

9 Dr. at paragraph 5 sets forth the facts he relied on in forming his
10 opinions. [The facts relied on by Dr. are set forth on pages 2-5 of his
11 Declaration.]

13 Dr. states at paragraph 6: “Based on my review of the medical records,
14 as well as my training, education and experience, it is my opinion that the care and treatment
15 rendered to by Respondent healthcare providers, including all attending
16 physicians and staff was within the standard of care in the community, and to a reasonable
17 degree of medical probability, was not the cause of any alleged injuries to Mr. based upon
18 the following” [The reasons relied on by Dr. in stating his opinion are set
19 forth on pages 6-8 of his Declaration.]

21 Dr. states at paragraph 7: “Within a reasonable medical probability, no
22 negligent action or inaction by the treating physicians and staff, caused Decedent’s
23 death.” [The reasons relied on by Dr. in stating his opinion are set forth on
24 pages 7-8 of his Declaration.]

26 Dr. states at paragraph 8: “It is my opinion, based on my education,
27 training and experience as well as my review of the aforementioned medical records and
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1 deposition testimony that Decedent's death was the result of the natural progression of his
2 original diagnosis of metastatic testicular cancer in December 2016.

3 **Neutral Arbitrator's Finding:** Respondents have met their burden of showing that
4 claimants' cause of action for professional negligence has no merit by showing that the element
5 of breach of the standard of care cannot be established. CCP section 437c, subd. (p)(2). Thus,
6 the burden shifts to claimants to show that a triable issue of material fact exists as to
7 respondents' compliance with the standard of care. CCP section 437c subd. (p)(2).

8
9 **CLAIMANTS' OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY**
10 **JUDGMENT DATED NOVEMBER 21, 2019**

11
12 Claimants' filed a four page document entitled "response and supporting evidence" dated
13 November 21, 2019. At the hearing on December 9, 2019, the Neutral Arbitrator allowed
14 claimants until January 17, 2020, to file and serve declaration(s) opposing respondents' motion
15 for summary judgment; and respondents until January 24, 2020, to file and serve a response to
16 claimants' declaration(s). The telephonic hearing date on respondents' motion for summary
17 judgment was continued to January 29, 2020.

18
19 Claimants state on page 4 of their "response and supporting evidence" that they agree
20 with respondent that _____ is entitled to summary adjudication.

21 **RESPONDENTS' EVIDENTIARY OBJECTIONS DATED NOVEMBER 27, 2019;**
22 **NEUTRAL ARBITRATOR'S RULINGS THEREON**

- 23
24 1. "Claimant's Opposition lacks foundation and calls for inadmissible hearsay."
25 **Ruling:** Sustained. See also, Code of Civil Procedure, section 2015.5.
26 2. "Claimant's Opposition does not state Claimants have the requisite education,
27 training or experience, they do not state Claimants' qualifications as physicians or
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1 medical experts. Claimants do not state they are familiar with the standard of care of
2 any healthcare provider. Claimants do not state what records they reviewed.”

3 **Ruling:** Sustained on basis of lack of foundation as to issue of standard of care. See
4 also, Code of Civil Procedure, section 2015.5.
5

6 3. “Claimants’ Opposition is speculative and conclusory. Claimants have no expertise
7 in oncology or treatment of metastatic testicular cancer. They lack the foundation to
8 provide any opinion regarding the standard of care, causation or prognosis.”

9 **Ruling:** Sustained. See also, Code of Civil Procedure, section 2015.5.
10

11 4. “The statements are conclusory and thus cannot raise a triable issue of fact.”

12 **Ruling:** Sustained as to issue of standard of care. See also, Code of Civil
13 Procedure, section 2015.5.

14 **DECLARATION OF _____, Ph.D., DATED JANUARY 15, 2020**

15 Page 1 of Dr. _____’s Declaration describes two “references supporting opposition [to]
16 Respondents’ motion for summary judgment.”
17

18 (1) The ambulatory and inpatient (hospital and Emergency Department) medical records
19 from _____ and _____ ;

20 (2) NCCN National Comprehensive Cancer Network, Clinical Practice Guidelines in
21 Oncology-Testicular Cancer, Version 2.2016. Claimant refers to this document as the “NCCN.”
22

23 Dr. _____ states that NCCN Guidelines are nationally recognized for dealing with
24 complex, aggressive, and rare cancers; that the “[d]ocument is common reference within any
25 medical oncology department, for all cancer types”; and that California has four member
26 institutions within the NCCN: UCSF Helen Diller Family Comprehensive Cancer Center,
27
28

1 Stanford Cancer Center, City of Hope National Medical Center, and UC San Diego, Moores
2 Cancer Center.

3 Page 2 contains “ ’s declaration of expertise to render substantial evidence
4 beyond speculation and conclusory assertions.”

5
6 “ , Ph.D.

7 Education: Doctor of Philosophy, Biomedical Physics

8 David Geffen School of Medicine, UCLA, 1985

9 Experience: Professor Emeritus of Physics,

10 Faculty member—Medical Physics Graduate Program

11 and Radiation and Oncology Residency Program.

