ARBITRATION CASE REFERENCE NO. 15843
JAMS ARBITRATION CASE REFERENCE NO.

,

Claimant,

and

Respondent.

Amended Decision Granting Respondents' Motion for Summary Judgment

I.

Procedural History of Motion

A motion for summary judgment (Motion) accompanied by a Separate Statement of Undisputed Facts were filed by Respondent (Respondent or) on or about August 15, 2019. An opposition to the Motion along with a Responsive Separate Statement were filed by Claimant Claimant) on or about October 31, 2019. Thereafter, a reply brief in support of the Motion was filed by along with a document entitled Respondents' Objections to Claimant's Evidence in Opposition to Respondents' Motion for Summary Judgment.

's moving papers included evidence pertaining to the specific care Claimant received at Roseville Emergency Department. This included the declaration of M.D., a purported expert in the field of emergency medicine. The declaration expressed Dr. opinion that the emergency medicine care and treatment received by Claimant, "complied in all respects with the standard of care" (Undisputed Fact 13). In addition, Dr. opined that no act or omission by the emergency room physician attending Claimant was a substantial factor in causing him injury or harm (Undisputed Fact 14).

Claimant's opposition took issue with a number of professed undisputed facts and included the declaration of M.D. who concluded that the care and

treatment provided by the emergency room staff to Claimant fell below the standard of care (Disputed Fact 13) and contributed to the deterioration of Claimant's health following his discharge from (Disputed Fact 14).

reply raised three principal points: (1) Dr. was not qualified to offer opinions as to the applicable standard of care regarding emergency medical care and treatment because she did not meet the qualifications to do so mandated by California Health and Safety §1799.110 (H&S 1799.110); (2) Dr. declaration inadequately set forth the bases for her opinions; and (3) there was no evidence submitted by Claimant that any breach in the standard of care was a substantial factor in causing injury to Claimant. reply brief was accompanied by Respondents' Objections to Claimant's Evidence in Opposition to Respondents' Motion for Summary Judgment raising specific objections to Dr. declaration and to Exhibit B which accompanied her declaration.

A telephonic oral argument was conducted with counsel and the arbitrator on November 15, 2019.[1] The focus of the arguments centered on whether Dr. was qualified as an expert to proffer standard of care opinion evidence under H&S 1799.110. counsel noted that there was a case on point and asked for leave to send a letter by the following Monday (November 18) citing the decision counsel argued was dispositive of the issue. Leave was granted, and counsel for Claimant was likewise given an opportunity to submit a letter response by Wednesday, November 20.

submitted its supplemental letter on November 18, and the following day, a similar response letter was submitted by Claimant. In addition to the legal citations and argument on the issue, Claimant also submitted a further Declaration of , M.D. Claimant argued in his letter that this supplemental declaration confirmed that Dr. met the requirements of H&S 1799.110, and her opinions raised triable issues of fact as to whether the care provided to Claimant by met the standard of care, as well as whether the breach of that standard proximately caused Claimant's health to deteriorate and caused injury.

In light of this additional evidence, counsel for requested until November 25 to file a further response. Although Claimant's counsel argued that a shorter time should be

[1] All further dates are in the 2019 calendar year unless otherwise indicated.

allowed, if at all, the arbitrator granted Kaiser's request and a final responsive letter was submitted by on November 25. The focus of this last response by was that the arbitrator should not consider Dr. supplemental declaration because it was not timely proffered by Claimant, and no leave to supplement the evidence was sought or granted. In addition, asserted that even if the supplemental declaration was allowed to be considered, it nevertheless failed to satisfy the requirement of H&S 1799.110, and was incompetent evidence.

The parties requested that a tentative decision on the motion and related matters be issued by the arbitrator after which counsel could request a further hearing. A Tentative Decision Granting Respondents' Motion for Summary Judgment was issued on December 4, and the parties were afforded an opportunity to request further oral argument by December 9. No such request having been made, the arbitrator now issues this final decision on the Motion.

II.

Analysis

A. The Additional Declaration of Dr. Was Submitted Without Leave and Will Not be Considered

As noted above, after briefing had been completed by the parties and at the conclusion of the hearing on the motion, leave was requested and granted for the parties to submit post-hearing letter briefs relating to the narrow question of what constitutes "emergency room services" within the meaning of H&S 1799.110. counsel submitted a brief within the time specified. However, the next day Claimant's counsel filed a letter brief attached to which was an additional declaration signed by Dr. which explained in more detail her experience in providing medical services in an emergency room setting. subsequently objected on the ground that the new declaration should not be considered because it was gratuitously submitted by Claimant's counsel without obtaining leave of court. In addition, asserted that even if the court exercises discretion to consider the declaration, its content did not create a triable issue of fact as to liability because Dr. experience did not satisfy the requirement of H&S 1799.110.

relies on *Bozzi v. Nordstrom, Inc.*, (2010) 186 Cal. App. 4th 755, 765. In that case plaintiff filed what she called a "surrebuttal" brief and supplemental declaration of Dr. on the day of the hearing on defendants' motion for summary judgment. Like here, plaintiff

never made a request to continue the hearing pursuant to Code of Civil Procedure section 437c, subdivision (h), on the ground that she could not have presented the supplemental declaration with her opposition brief, nor did she seek leave of court to file the "surrebuttal" brief or supplemental declaration. Counsel acknowledged on appeal that section 437c does not authorize 'surrebuttal' briefs or evidence, but argues the trial court should have exercised its discretion to consider the late papers, without offering any justification for her late submission.

