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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MELODY DELARROZ et al., Plaintiffs and Appellants, v. CHW/MARION MEDICAL CENTER et al., Defendants and Respondents.	B171658 (Los Angeles County Super. Ct. No. BC278099)

APPEAL from a judgment of the Superior Court of Los Angeles County, Valerie L. Baker and Cesar C. Sarmiento, Judges. Affirmed in part and reversed in part with directions.

Gary Rand & Suzanne E. Rand-Lewis Professional Law Corporations and Suzanne E. Rand-Lewis for Plaintiffs and Appellants.

Patterson, Ritner, Lockwood, Gartner & Jurich, Clyde Lockwood, Tobie B. Waxman; Greines, Martin, Stein & Richland LLP, Martin Stein and Alison M. Turner for Defendants and Respondents Regents of the University of California, Edward Harry Livingston, James Tomlinson, James Watson and Steven Beanes.

Bauer, Clinkenbeard, Ramsey & Spackman LLP, Hugh S. Spackman and Barbara A. Carroll for Defendant and Respondent Catholic Healthcare West.

Plaintiffs and appellants Melody Delarroz and her husband John Delarroz[1] appeal from a judgment following a jury verdict in favor of defendants and respondents Edward Livingston, M.D., James Watson, M.D., James Tomlinson, M.D., Steven Beanes, M.D., and the Regents of the University of California (collectively "the UC defendants") in this medical malpractice action. The Delarrozes contend: (1) the trial court should not have sustained a demurrer to causes of action for "intentional tort" and fraud without leave to amend; (2) the trial court erred by striking the Delarrozes' supplemental expert witness list; (3) the trial court judge exceeded its jurisdiction by ruling on motions in limine after the case had been transferred to another trial court judge; (4) the trial court's rulings on the motions in limine were erroneous; (5) the trial court abused its discretion by denying leave to amend the complaint during trial to conform to proof; (6) the trial court admitted evidence in error; and (7) the trial court failed to instruct the jury properly. We conclude the record contains no reversible error and affirm the judgment in favor of the UC defendants.

In a consolidated appeal, the Delarrozes appeal from a judgment following an order granting summary judgment in favor of Catholic Healthcare West doing business as Marion Medical Center (Medical Center). The Delarrozes contend: (1) the trial court should have granted a continuance to allow them to conduct further discovery; (2) the trial court's rulings on evidentiary issues were erroneous; (3) the Medical Center's separate statement of undisputed facts was procedurally deficient; (4) the Medical Center

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[1] Because they share the same last name, plaintiffs will be referred to individually by their first names.

did not negate the causes of action against it to shift the burden of proof on summary judgment; and (5) triable issues of fact exist. We conclude a triable issue of fact exists as to whether the Medical Center staff breached the standard of care and reverse the judgment in favor of the Medical Center.

FACTS AND PROCEDURAL BACKGROUND

Operation and Resulting Complications

Dr. Livingston established the bariatric surgery program at UCLA in 1993. On June 28, 2001, Dr. Livingston evaluated Melody for gastric bypass surgery. They discussed the surgery, including the risks of the operation and complications. Melody signed consent forms. The surgery was scheduled for July 23, 2001. Melody arrived and met Dr. Tomlinson, who was the senior resident on Melody's surgical team.

In the operating room, an anesthesiologist inserted a nasogastric tube down Melody's esophagus to her stomach. Dr. Tomlinson began the surgery prior to Dr. Livingston's arrival. UCLA protocol requires Dr. Livingston, as supervising physician, to be present in the operating room during critical parts of the procedure. Dr. Tomlinson performed a part of the procedure which requires pulling the stomach toward the feet and putting his fingers behind the esophagus to insert a red rubber tube. In detaching the esophagus from adjacent structures, Dr. Tomlinson thought he detected that the nasogastric tube had perforated the esophagus. He called for Dr. Livingston, who arrived and searched for a perforation. Dr. Livingston could not find any perforation, concluded that Dr. Tomlinson had been mistaken, and completed the significant portions of the bypass surgery by stapling Melody's stomach and transecting her small bowel. General surgery resident Dr. Beanes was present during Melody's surgery and prepared her chart. The chart did not document a laceration of the esophagus.

After the surgery, Melody developed a sepsis-like syndrome and tested positive for a leak. Dr. Livingston performed a second surgery. The surgery required placing a type of catheter in a vein in her groin to deliver medications quickly. Using dye, the surgery team found a pinpoint hole in her esophagus. After corrective surgery, Melody left the operating room and was placed on a ventilator in the intensive care unit.

Melody was discharged from UCLA on August 6, 2001, with an extended open wound and three drainage tubes for a wound infection. Nurses assisted Melody at home in caring for the wound. Melody had a follow-up visit with Dr. Livingston in August. On September 5, 2001, Melody's left leg swelled and the nurses advised her to go to the hospital immediately. Melody was admitted to the Medical Center for five days. The swelling was caused by a blood clot which likely resulted from the catheter placement during the second surgery. Medication was administered to reduce the size of the clot. Melody was treated at the Medical Center by her primary care physician Dr. Robert Hammond.

Melody had follow-up visits with Dr. Livingston in November 2001 and February 2002. At the November visit, Dr. Livingston concluded that the wound was not healing as expected and referred her to plastic surgeon Dr. Watson. It was ultimately determined that Melody had bowel fluid surfacing through a fistula that had likely been caused by a suture. Dr. Livingston explained the dangers of remedying the fistula and advised Melody to wait as long as possible before performing additional surgery in order to allow her adhesions to soften. Melody had the necessary surgery performed by Dr. Kenneth Waxman in April 2002.

The Complaint

In July 2002, the Delarrozes filed a complaint against multiple defendants, including the Regents, the Medical Center, and Drs. Hammond, Livingston, and Watson, alleging professional negligence, intentional and negligent emotional distress, fraud, and

loss of consortium. The Delarrozes amended their complaint to substitute Drs. Tomlinson and Beanes as Doe defendants. The UC defendants filed a demurrer to the fraud and emotional distress causes of action, which the trial court sustained with leave to amend.

