

1 negligence led to Mr. [redacted] 's death. Claimant's Demand for Arbitration also alleges that
 2 [redacted], Mr. [redacted], and Dr. [redacted] 's "Failure to Diagnose,
 3 Improper Treatment, Failure to Warn the Patient of known risks, and the delay in proper
 4 treatment and diagnosis from December, 2018 until February 13, 2018," resulted in Mr.
 5 [redacted] 's death. Claimant's Demand for Arbitration states "[i]t is clear that medical
 6 malpractice occurred, and as a result caused Mr. [redacted] 's death."

7 Now, Respondents move for summary judgment against Claimant. Respondents argue
 8 that (1) Claimant cannot raise a triable issue of material fact in support of her claim for medical
 9 negligence against Respondents, and (2) Claimant cannot raise a triable issue of material fact in
 10 support of her claim against

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 12 **II. LEGAL STANDARD**

13 Where a defendant seeks summary judgment or adjudication, he must show that either
 14 one or more elements of the cause of action, even if not separately pleaded, cannot be
 15 established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c,
 16 subd. (p)(2).) A defendant may satisfy this burden by showing that the claim cannot be
 17 established because of the lack of evidence on some essential element of the claim. (*Union Bank*
 18 *v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the
 19 burden shifts to plaintiff to show that a triable issue of one or more material facts exists as to
 20 that cause of action or defense thereto. (*Ibid.*) If Plaintiff cannot prove the existence of a triable
 21 issue of material fact, summary judgment or summary adjudication in favor of the defendant is
 22 proper. (*Ibid.*)

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 24 **III. REASONING**

25 **A. Medical Negligence**

26 The elements of a medical malpractice cause of action are: "(1) the duty of the
 27 professional to use such skill, prudence, and diligence as other members of his profession
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1 commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection
2 between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting
3 from the professional's negligence.” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

4 In medical malpractice actions, the moving defendants are entitled to summary judgment
5 if their motions are supported with expert declarations that their conduct met the community
6 standard of care, unless the plaintiff provides conflicting expert evidence. (*Munro v. Regents of*
7 *University of California* (1989) 215 Cal.App.3d 977, 984–85; *Flowers v. Torrance Memorial*
8 *Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 [“The standard of care against which the
9 acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it
10 presents the basic issue in a malpractice action and can only be proved by their testimony...”].)

11 Respondents challenge the second and third elements of Claimant’s medical negligence
12 claim: breach and causation. Respondents provide the declarations of _____, M.D.
13 (“Dr. _____”), an experienced emergency medicine doctor, and _____ (“Dr.
14 _____”), an experienced radiologist, in support of their Motion for Summary Judgment.

15 Mr. _____ had presented to the emergency department at _____ on
16 January 21, 2018 with complaints of leg and buttock pain. (Respondent’s Separate Statement of
17 Undisputed Material Facts [“RUMF”], No. 2.) He was also seen by a nurse practitioner at “
18 _____” on January 24, 2018 for complaints of back pain. (RUMF, No. 6.)
19 He was also seen at “
20 _____” on February 13, 2018, requesting an x-
21 ray on his right leg, complaining of constant pain with and numbing to his knee. (RUMF, No.

22 Mr. _____ was also seen at _____ Urgent Care by Mr. _____ on
23 February 13, 2018, complaining of back pain and requesting an MRI. (RUMF, No. 10.) Mr.
24 _____ ordered spine, hip, and knee x-rays. (RUMF, No. 11.) Dr. _____ noted that Mr.
25 _____’s spine x-ray “showed no significant degenerative changes and no soft tissue
26 abnormality.” (RUMF, No. 12.) Dr. _____ “recommended an MRI for further evaluation if
27 there was a concern for radiculopathy.” (RUMF, No. 12.) Dr. _____ also reviewed Mr.

1 's hip and knee x-rays, noting no soft tissue in the former and no significant soft tissue
2 abnormality in the latter. (RUMF, Nos. 13-14.) Mr. received a Methylprednisolone
3 injection, and Mr. prescribed various medications, instructed Mr. to follow up
4 with his primary care physician and to return for new or worsening pain, and with a note to go
5 off work from February 13, 2018 through February 14, 2018. (RUMF, No. 15.)