The court found no abuse of discretion in the trial court's refusal to consider the late tendered evidence. The court noted:

"A trial court has broad discretion under rule 3.1300(d) of the Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 623, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6; accord, *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715–716, [trial court has broad discretion to refuse to continue hearing where affidavit did not establish Code Civ. Proc., § 437c, subd. (h) conditions].)

"We cannot find any reason to conclude the trial court abused its discretion. Defendants followed all the rules and were entitled to expect the trial court to enforce them. Plaintiff did not invoke any of the available procedures to obtain a court order permitting her to file late papers. In any event, the 'surrebuttal' brief and supplemental declaration primarily urged the competency of Dr. to testify about escalators, which the trial court had already found in plaintiff's favor in its tentative ruling. The only other new statement in the supplemental declaration was that if an escalator stops gradually rather than suddenly in a power outage, the forward acceleration will be less likely to push forward the people riding it. We question whether that observation is beyond a layperson's knowledge, but in any event, it did not show a material dispute as to whether defendants breached their duty of care or manufactured a defective product. The trial court properly refused to consider plaintiff's late-filed papers, and in this case, the outcome would not have been different even if plaintiff had obtained leave of court to file them." (*Bozzi v. Nordstrom, Inc., supra* at pp. 765–66; see also, *Choi v. Sagemark Consulting*, (2017) 18 Cal. App. 5th 308, 322), review denied (Mar. 21, 2018).)

The circumstances here are indistinguishable from the above-cited authorities, and the additional declaration of Dr. submitted after the hearing on the motion and without

obtaining leave to file it upon a showing of good cause will not be considered.

B. Even if Considered, Dr. Second Declaration Does Not Show the Requisite Experience Required by H&S 1799.110, and Therefore, Her Opinion Evidence Does Not Show a Triable Issue of Fact that Services Fell Below the Standard of Care, and Caused Claimant Injury and Damages

It is noted that, in addition to declining the request to consider the late proffered evidence, the court in *Bozzi v Nordstrom, Inc.* also briefly addressed the question of, if the trial court had considered the unauthorized late declaration, whether a triable issue of fact would have been found.

original objection to the first declaration of Dr. was its position that she was not qualified to offer opinion testimony concerning the standard of care for emergency room physicians and whether that standard was met under the facts of this case. In this regard, H&S 1799.110 is quite explicit in setting forth the evidentiary requirement:

"(a) In any action for damages involving a claim of negligence against a physician and surgeon arising out of emergency medical services provided in a general acute care hospital emergency department, the trier of fact shall consider, together with all other relevant matters, the circumstances constituting the emergency, as defined herein, and the degree of care and skill ordinarily exercised by reputable members of the physician and surgeon's profession in the same or similar locality, in like cases, and under similar emergency circumstances.

"(b) For the purposes of this section, "emergency medical services" and "emergency medical care" means those medical services required for the immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death.

"(c) 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 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 occurred."

Neither party disputes that Claimant was treated at

(Undisputed Facts 1 and 2). What was disputed by Claimant was whether the type of condition that caused his family to deliver him to the required emergency medical services under H&S 1179.110, and the services he actually received invoked H&S 1799.110. Indeed, as noted above that question was at the center of the oral argument and the post-hearing leave granted to supply supplemental legal authorities on that issue.

This question is easily answered both by referencing the two decisions cited by in its supplemental letter brief of November 18, as well as by *Miranda v. Nat'l Emergency Servs., Inc.*, (1995) 35 Cal. App. 4th 894, 905.

First, in *James v. St. Elizabeth Community Hosp.*, (*James*) (1994) 30 Cal. App. 4th 73, 76–77, the plaintiff had injured her left ring finger while moving boxes at work. Later that day, plaintiff visited a nearby clinic and was told that her finger was not broken. A clinic doctor applied a splint consisting of a "tongue depressor type piece of wood" and tape. The splint held the plaintiff's middle and ring fingers straight. During the night, plaintiff's ring finger swelled and her engagement and wedding rings tightened.

The next day, after several unsuccessful attempts to have her rings removed, plaintiff went to St. Elizabeth's emergency room. The emergency room personnel removed her rings. Plaintiff felt immediate relief. X-rays were ordered and after reading the X-rays, the attending physician informed plaintiff that her left ring finger had a small fracture. Plaintiff was instructed to leave the splint on for three to four weeks and to then see her own doctor. About four weeks later, plaintiff saw her physician. When the physician removed the splint, plaintiff was unable to bend her fingers. Plaintiff underwent extensive physical therapy for approximately a year, and her attorney claimed in his opening statement that plaintiff still suffers residual effects.