In March 2003, the Delarrozes filed an amended complaint, alleging professional negligence against all defendants based on the following allegations. Each defendant was a medical practitioner or health care provider held out as possessing the degree of skill common to the medical community. On July 23, 2001, Melody consulted with defendants for diagnosis and treatment, which defendants undertook to provide. That same day, Melody suffered injury during gastric bypass surgery while under the care of the Regents, and Drs. Tomlinson, Beanes, and Livingston. Melody's injury was exacerbated by failure on the part of the Regents, the Medical Center, and Drs. Tomlinson, Beanes, Livingston, Watson, and Hammond to properly treat her, including misrepresentation of her condition and concealment of material facts concerning her condition, surgery, residuals, and permanent injuries. Defendants negligently provided treatment and health care services to Melody and engaged in unreasonable acts or omissions that fell below the standard of care commonly exercised by health care providers in the community, which acts and/or omissions were the legal cause of Melody's resulting permanent injuries. As a result of defendants' professional negligence, Melody suffers from permanent damage to her gastrointestinal and immune systems, permanent internal and external scars, adhesions, emotional distress, pain, suffering, and anxiety.

The Delarrozes alleged a cause of action for fraud against the Regents and Drs. Livingston, Hammond, and Watson, containing the following allegations of intentional and negligent misrepresentation. On July 23, 2001, and during Melody's hospitalization at UCLA, Drs. Livingston, Hammond, and Watson represented: (1) they were knowledgeable and qualified in gastric bypass surgery and treatment of Melody's medical condition; (2) Melody's bypass surgery was accomplished without

complication; and (3) Melody did not need further medical care. These representations were false, because: (1) Melody had suffered injury during the surgery that was caused by defendants; (2) Dr. Livingston did not perform the surgery; (3) Melody suffered complications which required immediate intervention; and (4) Melody has permanent external and internal scarring that will cause her problems for the rest of her life. Defendants knew the representations were false when they made them or had no reasonable grounds for believing the representations were true.

In addition to these misrepresentations, the Delarrozes alleged that on July 23, 2001, and thereafter, the Regents and Drs. Livingston, Hammond, and Watson concealed: (1) Melody had suffered injury during surgery and complications due to their professional negligence; (2) her true condition and its cause; and (3) Melody could not wait before receiving additional treatment. The Delarrozes also alleged that these same defendants were liable for making a promise without the intent to perform. Specifically, defendants promised they would provide expert care and treatment without the intent to perform. In justifiable reliance on defendants' conduct, Melody did not seek other medical treatment.

A cause of action entitled "intentional tort" was alleged against the Regents and Drs. Hammond, Livingston, Tomlinson, and Beanes. The professional negligence allegations were incorporated by reference. In addition, the Delarrozes alleged that they "suffered severe emotional distress due to the conduct of said Defendants. Said Defendants[] caused [Melody] to suffer injury, when they caused injury to her esophagus. [Melody] did not consent to said contact. Because Defendants lacerated [Melody's] esophagus, then left said laceration open, [Melody's] internal organs became infected and she suffered life threatening illness. [John] witnessed [Melody's] post-surgical course, at which time, [Melody] almost died, and only after [John] demanded intervention, did said Defendants finally acknowledge and agree to treat [Melody's] infection. At this time [the Delarrozes] observed green pus coming from [Medody's] abdomen. [The Delarrozes]

were severely distressed because [Melody] had to remain hospitalized, became severely anxious and depressed and had to remain on a respirator in order to breathe."

The "intentional tort" cause of action incorporated the allegations of the fraud cause of action by reference and additionally alleged that "[Melody] did suffer a battery when Defendants lacerated her esophagus, since said offensive touching was not authorized by her. [Melody] did not authorize anyone other than Dr. Livingston to perform her surgery, and all contact during surgery by the other Defendants was an unauthorized battery. [Melody] is informed and believes that [Dr. Livingston] did not in fact perform her surgery and did not supervise same; thus, allowing [Melody] to be placed in a life-threatening situation, which he thereafter concealed from both [of the Delarrozes,] to their great emotional distress. [¶] [The Delarrozes] did suffer due to Defendants' outrageous and fraudulent conduct, severe anguish, anxiety, anger and fear, all to their general damage, as stated herein." In addition, the Delarrozes alleged a cause of action for loss of consortium.

The UC defendants filed a demurrer on the grounds that the cause of action entitled "intentional tort" did not properly state a cause of action for intentional or negligent infliction of emotional distress and the fraud cause of action failed to allege facts with sufficient particularity. The Delarrozes filed an opposition. The trial court sustained the demurrer without leave to amend on the grounds that the intentional tort cause of action was unclear, fraud had not been alleged with particularity, and the Delarrozes had not shown a reasonable likelihood that these defects could be cured through amendment.

During the hearing on the demurrer, the Delarrozes' counsel argued that the intentional tort cause of action sufficiently alleged the elements of battery. Their counsel requested leave to amend to expand the allegations to plead separate causes of action for battery and intentional infliction of emotional distress. Their counsel represented that the Delarrozes could allege "the defendants caused an unauthorized touching of the plaintiff's person; that -- as we have in the amended complaint already, that

Dr. Livingston had been authorized to perform the surgery and nobody else; that Dr. Livingston, in fact, did not perform the surgery, and, therefore, the other physician that did perform the surgery performed -- excuse me, committed a battery against the plaintiff's person; that based on the conduct and the battery that was performed against the plaintiff she sustained damages." The trial court noted that the cause of action had been alleged against nearly all of the other defendants, including Dr. Livingston. The Delarrozes' counsel stated that Melody had been unconscious during the procedure, and discovery was ongoing, but acknowledged that they could narrow down the defendants. The UC defendants' counsel argued that if an unauthorized individual performed Melody's surgery, the cause of action would be lack of consent, which was a subset of professional negligence. The trial court sustained the demurrer to the causes of action for intentional tort and fraud without leave to amend and granted the UC defendants' motion to strike the fraud cause of action.

The Medical Center filed a motion for summary judgment, which the trial court granted, as discussed in greater detail below. The Delarrozes filed a timely appeal. Dr. Watson also filed a summary judgment motion and prevailed.

Trial

A jury trial was held in February 2004. The remaining defendants were the Regents and Drs. Livingston, Tomlinson, and Beanes. During the proceedings, the Delarrozes requested leave to amend to allege a medical battery cause of action. The trial court denied their request. Prior to closing arguments, the trial court instructed the jury that to establish negligence, Melody must prove one or more of the defendants had been negligent, she was harmed, and the negligence was a substantial factor in causing the harm.