6 Respondents met their burden to show Plaintiff cannot establish they breached their duty
7 to Mr. . Dr. 's opinion is the medical care and treatment provided to Mr.
8 complied with the applicable standard of care at all times. (RUMF, No. 18.) Dr.
9 's opinion is Mr. acted reasonably and appropriately in ordering x-rays and
10 administering a methylprednisolone injection. (RUMF, No. 19.) Dr. 's further opinion
11 is Mr. was properly examined and worked up in the urgent care clinic, including
12 undergoing spine, hip and knee x-rays. (RUMF, No. 20.) Dr. 's opinion is Mr.
13 's presentation did not warrant an MRI. (RUMF, No. 21.) His opinion is it was
14 reasonable and appropriate for Mr. to be prescribed with Deltasone and Norco for
15 pain. (RUMF, No. 22.)

16 Dr. 's opinion is that Dr. appropriately and reasonably evaluated Mr.
17 's x-rays, that there were no significant findings in the x-rays that were not addressed
18 in Dr. 's reports, and no findings from Mr. 's x-rays required further work-up or
19 treatment. (RUMF, Nos. 23-27.)

20 Respondents also met their burden to show Claimant cannot establish causation. Dr.
21 and Dr. opine that that nothing Respondents did or failed to do caused Mr.
22 any pain or injury. (RUMF, No. 28.)

23 The burden shifts to Claimant, who is not able to carry it. Claimant's late-filed
24 opposition includes no expert declaration or evidence. Instead, Claimant (1) argues
25 Respondents' Motion for Summary Judgment is premature; (2) requests a continuance to
26 conduct further discovery; and (3) contends she did not receive adequate notice of this hearing.
27 The Arbitrator addresses each contention in turn.

1 First, Claimant’s argument that Respondents’ Motion for Summary Judgment is
2 premature is unpersuasive. Claimant filed her Demand for Arbitration on February 10, 2019.
3 Respondents served their Motion for Summary Judgment on January 31, 2020, almost a year
4 later. Both parties had ample time to conduct discovery.

5 Second, Claimant’s request for a continuance to conduct further discovery is
6 unconvincing. “If it appears from the affidavits submitted in opposition to a motion for
7 summary judgment or summary adjudication, or both, that facts essential to justify opposition
8 may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a
9 continuance to permit affidavits to be obtained or discovery to be had, or make any other order
10 as may be just. The application to continue the motion to obtain necessary discovery may also
11 be made by ex parte motion at any time on or before the date the opposition response to the
12 motion is due.” (Code Civ. Proc., § 437c, subd. (h).)

13 In her declaration, Claimant states she obtained an attorney who was willing to assist her
14 in March 2020, before the shelter-in-place order was in place. (Opp., Decl., ¶ 6.) She
15 states she was unable to meet with the attorney in person to establish an attorney-client
16 relationship because of the shelter-in-place orders. (Opp., Decl., ¶ 6.) She states she
17 intends to pursue her claim and conduct discovery with the assistance of her discovery, given
18 the opening of the economy. (Opp., Decl., ¶ 6.) The Arbitrator understands that
19 current circumstances made it difficult to meet with attorneys in person, but there are numerous
20 telephonic and videoconferencing technology options that could have enabled Claimant to
21 speak with an attorney during the last several months.

22 Claimant also argues that her deposition, once she receives a copy, would raise triable
23 issues of material fact regarding treatment for Mr. ’s various medical conditions. (Opp.,

24 Decl., ¶ 8.) However, Claimant has provided no evidence that would suggest that her
25 deposition testimony qualifies as an expert witness’s testimony, and only an expert witness’s
26 declaration could rebut Respondents’ evidence. (See, e.g., *Munro v. Regents of University of*
27 *California, supra*, 215 Cal.App.3d 977, 984–85.)