The appellate court concluded that the term 'emergency medical coverage' is broader than the term 'emergency medical services,' and subdivision (c) applies whenever an emergency room physician treats a patient in a general acute care hospital emergency department. (*James, supra* at pp. 79–81.)

James was quoted and followed in *Miranda v. Nat'l Emergency Servs., Inc.*, (1995) 35 Cal. App. 4th 894, which held: "[W]e emphasize that we do not differentiate between emergency

and nonemergency afflictions or injuries in applying subdivision (c) of section 1799.110. Hospital emergency rooms are often undoubtedly seen or used as a general medical office with conveniently extended hours. Nevertheless, emergency room patients 'receive treatment in a markedly different environment than in the relaxed office confines of a private practitioner' (*James, supra*, 30 Cal.App.4th at p. 81, 35 Cal.Rptr.2d 372) or in a hospital setting outside the emergency room. 'Not only is the atmosphere of an emergency room quite different, but so is the typical doctor-patient relationship that is found there.' (Ibid.)" (*Miranda* at p. 600.)

Therefore, there is no question that all of medical services provided to Claimant at the fell within H&S 1799.110, and required expert testimony by a physician who "had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department." H&S 1799.110(c).

This brings us to the last inquiry: whether the experience of Dr. qualified her to render expert opinions as to the quality of care received by Claimant. In her subsequent declaration, Dr. references her experience in the Emer (Department) as "providing emergency medical coverage" in that Department, noting that one of her professional duties "is to provide acute care *consultations*" in the Department. She also is "routinely called upon *to consult with emergency physicians* regarding the care and treatment of infants," and that she *consults* "with ER physicians concerning the care and treatment of infant illnesses in the ER and whether to admit the infant." [emphasis added]

argues that the statute was specifically intended to limit expert testimony to those who serve in the unique medical cauldron of hospital emergency rooms as regular emergency room physicians. conclusion from Dr. declaration is that she has not been employed as an emergency room physician but rather consults with emergency room physicians as necessary as a neonatologist. I agree that this is the most reasonable conclusion from her statements.

The court in *Stokes v. Baker* (2019) 35 Cal.App.5th 946, 963, noted that H&S 1799.110 was enacted to prevent "super-specialists", such as Dr. , from giving expert testimony on the standard of care for emergency room physicians. The court reasoned that the knowledge of a physician regularly engaged in the emergency room environment is essential to

understanding and assessing the sort of "instantaneous decisions" emergency room doctors must make, "often without the benefit of medical histories, consultation, or time for reflection" citing *James, supra*, 30 Cal.App.4th at p. 81. (*Stokes v. Baker*, 35 Cal. App. 5th 946, at 961.)

In its analysis, the *Stokes* court referenced a report to the Senate Judiciary Committee analyzing then proposed H&S 1799.110 which emphasized the "unusually high" malpractice exposure emergency room physicians face in comparison to other medical providers. (Sen. Com. on Judiciary (Aug. 8, 1977) Analysis of Assem. Bill No. 1301 (1977-1978 Reg Sess.) Section Dealing with Malpractice Liability for Emergency Physicians.) "The report identified several unique characteristics of emergency room care to explain this disparate impact, including that '[e]mergency physicians must make instantaneous decisions on the diagnosis and treatment of emergency patients,' while '[o]ther physicians have the ability to review past medical history, seek a consultation, study current medical literature, and reflect upon the proper diagnosis and course of treatment.' (Ibid.) The report stressed that this factor, in particular, subjected emergency room physicians to unfair treatment in malpractice litigation, explaining: plaintiffs 'may present expert testimony that the emergency physician was negligent,' but a jury may not appreciate that 'this expert witness had an opportunity to seek consultations, review medical texts, review the medical history, and reflect upon his testimony.' (Ibid.) Without this relevant context, the report concluded, 'it is extremely difficult in the calm atmosphere of the court room to recreate the atmosphere of urgency that existed in the emergency room.' (Ibid.)" (*Stokes v. Baker, supra* at pp. 962–63.)

In light of all of the foregoing, even if Claimant had requested leave to submit and have the arbitrator consider this second declaration of Dr.   in connection with Motion, that declaration does not meet the requirements of H&S 1799.110, and would be inadmissible on the issue of the standard of care applicable to emergency room physicians, in this case, Dr.   who provided the care to Claimant at the

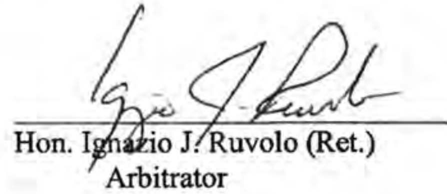
III.

Conclusion

The Motion is granted.

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 Health Care.

Dated: December 11, 2019



Hon. Ignazio J. Ruvolo (Ret.)
Arbitrator