The trial court specifically instructed the jury on California Code of Regulations, title 22, section 70707 as follows in pertinent part: "These are the patient's rights the

defendants must have observed . . . as to Melody Delarroz: the right to considerate and respectful care; the right to know the name of the physician who has primary responsibility for coordinating her care and the names [and] professional relationships of all other physicians [and] non-physicians who will see her; . . . [¶] [t]he right to receive as much information about any proposed treatment or procedure as she may need in order to give informed consent or to refuse this course of treatment[.] Except in emergencies[, this information] shall include a description of the procedure or treatment[,] that medically significant risks are involved, alternate courses of treatment or nontreatment, and the risks involved in each[,] and to know the name of the person who will carry out the procedure or treatment; [¶] [t]he right to participate actively in decisions regarding medical care; . . . the right to a reasonable continuity of care and to know in advance the time and location of appointments as well as the identity of the persons providing care[.] [¶] . . . [¶] If you decide that [anyone] of the defendants violated any one of [the rights] above and that violation was [a substantial factor] in bringing about their harm, then you must find that defendant negligent. [¶] If you find that a defendant did not violate this law or that violation was not a substantial factor in bringing about their harm, you must still decide whether or not that defendant was negligent in light of the other instructions."

The trial court instructed the jury on informed consent as follows: "If a patient consents to a medical procedure, they must be informed. A patient gives an informed consent only after the physician/surgeon has explained the proposed treatment or procedure. A physician or surgeon must explain the likelihood of success and the risks of [agreeing to a] medical procedure in . . . language that the patient can understand and give the patient as much information as she needs to make an informed decision, including any reasonable risk that a reasonable person would consider important in deciding to have proposed treatment or operation. [¶] The patient must be told about any risk of death or any serious potential risk or potential result that may occur after a procedure is performed. A physician/surgeon is not required to explain minor risks that are not likely to occur. [¶] Melody Delarroz claims that the Regents were negligent

because Dr. Livingston and/or Dr. Tomlinson and/or Dr. Beanes performed procedures on Melody Delarroz without her informed consent. To establish this claim, Melody Delarroz must prove all of the following: one, that Dr. Livingston and/or Dr. Tomlinson and/or Dr. Beanes performed procedures on Melody Delarroz; two, that Melody Delarroz did not give her informed consent for the procedure[] . . . performed by Dr. Livingston and/or Dr. Tomlinson and/or Dr. Beanes; [¶] [t]hat a reasonable person in Melody Delarroz's position would not have agreed to the procedure to be performed by Dr. Livingston and/or Dr. Tomlinson and/or Dr. Beanes if he or she had been fully informed of the results and risks of Dr. Livingston, Dr. Tomlinson, Dr. Beanes in performing the procedure; [¶] [a]nd four, that Melody Delarroz was harmed[] . . . by the result or risk[] that the Regents should have explained before Dr. Livingston and/or Dr. Tomlinson and/or Dr. Beanes performed procedures on Melody Delarroz."

After the trial court instructed the jury, the Delarrozes' counsel discussed the verdict form and the instructions during closing argument, including the instruction on negligence per se instruction. Counsel stated: "These basic protections exist in the law because everybody has a right to the sanctity of their own body. Period. That's how simple this case is. [¶] If someone does not respect the sanctity of your body, by touching you without your consent, it's a violation of the law. And in the context of the health care, it's a clear violation of your rights as a patient[,] because a patient cannot be touched or operated upon by a physician who they did not retain as their doctor, and they did not consent to perform their operation." The Delarrozes' counsel reviewed the evidence to support finding that neither Dr. Beanes nor Dr. Tomlinson had ever spoken with the Delarrozes. The Delarrozes argued that Dr. Beanes did not comply with the law, because he touched Melody in violation of her ability to choose her physician and did not comply with items one through nine of the Administrative Code section. The Delarrozes argued that Melody had a right to know Dr. Tomlinson's name, his professional relationship to Dr. Livingston, and the fact that he would be doing the surgery as part of her right to informed consent.

The special verdict form asked the jury for a yes or no answer as to whether Drs. Livingston, Tomlinson, or Beanes or the Regents were negligent. If the jury had answered affirmatively as to any one of the doctors or the Regents, they would have next answered whether defendants' negligence was a substantial factor in causing harm to Melody. However, the jury found each of the defendants had not been negligent and did not reach the substantial factor question. Judgment was entered in favor of the Regents and Drs. Livingston, Tomlinson, and Beanes on May 17, 2004. The Delarrozes filed a timely appeal. The appeals from the summary judgment in favor of the Medical Center and the judgment following the jury trial were consolidated.

DISCUSSION

I. Exclusion of Substantive Causes of Action

A. Standard of Review

"When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The trial court's denial of leave to amend the complaint to conform to proof during the proceedings is also reviewed for abuse of discretion. Ordinarily, trial courts should exercise liberality in permitting amendments. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965; *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159.) Nevertheless, "a trial court's exercise of discretion with respect to amendment of

pleadings should be upheld unless clearly abused." (*Avedissian v. Manukian* (1983) 141 Cal.App.3d 379, 384.)

We also note that, "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

However, a judgment may not be reversed on appeal "for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)" (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

B. Medical Battery

The Delarrozes make several contentions, based on their allegation that Melody did not consent to the performance of surgical procedures by medical practitioners other than Dr. Livingston. Specifically, the Delarrozes contend: (1) the amended complaint stated a cause of action for medical battery; (2) the trial court should have granted leave to amend after sustaining the demurrer or during the trial to state a cause of action for medical battery; and (3) the trial court erred by refusing to instruct the jury on medical battery. Even were these contentions found to be true, any error was harmless and does not warrant reversal because the jury's verdicts in favor of defendants on the theories of negligence per se and informed consent demonstrate the Delarrozes would not have prevailed had the issue of medical battery been submitted to the jury.

"[A] physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used." (*Conte v. Girard Orthopaedic*

Surgeons Medical Group, Inc. (2003) 107 Cal.App.4th 1260, 1266-1267.) "A typical medical battery case is where a patient has consented to a particular treatment, but the doctor performs a treatment that goes beyond the consent." (*Id*. at p. 1267.) "'The scope of the defendant's protection is the scope of the consent. If his conduct would be tortious except for consent and his conduct goes beyond the consent . . . , he is subject to liability.' [Citation.] In the medical battery context, the scope of the consent is important because the gist of such battery is that the doctor has intentionally touched the patient without consent or in a manner that exceeds the consent and without justification. [Citations.]" (*Id.* at p. 1268.) The plaintiff must also prove that the harmful or offensive contact caused injury. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1495.)[2]

In this case, the Delarrozes' medical battery theory was based on the same facts as their theories of negligence per se and informed consent. The negligence per se instruction stated that if a defendant violated any of nine rights and the violation was a substantial factor in bringing about harm to Melody, then the jury must find the defendant was negligent. One of the rights was the right to know the names and professional relationships of all physicians who would see her and the right to know in advance the identity of the persons providing her care. By finding that defendants were not negligent, the jury necessarily found that Melody knew the names and professional relationships of all the physicians who saw her and the identity of the persons providing her care, or that any violation of this law was not a substantial factor in causing her harm.