12
13 “Medical Physics is an applied branch of Physics concerned with the applications of
14 physical science to the diagnosis and treatment of disease. Utilizing instruments and techniques
15 used in the practice of radiology, nuclear medicine, and radiation oncology. Dr. has been
16 involved in teaching, research, consultation, and clinical service for over 32 years. Specific areas
17 of expertise include: Positron Emission Tomography (PET, Computerized Tomography (CT),
18 and Magnetic Resonance Imaging (MRI). Radiation Biology and Radiation Oncology.”

19
20 Dr. states in part at page 2: “From February 11-27, the Medical Record cited
21 documented statement of neurological symptoms that should have led to the ordering of MRI of
22 the brain to determine if any evidence of metastatic disease existed, (NCCN page MS-9).”

23
24 Dr. states in part at page 4: “From March 14-17, 2017, the Medical Record also
25 contained several documented statements of neurological symptoms that should have led to the
26 ordering of MRI of the brain to determine if any evidence of metastatic disease existed, (NCCN
27 page MS-9).”

28

1 Dr. 's "Summary" is set forth on pages 3-5 of his Declaration. The following are
2 excerpts:

3 "The Medical Record (Page 1384) states the disease at Stage 111b, intermediate risk,
4 nonseminoma. The NCCN (page MS-2) also points out that nonseminoma (as compared to
5 seminoma) is the more clinically aggressive tumor. Given that, the NCCN (page MS-13) states
6 that the cure rate is approximately 70%."

7
8 "During February and March 2017, decedent was in the Emergency Department, and
9 hospitalized, and under twenty-four hour care for seven days. Various neurological signs were
10 positive although, mild, one could not tell the origin(s) of the symptoms therefore (as described
11 in the NCCN guidelines) a cautious approach was warranted. MRI of the brain, with and without
12 contrast, should have been ordered because of what was clinically indicated (i.e.,...,extensive
13 lung metastasis, or neurological signs or symptoms)."

14
15 "Also, as stated in Medical Record (page 3231) patient was developmentally delayed—
16 therefore, in itself could help mask neurological symptoms making it more of a need to do brain
17 imaging in Feb/March while in the hospital."

18
19 "The neurological symptoms listed on the chart in February and March are consistent
20 with symptoms stemming from chemotherapy. But they are also symptoms one would expect
21 from developing brain metastases. Since the decedent had a disease well known to have a high
22 probability to spread to the brain—cranial imaging should have been performed."

23
24 "If cranial imaging was performed in February or March the brain metastasis would have
25 been much smaller leading to treatment at an earlier diagnosis. Also, early detection of the brain
26 metastases could have led to a different treatment plan than what was taking place (NCCN page
27 MS-13)."

28

1 “The discovery of the brain tumor in Feb or March would naturally lead to extracranial
2 imaging including the spine. Again, early detection of disease with the T1 and T2 vertebral
3 bodies would lead to a much higher medical probability of success.”

4
5 Dr. ’s “Conclusions” are set forth on pages 5-6 of his Declaration. The following
6 are excerpts:

7 “Consistent with the NCCN 70% cure rate statement (Page MS 13) – The Medical
8 Record (February 17, 2017 and April 3, 2017) the imaging showed that the Chemotherapy
9 treatment was very effective. There was a significant decrease in the number and size of
10 pulmonary metastases (Medical Record Page 3024). The chemotherapy treatment was yielding
11 positive results. The four-cycle chemotherapy regimen employed by Dr. (as recommended
12 by NCCN, page MS-13) appeared to be working well. Reasonable to still claim at least 70%
13 cure rate.”

14
15 “Some of the facts just stated above are in contradiction with the Expert Declaration by
16 Dr. (September 9, 2019). He states that the condition was not curable at the
17 time of initial diagnosis (December 2016). If so, why did Dr. not stage the disease at Stage
18 111c (poor-risk). If so, the initial treatment plan would have been different (NCCN, page MS-
19 13). From the declaration of Dr. , seems that he would have initially staged
20 the disease at 111c, poor risk. Therefore, according to NCCN the wrong treatment plan was
21 employed. NCCN list instead enrolling these patients in clinical trials as the preferred treatment
22 (page MS-13).”

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24
25 Dr. states that “triable issues regarding the Standard of Care remain and the motion
26 for Summary Judgment should be denied in order to allow this case to proceed to arbitration.”
27
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1 also, Garibay v. Hemmat (2008) 161 Cal.App.4th 735; Keniston v. American National
2 Insurance Co. (1973) 31 Cal.App.3d 803, 813.