1 Claimant further states that she is entitled to conduct discovery to establish the elements
 2 essential to her claims, and intends to do so. (Opp., Decl., ¶ 9.) But as far as the
 3 Arbitrator can determine, Claimant has had over a year and a half to conduct this discovery, but
 4 has not yet done so. Claimant fails to explain why, or explain what discovery, exactly, she still
 5 needs to conduct, why such discovery has not yet been conducted, or what facts she seeks to
 6 establish with this discovery. Claimant has not satisfactorily showed that “facts essential to
 7 justify opposition may exist but cannot, for reasons stated, be presented.” (Code Civ. Proc.,
 8 § 437c, subd. (h).)

9 On June 15, 2020, the Arbitrator gave an indicated ruling of granting the motion and
 10 denying the request in the written opposition for a continuance. However on June 16, Claimant
 11 made an oral request to continue the hearing and the Arbitrator granted the request to give
 12 newly retained attorney time to find an expert or even a potential expert to
 13 oppose the motion. On July 7, 2020, Ms. did not appear and Claimant made another
 14 request to look for another attorney. Again, due to the age of the case, the timely filing by
 15 Respondents and the speculative nature of Claimant being able to hire another attorney, the
 16 Arbitrator does not find good cause to continue. Therefore, Claimant’s request for a
 17 continuance is DENIED.¹

18 Third, Claimant argues that she did not receive proper notice of the continued hearing
 19 date from the moving party. (Opp., Decl., ¶ 4.) On April 14, 2020, the Arbitrator
 20 continued the hearing from April 20, 2020 to June 16, 2020. The Arbitrator’s office e-mailed
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 23
 24 ¹ The Arbitrator also notes that Claimant’s opposition papers, and therefore her request for a
 25 continuance, were not timely filed. A request for a continuance is due on or before the
 26 opposition deadline. (Code Civ. Proc., § 437c, subd. (h).) The opposition to a motion for
 27 summary judgment is due fourteen days before the hearing date, unless the court for good cause
 28 orders otherwise. (Code Civ. Proc., § 437c, subd. (b)(2).) The hearing date is June 16, 2020, so
 the opposition due date was June 2, 2020. Claimant did not file her opposition papers until June
 12, 2020, just four days before the hearing date. In other words, Claimant’s request for a
 continuance could also be denied simply because it was untimely.

1 and mailed written notice both to defense counsel and to Claimant. The service address it used
2 for Claimant is the same as the address on Claimant’s opposition papers:

3 . In other words, it is true that Respondents did not
4 provide notice, but because the Arbitrator’s office served notice of the continuance to Claimant
5 directly, Respondents were not required to do so.

6 For these reasons, the Arbitrator finds Claimant has not met her burden to show a triable
7 issue of material fact exists as to her medical negligence claim against Respondents. Thus,
8 Respondents’ Motion for Summary Judgment is GRANTED.

9 B. _____

10 Respondents also argue that Claimant cannot raise a triable issue of material fact in
11 support of her claim against _____. This argument appears to be an alternative
12 argument in favor of summary adjudication against _____, had Respondents not
13 prevailed on their Motion for Summary Judgment. The Arbitrator need not rule on this issue
14 because he already ruled in favor of _____ and the other respondents on Claimant’s
15 sole medical malpractice claim, above. The Arbitrator also notes that Respondents’ notice of
16 motion does not include a request for summary adjudication. Because of this lack of notice, had
17 the Arbitrator ruled in Claimant’s favor on Respondents’ first issue (the medical malpractice
18 claim), he would not have been able to grant summary adjudication in favor of
19 _____. (Cal. Rules of Court, rule 3.1350(b); *Maryland Casualty Co. v. Reeder* (1990) 221
20 Cal.App.3d 961, 974, fn. 4.) In other words, the Arbitrator need not and cannot rule on this
21 issue.

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IV. RULING

Respondents' Motion for Summary Judgment is GRANTED.

Claimant's request for a continuance is DENIED.

It is hereby ordered that judgment be entered in favor of Respondents and against Claimant. This matter shall be dismissed with prejudice as to Respondents.

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 Care.

IT IS SO ORDERED.



Dated: July 7, 2020

Hon. Benny Osorio (Ret.)

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