Another one of the rights was that Melody had the right to receive as much information about the proposed procedure as she might need to give informed consent,

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[2] A battery may also be found if the patient expressly places conditions on her consent to a medical procedure, the medical practitioner intentionally violates the condition, and the patient suffers harm as a result of the doctor's violation. (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.*, *supra*, 107 Cal.App.4th at p. 1269.) The Delarrozes did not argue in the trial court or on appeal that Melody expressly placed conditions on her consent that were communicated to defendants, but that defendants nevertheless violated.

including a description of the procedure, the medically significant risks, alternate courses of treatment, and the name of the person who would be carrying out the procedure. By finding that defendants were not negligent, the jury necessarily found that Melody received sufficient information to give informed consent to the gastric bypass procedure, including a description of the procedure and the medically significant risks, as well as the names of those who would be carrying out the procedure, or the jury found that any violation of this law was not a substantial factor in bringing about harm to Melody.

The instruction on informed consent similarly provided that a physician must give a patient as much information as she needs to make an informed decision to consent to a medical procedure. The jury was instructed that the Delarrozes had to prove a defendant had performed procedures on her, she did not give her informed consent for the procedure to be performed, a reasonable person would not have agreed to the procedure had she been fully informed, and Melody was harmed by a result or risk that the defendant should have explained before performing procedures. In closing argument, the Delarrozes' counsel explained these instructions by stating that if Melody was operated upon by a physician whom she did not retain as her doctor, then she had not consented to that physician performing her operation. The Delarrozes' counsel argued that both under the Administrative Code and as part of giving informed consent, Melody had a right to know Dr. Tomlinson's name, his professional relationship to Dr. Livingston, and the fact that he would be doing her surgery.

It is clear that in finding defendants were not negligent, the jury necessarily found that Melody knew physicians other than Dr. Livingston would be performing procedures during her operation, or the jury found that the performance of procedures by other physicians was not a substantial factor contributing to her injuries. It is apparent from the jury verdicts that had the trial court permitted the Delarrozes to amend their complaint to allege a cause of action for medical battery and instructed the jury on medical battery, the jury would have found that one of the elements of a medical battery had not been established: Melody consented to performance of procedures by physicians other than

Dr. Livingston, or the other physicians' conduct was not a substantial factor in causing her harm. We conclude it is not reasonably probable that a result more favorable to the Delarrozes would have been reached had the trial court granted them leave to amend the complaint to state a cause of action for medical battery or instructed the jury on medical battery. (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

C. Intentional and Negligent Misrepresentation

The Delarrozes similarly contend: (1) the amended complaint stated a cause of action for intentional or negligent misrepresentation; (2) the trial court abused its discretion by sustaining the demurrer without leave to amend; and (3) the trial court erred by refusing to instruct the jury on negligent misrepresentation. We disagree.

"The elements of a cause of action for fraud and a cause of action for negligent misrepresentation are very similar. Pursuant to Civil Code section 1710,[3] both torts are defined as deceit. However, the state of mind requirements are different. 'Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]' [Citation.] Negligent misrepresentation lacks the element of intent to deceive. Therefore, ' "[w]here the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." [Citation.]' [Citations.]" (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 85-86.)

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3 "Civil Code section 1710 provides in pertinent part: 'A deceit, . . . , is either: [¶] 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; [¶] 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; [¶] 3. The suppression of fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact[.]'"

"'In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus '"the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect."' [Citation.] This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.'"' [Citation.]" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) Several cases have implied that negligent misrepresentation must be pled with specificity as well. (*Ibid*.)

The Delarrozes did not allege any misrepresentation by any defendant with the requisite specificity to state a cause of action for fraud, nor did they meet their burden to demonstrate in the trial court or on appeal that they could have amended their complaint to allege a misrepresentation with specificity. The Delarrozes alleged in the most general terms that over the course of several days, three doctors collectively represented that: they were knowledgeable and qualified in gastric bypass surgery and treatment of Melody's medical condition; Melody's bypass surgery was accomplished without complication; and Melody did not need further medical care. These allegations were insufficient to identify any specific representation made by a particular defendant, the source of the representation or the means by which the representation was made, when the statement was made, or to whom the statement was made. Although the Delarrozes requested leave to amend to expand the allegations of the amended complaint, the Delarrozes did not identify in the trial court or on appeal any particular statement alleged to have been false or any of the other facts necessary to state a cause of action for intentional or negligent misrepresentation. Therefore, the trial court did not err by denying the Delarrozes leave to amend and refusing to instruct the jury on negligent misrepresentation. (See *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1819 [demurrer to fraud cause of action properly sustained without leave to amend where the appellate court could not perceive a "reasonable possibility that the defects in the complaint can be cured by amendment," and plaintiff did not "suggest any such

possibility"]; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 75 [flaws in allegations in fraud cause of action justified sustaining demurrer without leave to amend].)

D. Concealment

The Delarrozes contend: (1) the amended complaint stated a cause of action for fraud based on concealment; (2) the trial court abused its discretion by sustaining the demurrer without leave to amend and denying leave to amend to conform to proof during trial; and (3) the trial court erred by refusing to instruct the jury on concealment. We conclude that any error was harmless, because the jury necessarily would have found against the Delarrozes on this cause of action.

"'[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citation.]" (*Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157-158.)

In their amended complaint, the Delarrozes alleged defendants concealed that Melody suffered injuries during surgery and complications as a result of negligence that required immediate further treatment. In requesting leave to amend, the Delarrozes did not propose any additional allegations concerning concealment. Apart from whether the trial court abused its discretion by denying leave to amend, there is no reasonable probability that the Delarrozes would have prevailed if their concealment cause of action had been presented to the jury. According to the jury verdicts, there was no negligence; it follows that there was no concealment of negligence. Assuming there was error in denying the motion to amend the complaint as to the cause of action alleging fraud by

concealment, the error was necessarily nonprejudicial in light of the jury verdict on negligence.