3 **Neutral Arbitrator's Ruling on Admissibility of Declaration of [REDACTED], PhD**

4 The Neutral Arbitrator finds that Dr. [REDACTED] has not demonstrated he is qualified to opine
5 on the standard of care of physicians caring for and treating patients under circumstances similar
6 to decedent. Dr. [REDACTED] does not state in his declaration that he is familiar with the standard of
7 care required of physicians caring for patients under circumstances similar to decedent. Dr.
8 [REDACTED] does not explain how his stated expertise would qualify him to opine on the standard of
9 care required of physicians caring for patients under similar circumstances. Dr. [REDACTED] does not
10 state that he diagnoses or treats cancer patients. Dr. [REDACTED] does not state that he has a medical
11 degree. Dr. [REDACTED] does not state that he has practiced as a treating physician. The NCCN
12 document to which Dr. [REDACTED] refers is inadmissible hearsay. For these reasons, Dr. [REDACTED]'s
13 declaration lacks proper foundation for him to opine regarding the standard of care of physicians
14 caring for patients under similar circumstances, and on that ground his declaration is
15 inadmissible to prove the element of standard of care in a medical malpractice action. (See,
16 Code of Civil Procedure, section 437c, subd. (p)(2); see also, cases cited on pages 4-7 of this
17 Order.)

18 **Neutral Arbitrator's Finding:** Claimants have not presented admissible, expert
19 evidence that controverts respondents' showing that the element of breach of the standard of care
20 cannot be established. See, CCP 437c, subd. (p)(2). Thus, the Neutral Arbitrator finds that
21 claimants have not met their burden to show that a triable issue of material fact exists as to
22 respondents' compliance with the standard of care.
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1 "A defendant ... moving for summary judgment must 'show' that *either*: [1] one or more
2 elements of the 'cause of action ... *cannot be established*'; OR [2] there is a *complete defense* to
3 that cause of action. [CCP section 437c(p)(2) (emphasis added)]." California Practice Guide,
4 Civil Procedure Before Trial, 10:240.

6 "Once the moving party has met its initial burden, the burden shifts to the opposing party
7 to produce *admissible evidence* showing a triable issue of fact exists (CCP section
8 437c(p)(2))." California Practice Guide, Civil Procedure Before Trial, 10:253.

9 The first issue is whether respondents have met their initial burden of production under
10 CCP section 437c, subd. (p)(2). "A defendant has met his or her burden of showing that a cause
11 of action has no merit if that party has shown that one or more elements of the cause of action ...
12 cannot be established, or that there is a complete defense to that cause of action." The moving
13 party bears the initial burden of production to make a *prima facie* showing that there are no
14 triable issues of material fact. See, *Aguilar v. Atlantic Richfield Co.* (2001) 25 C.4th 826, 851.

17 In the instant case, Dr. _____ opined that the care and treatment rendered by
18 respondents was within the standard of care in the community. (Declaration of

19 _____, M.D., paragraph 6.)

20 The Neutral Arbitrator made the following Finding: "Respondents have met their burden
21 of showing that claimants' cause of action for professional negligence has no merit by showing
22 that the element of breach of the standard of care cannot be established. CCP section 437c, subd.
23 (p)(2). Thus, the burden shifts to claimants to show that a triable issue of material fact exists as
24 to respondents' compliance with the standard of care. CCP section 437c subd. (p)(2)."

26 "When the moving party produces a competent expert declaration showing there is no
27 triable issue of fact on an essential element of the opposing party's claims, the opposing party's
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1 burden is to produce a competent expert declaration to the contrary.” *Bozzi v. Nordstrom, Inc.*
2 (2010) 186 Cal.App.4th 755, 761-762.

3 “Once the moving party... has met that burden, the burden shifts to the plaintiff ... to
4 show that a triable issue of one or more material facts exists as to that cause of action or a
5 defense thereto” See, CCP section 437c, subd. (p)(2); *FSR Brokerage Inc. v. Superior Court*
6 (*Blanco*) (1995) 35 Cal.App.4th 69, 73-74.

7
8 Claimants in this case have not come forward with admissible, expert evidence regarding
9 the standard of care element that must be proved in a medical malpractice action. See, CCP
10 section 437c, subd. (p)(2). Dr. _____’s declaration as it relates to the issue of standard of care is
11 inadmissible for lack of a proper foundation and the NCCS document is inadmissible hearsay, as
12 discussed above.

13
14 The Neutral Arbitrator made the following Finding: “Claimants have not presented
15 admissible, expert evidence that controverts respondents’ showing that the element of breach of
16 the standard of care cannot be established. See, CCP section 437c, subd. (p)(2). Thus, the
17 Neutral Arbitrator finds that claimants have not met their burden to show that a triable issue of
18 material fact exists as to respondents’ compliance with the standard of care.”

19
20 Dr. _____’s expert declaration is uncontradicted and conclusive proof that
21 respondents complied with the prevailing standard of care. Claimants have not shown that a
22 triable issue of material fact exists as to that element of the cause of action for medical
23 malpractice. Because claimants have not done so, respondents are entitled to judgment as a
24 matter of law. *Aguilar v. Atlantic Richfield Co.*, supra, 25 CA4th 826, 854.

25
26 Respondents’ motion for summary judgment is granted.
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