During the trial, the Delarrozes requested leave to amend to allege a cause of action for concealment based on defendants' failure to inform Melody that individuals other than Melody's doctor would be operating on Melody. The jury was instructed on this subject in connection with the negligence cause of action and resolved the issue in favor of defendants and against the Delarrozes. Under these circumstances, it is not reasonably probable a result more favorable to the Delarrozes would have occurred had the trial court permitted leave to amend the complaint. (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

II. Evidentiary and Trial Issues

A. Supplemental Expert Witness List

In December 2003, the parties exchanged expert witness information pursuant to Code of Civil Procedure section 2034.[4] The UC defendants designated a surgery specialist and a plastic surgery specialist as expert witnesses retained for trial. They designated Drs. Livingston, Beanes, and Tomlinson as expert witnesses who had not been retained. The UC defendants provided addresses for the witnesses and an expert witness declaration stating that the surgery specialists would testify as to all issues relevant to the litigation, including the standard of care, causation, and damages. The Delarrozes' expert witness information consisted of 20 names of "non-retained experts" whose opinions they expected to offer in evidence at trial, including the individual defendants and other

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[4] All further statutory references are to the Code of Civil Procedure unless otherwise noted. Section 2034 has been reorganized without substantive change as sections 2034.010 et seq. effective July 1, 2005. All references to section 2034 are to the provision in effect at the time of the proceedings in this action.

treating physicians, other employees of the Regents, and defendants' experts. The Delarrozes did not provide addresses, nor did they attach an expert witness declaration.

On January 9, 2003, the Delarrozes provided a "supplemental" exchange of expert witness information adding internist Dr. Irene Faust and surgeon Dr. Michael Leitman as retained experts. The Delarrozes' counsel also submitted an expert witness declaration stating that Dr. Faust would testify as to Melody's injuries and the reasonableness of the care she received, and Dr. Leitman would testify as to all issues relevant to the litigation, including the standard of care, causation, and damages.

The UC defendants filed an objection and moved to strike the supplemental designation of expert witnesses on the ground that the Delarrozes had not meaningfully participated in the original exchange of expert information. The Delarrozes argued in opposition to the motion that they had not retained an expert prior to December 22, 2003, and therefore, the supplemental designation was permitted under section 2034, subdivision (h). The Delarrozes' attorney declared that although the Delarrozes had submitted expert declarations provided by Dr. Leslie Rand-Luby in opposition to various summary judgment motions, Dr. Rand-Luby had never been retained as an expert. Dr. Rand-Luby is the Delarrozes' counsel's sister and she provided declarations as an informal consultant to save litigation costs. The Delarrozes did not authorize their attorney to retain an expert witness until after they received the UC defendants' expert designations.

After a hearing, the trial court granted the motion to strike the Delarrozes' supplemental designation. The trial court found no justification for the Delarrozes' failure to designate Drs. Faust and Leitman in their original designation and concluded no grounds existed to supplement the designation under section 2034, subdivision (h). Moreover, the trial court found the Delarrozes were aware in advance of the original designation that they would be required to call experts in surgery and internal medicine, based on the nature of the action and the UC defendants' submission of a surgeon's declaration in support of a prior summary judgment motion.

On appeal, the Delarrozes contend that they were entitled to submit a supplemental expert witness list pursuant to section 2034, subdivision (h) as a matter of law. We conclude that section 2034, subdivision (j) requires the trial court to exclude an expert witness who was not properly designated in the original exchange under subdivision (f), even though the criteria for submission of a supplemental list under subdivision (h) might otherwise be satisfied.

Section 2034 governs discovery pertaining to expert witnesses. Any party may demand the simultaneous exchange of information concerning expert trial witnesses. (§ 2034, subd. (a).) Parties must provide expert witness information, including names and addresses, on or before the date specified in the demand. (*Id.*, subd. (f).) If the expert is a party, an employee of a party, or has been retained for the purpose of providing an opinion, the designation of that witness shall include "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (*Id.*, subd. (f)(2)(B).)

"Within 20 days after the exchange . . . , any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." (§ 2034, subd. (h).) The supplemental list permits a party to add experts in response to an adversary's designation; it does not excuse the failure to list experts that should have been disclosed in the initial witness exchange. (Cf. *Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 91 [replacing an expert who subsequently became unavailable required a motion to augment under section 2034, subdivision (k)]; *Basham v. Babcock* (1996) 44 Cal.App.4th 1717, 1723 [supplemental list may not be used to substitute experts]; but see *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575, 580, fn.5 [declining to address whether the statutory purpose of section 2034 to provide simultaneous exchange of expert

information vitiates the express language allowing supplemental designation of retained experts when no retained experts were designated in original exchange].)

"[The purpose] of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.) "Sometimes, the exchange reveals that one party plans to call experts on subjects the opposing party assumed would not require expert testimony. In such cases, the opposing party has the right to supplement its expert witness exchange by adding experts to cover subjects on which the opposing party indicates it plans to offer expert testimony, and on which it had not previously retained an expert." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 8:1686, pp. 8J-17-18.) "The 'supplemental list' is for experts on subjects not included in the original exchange. A supplemental list cannot be used to add experts on subjects designated in the original exchange." (*Id*., ¶ 8:1686.1, p. 8J-18.)

The trial court must exclude the expert opinion of any witness offered by a party who has unreasonably failed to list that witness as an expert under section 2034, subdivision (f), unless the party successfully moves to augment an expert witness list under subdivision (k);[5] is granted relief from failure to submit an expert witness list under

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[5] Section 2034, subdivision (k) provides: "On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to (1) augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained, or (2) amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give. . . . The court shall grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed

subdivision (*l*); or calls the expert at trial after the expert had been designated by another party and deposed, or for limited impeachment purposes. (§ 2034, subd. (j).)[6]

"The decision to grant relief from the failure to designate an expert witness is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of manifest abuse of that discretion." (*Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476.)

The trial court's finding that it was unreasonable to omit Drs. Faust and Leitman from the original exchange of expert information is supported by substantial evidence. An action for professional negligence normally requires expert testimony to prove that the standard of care had been breached. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606-607; *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844.) The Delarrozes were on notice of the need for expert testimony from the law of medical negligence, as well as their knowledge that the UC defendants had previously submitted a surgeon's expert declaration in connection with a motion for summary judgment. The Delarrozes' failure to designate one or more experts in their original designation was unreasonable.

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to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in subdivision (f) on all other parties who have appeared in the action."

6 Section 2034, subdivision (j) provides: "Except as provided in subdivisions (k) [motions to augment expert witness list], (*l*) [relief from failure to submit expert witness list], and (m) [expert designated by another party or called for impeachment], on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (1) List that witness as an expert under subdivision (f). [¶] (2) Submit an expert witness declaration. [¶] (3) Produce reports and writings of expert witnesses under subdivision (g). [¶] (4) Make that expert available for a deposition under subdivision (i)."

Nothing contained in the UC defendants' expert information justified the Delarrozes' addition of retained experts to provide expert testimony on the essential elements of their cause of action.

Once the trial court found that the Delarrozes had unreasonably failed to list Drs. Faust and Leitman in the original exchange of information, the trial court was required to exclude their opinions. Section 2034, subdivision (j) does not provide an exception to exclusion for witnesses identified in supplemental lists under subdivision (h). Nor did the Delarrozes make a motion to augment their original list under subdivision (k). The trial court properly excluded the opinions of the Delarrozes' retained experts.

B. Motions in Limine

1. Standard of Review

We review rulings on motions in limine for an abuse of discretion. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456.) Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." A miscarriage of justice should be declared only when the appellate court, after an examination of the entire cause, including the evidence, is of the opinion that it is

reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

2. Jurisdiction

Judge Valerie Baker ruled on several motions in limine after the action was transferred to Judge Cesar Sarmiento. The Delarrozes contend Judge Baker did not have jurisdiction to rule on the motions. The brief of the Delarrozes on this subject consists of one paragraph, with no citation to or discussion of pertinent authority and no discussion of prejudice. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the pointed as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021.) "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793.)

Moreover, we note that Judge Sarmiento requested that Judge Baker rule on the motions in limine, and Judge Baker expressly stated that her rulings on the motions were without prejudice to the right of either side to ask Judge Sarmiento for reconsideration. The Delarrozes did not ask for reconsideration of any ruling except one to exclude discussion of Medical Injury Compensation Reform Act (MICRA) limits on noneconomic damages. The jurisdictional issue has been waived.

3. Exclusion of Specific Matter

The Delarrozes contend that eight[7] of the UC defendants' motions in limine should have been denied because they sought to exclude broad categories of evidence, rather than specific matter as required by Superior Court of Los Angeles, Local Rules, rule 8.92. The Delarrozes' brief merely lists the in limine motions by number, with no discussion of the merits of any individual motion and no analysis of how the trial court's rulings constitute reversible error. This cursory discussion does not satisfy the rule that argument on appeal must contain a legal argument and citation to pertinent authority. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 764, 793; *Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785; *Huntington Landmark Adult Community Assn. v. Ross*, *supra,* 213 Cal.App.3d at p. 1021.)

4. Reference to MICRA Cap on Damages

The Delarrozes also contend Judge Sarmiento should not have excluded reference to the statutory cap on non-economic damages during closing argument. Apart from whether the ruling was an abuse of discretion, the Delarrozes have failed to show any prejudice resulted from the exclusion of this information, as the jury found no liability and did not reach the issue of damages. (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

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[7] The motions in limine include the following rulings by Judge Baker excluding: the display or use of a medical text prior to laying a proper foundation; evidence of any insurance defendants have against loss; reference to other medical malpractice actions that have been brought against the defendants; reference to limits on general damages imposed by the MICRA; evidence of an expert's personal practices, as opposed to the standard of care; and testimony or documentary evidence that did not rise to the level of the standard of care.

C. Admission of Evidence

1. Standard of Review

Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

2. Dr. Livingston's Testimony

The Delarrozes contend the trial court erred by permitting Dr. Livingston to provide expert testimony on causation in violation of a prior order precluding Dr. Livingston from providing expert witness testimony. The Delarrozes simply list several pages of the reporter's transcript in support of this contention, without identifying what expert testimony was improperly given by Dr. Livingston, and without any analysis of prejudice. Under these circumstances, we consider the issue waived. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 764, 793; *Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-785; *Huntington Landmark Adult Community Assn. v. Ross*, *supra*, 213 Cal.App.3d at p. 1021.) In any event, our review of the cited testimony reveals that Dr. Livingston did not provide expert testimony, but instead testified to his practice in treating patients. There was no error.

3. Nondesignated Expert Witness

The Delarrozes contend that the trial court erroneously allowed Dr. Zhaoping Li, who is a medical doctor and a nutritionist at UCLA, to provide expert witness opinions, even though Dr. Li had not been designated as an expert witness. The testimony cited by the Delarrozes describes the results of Dr. Li's physical examination of Melody, including her weight and body fat percentage, and Dr. Li's explanation of the number of calories Melody could eat without gaining or losing weight. At no point in their brief do the Delarrozes indicate the improper expert opinion offered by Dr. Li. The Delarrozes have completely failed to demonstrate error or prejudice. (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

4. Nasogastric Tube

The Delarrozes contend the trial court erroneously admitted a nasogastric tube other than the tube used during Melody's surgery as demonstrative evidence. Under Evidence Code section 352, the trial court has almost total discretion in admitting the results of demonstrations, experiments and tests, and its decision will only be reversed for an abuse of discretion. (*Culpepper v. Volkswagen of America, Inc*. (1973) 33 Cal.App.3d 510, 522) There is nothing inherently inadmissible in use of evidence in the form of a replica or accurate depiction of the original item. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1291 [mannequin]; *People v. Frausto* (1982) 135 Cal.App.3d 129, 143 [weapon].) The Delarrozes have not explained how the admission of a tube similar to that used in the procedure in dispute resulted in error or a miscarriage of justice. (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

D. Jury Instructions

In addition to the jury instructions discussed above, the Delarrozes contend the trial court erred by not providing instructions to the jury as to basic standard of care, res ipsa loquitur, a modified version of informed consent, false promise, and the definition of an important fact or promise. The Delarrozes present this issue in the most summary fashion, with no real argument, factual discussion, citation to authority, or analysis of actual prejudice. We decline to address it. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

III. Summary Judgment

A. Facts

1. Motion for Summary Judgment and Supporting Evidence

On June 11, 2003, the Medical Center filed a motion for summary judgment on the grounds that: the Medical Center did not violate the standard of care; no act or omission of the Medical Center caused Melody's injuries; and there was no agency relationship between Dr. Hammond and the Medical Center. The Medical Center submitted Melody's response to the interrogatory question: "Please set forth and describe in detail all facts upon which [you] base [your] contention that [the Medical Center] was, in any way negligent or responsible for or connected with the injuries or damages alleged in this litigation." In response, Melody stated that she was admitted to the Medical Center on September 5, 2001, for pain in her groin area and swelling of her lower left leg, and discharged on September 10, 2001. She was admitted to the Medical Center again on January 24, 2002, for pain in her left leg. On February 18, 2002, she was admitted to the Medical Center for an abdominal scan. The scan showed "a herniation of small bowel

loops into the subcutaneous fat at the lower end of this anterior abdominal wall defect and extending below the level of the umbilicus." During Melody's treatment at the Medical Center, no physician advised Melody that the bypass site was infected and she needed immediate treatment, nor did anyone tell her that her condition was life-threatening. Melody stated that the physicians and other employees of the Medical Center were aware of her condition, but did not want to try to fix such a botched operation, so they told her nothing, allowing the failure to be perpetuated.

The Medical Center submitted the expert declaration of licensed, registered nurse Linda Leon. Leon's declaration listed her extensive education and training to practice nursing. Leon reviewed the Medical Center's chart showing Melody came to the emergency room on September 5, 2001, with swelling of her lower leg. At the time, she had an open abdominal wound from her recent gastric bypass surgery and was under Dr. Livingston's care for the wound. Melody was admitted to the hospital for a blood clot and treated with intravenous heparin and oral coumadin by her primary care physician Dr. Hammond through September 10, 2001. Nursing records show Melody made good progress with the medications. Based on Leon's education, training, and experience, as well as her review of the records, her professional opinion was that the Medical Center's nurses acted within the standard of care, because the nurses observed and reported Melody's condition to her treating physician, cared for her appropriately, monitored her vital signs, recorded their observations in her chart, and followed the physician's orders regarding the wound dressing changes. In addition, Leon's opinion was that Melody did not sustain any damage or injury as a result of the care provided by the Medical Center between September 5, 2001, and September 10, 2001. Leon noted that nurses do not diagnose or prescribe for patients. Nurses' duties are to administer the physician's orders, chart the patient's progress, and assess and inform the doctor of any changes in the patient's condition.

2. Opposition to Motion and Supporting Evidence

On August 22, 2003, the Delarrozes filed an opposition to the motion for summary judgment on the grounds that further discovery was necessary to oppose the motion, the Medical Center's expert declaration was deficient, the Medical Center had not shifted the burden of proof, and triable issues of fact existed as to whether the Medical Center had met the standard of care. The Delarrozes stated that they had noticed the depositions of the person most knowledgeable at the Medical Center and several of the individual doctor defendants. They argued they were entitled to take these depositions to obtain essential facts for their opposition.

The Delarrozes submitted Melody's declaration as to the following. The Medical Center refused to treat her for complications after her bypass surgery. Marian Home Health Care nurses attended to Melody's incision site after the surgery from August 7, 2001, until September 5, 2001. Melody had pain in her groin and her left leg swelled. The nurses at her home advised her to go to the Medical Center immediately. She was admitted through the emergency room to the Medical Center. During her five-day hospitalization, she was treated with blood thinners to reduce a blood clot. The Medical Center's nurses would not respond when Melody needed them. Melody urinated in bed, and nurses did not arrive for between 20 and 40 minutes. On another occasion, Melody vomited on herself, and the nurse she called for never came. A staff person who arrived to change the wound bandages attended to her. The Medical Center did not have a trapeze over her bed for her to pull herself up and move around. The bed did not move up or down, and the Medical Center did not have a wheelchair or toilet seat large enough for her. The Medical Center refused to help Melody with these issues. Melody was in severe pain in her stomach area and unable to swallow pain medication pills, yet the Medical Center would not help her. Melody had a large, infected, oozing open wound, but the Medical Center simply changed the bandages. The bandages fell off because they were improperly done. The Medical Center did not ask her about the supplies she

needed. The wound became worse and Melody suffered pain, vomiting, and ongoing infection as a result.

The Delarrozes also submitted the expert declaration of Dr. Rand-Luby. Dr. Rand-Luby is a surgeon whose practice includes treating patients for abdominal and gastric complications, and surgeries related to gastric problems. She performed two or three gastric procedures during the time period stated in the complaint. She regularly reviews patient and hospital records concerning gastric problems such as Melody experienced, including their care and treatment. Dr. Rand-Luby regularly interacts with family practice physicians and the nursing staff of hospitals like the Medical Center. She declared that she was familiar with the standard of care for nurses and hospitals in the treatment of patients with Melody's conditions.

Dr. Rand-Luby opined as follows in pertinent part: "[The Medical Center] did not meet the standard of care concerning [Melody's] medical conditions listed [on her hospital admission records and home nursing health plan]. The providers at [the Medical Center] knew [Melody] had undergone a previous surgery with complications. They did not address those complications. They did not communicate with Dr. Hammond about them. They did not communicate with Dr. Livingston about them. The healthcare providers at [the Medical Center] should have communicated with Dr. Hammond and Dr. Livingston about the surgery, [Melody's] post-surgical complications, whether she had a fistula, infection and wound care. . . . [Melody's] deposition testimony indicates that not only did [the Medical Center] fail to examine [Melody] post-operatively, they refused to discuss the complications with her. This fails to meet the standard of care. [The Medical Center] should not have refused to treat [Melody] for these conditions. Both [the Medical Center] and Dr. Hammond should have informed [Melody] about her complications. Both [the Medical Center] and Dr. Hammond should have called Dr. Livingston or another specialist and consulted with them. This failure was also a failure to meet the standard of care which was a substantial factor of injury to [Melody]."

Dr. Rand-Luby criticized Leon's declaration. The Delarrozes filed objections to the Medical Center's evidence.

3. Reply and Trial Court Ruling

The Medical Center filed a reply on August 29, 2003, on the grounds that Leon's declaration was sufficient, the Medical Center and Marian Home Health Care were not the same entity, the Delarrozes failed to identify an act of negligence by the Medical Center causally related to Melody's injuries, and a continuance for further discovery was unwarranted. The Medical Center filed evidentiary objections to the declarations of Melody and Dr. Rand-Luby.

At a hearing on September 9, 2003, the trial court found Leon was qualified to render an opinion as to the standard of care for hospitals and their nursing staff. The trial court sustained the majority of the Medical Center's objections to Dr. Rand-Luby's declaration on the grounds that Dr. Rand-Luby had not shown the requisite expertise as to the standard of care for nurses and hospitals, and her statements and opinions lacked foundation, were argumentative, or irrelevant. In response to the Delarrozes' request for a continuance, the trial court found they had failed to set forth the facts they hoped to discover and had not shown due diligence. The request for a continuance was denied. The trial court found that the Medical Center had met its burden, and the Delarrozes had failed to establish a triable issue of fact as to causation. The trial court granted the motion for summary judgment. The trial court entered an order granting the motion for summary judgment on September 18, 2003, and awarded costs to the Medical Center.

B. Standard of Review

The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) "A trial court

properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.) A declaration which simply contradicts a prior discovery admission is not normally sufficient to raise a triable issue of fact. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.) We review rulings on evidentiary objections in motions for summary judgment de novo. (*Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149, fn. 2.)

C. Expert Declaration

The Delarrozes contend Dr. Rand-Luby was qualified to provide an opinion as to whether the treatment provided by the Medical Center's staff met the standard of care for the medical community, and therefore, her opinions should not have been excluded. We agree.

"In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]" (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-524.) "To qualify a witness as a medical expert, it must be shown that the witness (1) has the required professional knowledge, learning and skill of the subject under inquiry sufficient to qualify him to

speak with authority on the subject; and (2) is familiar with the standard required of a [professional] under similar circumstances; where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility. [Citation.]" (*Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128.)

"[The] criteria for determining expertise are as follows: (1) occupational experience, the kind which is obtained casually and incidentally, yet steadily and adequately in the course of some occupation or livelihood; (2) basic education and professional training; and (3) practical knowledge of what is customarily done by physicians under circumstances similar to those which confronted defendant. [¶] Nor is it critical whether a medical expert is a general practitioner or a specialist so long as he exhibits knowledge of the subject. Where a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly engaged but as to which he has an opinion based on education, observation or association with that specialty, his opinion is competent." (*Evans v. Ohanesian*, *supra*, 39 Cal.App.3d at p. 128.)

"Expert witnesses normally testify concerning the *bases* for their opinions, and the court may *require* the expert to state the bases before giving his opinion. [Citation.] . . . An expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound. [Citations.] [¶] . . . [¶] . . . [An] opinion unsupported by reasons or explanations does not establish the absence of a material fact issue for trial, as required for summary judgment." (*Kelley v. Trunk*, *supra*, 66 Cal.App.4th at pp. 523-524.)

Dr. Rand-Luby demonstrated that she has the basic education and professional training required for an expert witness, in that she is a medical doctor licensed to practice in California with staff privileges at hospitals in Southern California. She also demonstrated occupational experience with the care and treatment received by gastric surgery patients in hospital environments. Her practice includes treating patients for gastric complications, and she performed two or three surgeries related to gastric

problems during the time period stated in the complaint. Dr. Rand-Luby declared that she was familiar with the standard of care for nurses and hospitals, based on her regular interaction with the nursing staff of hospitals like Medical Center and her treatment of patients with complications similar to Melody's. Dr. Rand-Luby's declaration established the necessary foundation to provide expert testimony on the standard of care for hospital staff, as well as any breach by the Medical Center. Dr. Rand-Luby's statements and conclusions regarding the care provided by the Medical Center staff should not have been excluded on the basis of her qualifications as an expert.

D. Professional Negligence

The Delarrozes contend the Medical Center failed to shift the burden of proof, or alternatively, triable issues of fact exist. We agree that the evidence shows a triable issue of fact exists as to whether the Medical Center breached the standard of care.

The Delarrozes' cause of action for professional negligence alleged that the Medical Center failed to properly treat Melody. Asked by interrogatory for all facts upon which the Delarrozes based their contention that the Medical Center had been negligent, the Delarrozes stated that Melody was admitted to the Medical Center on September 5, 2001, and discharged five days later on September 10, 2001. She was also admitted on January 24 and February 18, 2002. The Delarrozes stated that the employees of the Medical Center were aware Melody's surgery site was infected, her condition was life-threatening, and she needed immediate treatment, but no one told her. As a result, the conditions remained untreated.

The Medical Center submitted evidence to show that the care and treatment provided by the Medical Center staff did not breach the standard of care. The Medical Center provided care and treatment to Melody on September 5, 2001, through September 10, 2001. Leon declared that the standard of care requires nurses to record a patient's progress and inform the patient's doctor of any changes in the patient's

condition, but nurses do not treat, diagnose, or prescribe for patients. The nurses at the Medical Center: observed Melody; monitored her vital signs; recorded their observations, including her positive response to the medications prescribed by her treating physician; changed the dressing on her surgery site as directed by her physician; and reported her condition to her physician. Based on these facts, Leon concluded that Melody received appropriate treatment within the applicable standard of care. In addition, the Medical Center submitted evidence to show that physicians with staff privileges are not employees of the Medical Center staff. The Medical Center's evidence was sufficient to show that the Medical Center staff acted within the applicable standard of care. Specifically, the standard of care did not require the Medical Center staff to diagnose an infection of the surgery site or prescribe treatment other than that ordered by the patient's physician. Moreover, the staff monitored Melody's vital signs, which were normal, and informed her physician of her condition.

The Medical Center's evidence was sufficient to shift the burden of proof to the Delarrozes to show a triable issue of fact existed as to whether the Medical Center staff failed to inform Melody that she had an infection requiring immediate medical attention in breach of the standard of care. Dr. Rand-Luby's declaration demonstrated a triable issue of fact existed. Specifically, Dr. Rand-Luby declared that the Medical Center staff was aware of Melody's gastric bypass surgery and complications from her hospital admission records. Dr. Rand-Luby also stated that the Medical Center staff should have informed Melody about the complications from her surgery. Dr. Rand-Luby opined that the Medical Center staff's refusal to discuss or treat post-surgery complications failed to meet the standard of care for hospital staff and was a substantial factor causing injury to Melody. The Delarrozes submitted sufficient evidence to demonstrate a triable issue of fact. The judgment in favor of the Medical Center must be reversed and the motion for summary judgment denied.[8]

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[8] On appeal, the Delarrozes contend the trial court improperly considered evidence in the Medical Center's reply that the entity which provided care for Melody in her home

DISPOSITION

The trial court's September 18, 2003 judgment and order granting the motion for summary judgment is reversed. The trial court is directed to enter a new and different order denying the motion for summary judgment. Melody Delarroz and John Delarroz are awarded their costs from their appeal of the September 18, 2003 judgment as against Catholic Healthcare West doing business as Marion Medical Center.

The May 17, 2004 judgment is affirmed. Edward Livingston, M.D., James Watson, M.D., James Tomlinson, M.D., Steven Beanes, M.D., and the Regents of the University of California are awarded their costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.

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prior to September 5, 2001, was not the Medical Center. However, this contention is irrelevant, because the Delarrozes have not alleged that Melody received any treatment from the Medical Center prior to September 5, 2001, that breached the standard of care.