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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANDRE W. DOMBY, Plaintiff and Appellant, v. ARTHUR S. MORITZ, Defendant and Respondent.	D050165 (Super. Ct. No. GIC852977)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B Quinn, Judge. Affirmed.

In this medical malpractice case we affirm a summary judgment granted in favor of a physician who practices as a "hospitalist," a relatively new medical specialty. In general, a hospitalist acts as a patient's primary care physician while the patient is receiving inpatient care at a hospital. Here, the hospitalist admitted a cardiac patient into the intensive care unit (ICU) of a hospital with the understanding her cardiac care would be the responsibility of the cardiology physicians who were treating the patient's existing

cardiac condition. Following the patient's admission to the ICU, the patient experienced further cardiac difficulty and ICU nurses contacted a cardiologist on three occasions and provided the patient with the treatment ordered by the cardiologist. The ICU nurses did not contact the hospitalist until, early in the morning following the patient's admission, the patient's heart stopped. The hospital staff was unable to revive the patient and the patient died shortly before the hospitalist was able to return to the hospital.

In response to a malpractice action brought against the hospitalist, the cardiologists and the hospital by the patient's heirs, the hospitalist moved for summary judgment. The hospitalist relied on the declarations of an expert who stated that in relying on the cardiologists to treat the patient's cardiac condition and in relying on the ICU staff to contact the cardiologists in the event the patient's condition changed, the hospitalist acted within the standard of care for his specialty and that in any event the hospitalist's care did not cause the patient's death.

In opposing the hospitalist's motion, the plaintiff relied on the declarations of a physician who believed the hospitalist should have taken steps to insure the cardiologists placed an intravenous pacemaker in the patient. According to the plaintiff's expert, the intravenous pacemaker would have saved the patient's life. The hospitalist objected to the expert's declarations on the grounds they were conclusory and speculative. The trial court sustained the hospitalist's objections to the expert's declarations and granted the hospitalist's motion.

As we explain more fully below, the trial court acted properly in sustaining the hospitalist's objections to the declarations submitted by the plaintiff's expert. The

declarations did not offer any reasoned explanation for the expert's conclusion greater participation by the hospitalist would have caused the patient's cardiologists to treat the patient differently or more aggressively or that such treatment would have saved her life. In light of the fact the plaintiff did not provide the trial court with any admissible expert evidence, there was no dispute in the record the hospitalist acted within the standard of care for his specialty. Given that record, the trial court was required to grant the hospitalist's motion for summary judgment.

FACTUAL AND PROCEDURAL SUMMARY

In early 2005 Helen Domby (Helen) was a 67-year-old cardiac patient who suffered from high blood pressure for which she was prescribed a daily dose of 100 milligrams of Atenolol, a so-called beta blocker. She was also treated with a blood thinner, coumadin. Her cardiac condition was being treated by Dr. Brian Jaski, a cardiologist.

At some point during the afternoon or evening of January 11, 2005, Helen took her blood pressure. Helen discovered her blood pressure was high and that she had a rapid pulse. She called her primary care physician who told her to take another dose of Atenolol. Shortly after taking the additional Atenolol, Helen felt light-headed and fainted. Helen's husband, plaintiff and appellant Andre W. Domby (Andre), thought she might be having a stroke and took her to the emergency room at Sharp Memorial Hospital (Sharp).

In the emergency room Helen was examined and treated by Dr. Bradley Zlotnick. Dr. Zlotnick found Helen was suffering from bradycardia, a slow heart rate. As antidotes to the Atenolol, Dr. Zlotnick gave Helen Glugagon and atropine.

In the course of treating Helen, Dr. Zlotnick also contacted one of Dr. Jaski's cardiology partners, Dr. John Gordon. Dr. Gordon instructed Dr. Zlotnick to put an external pacemaker on Helen prophylactically in the event Helen's heartbeat dropped. Dr. Gordon also asked Dr. Zlotnick to contact defendant and respondent Dr. Arthur S. Moritz, a hospitalist who works at Sharp, and ask Dr. Moritz to admit Helen to Sharp's ICU. Because Helen had responded to the treatment provided by Dr. Zlotnick, Dr. Gordon did not believe that any further intervention was necessary or advisable. However, Dr. Gordon advised Dr. Zlotnick that if her status changed he was available and would be happy to see her. According to Dr. Zlotnick, the pacemaker was on when Helen was in the emergency room and when she was admitted to the ICU.

At the request of Dr. Zlotnick, Dr. Moritz examined Helen at approximately 7:40 p.m. on the evening of January 11. Dr. Moritz found that she was alert and conversive and that the external pacemaker was turned off. He found that her vital signs were stable and that she was able to maintain normal blood pressure and pulse on her own.

Dr. Moritz admitted Helen to the ICU. Dr. Moritz understood from Dr. Zlotnick that Dr. Gordon would oversee Helen's cardiac needs while she was in the hospital. Nonetheless, given Helen's medical history and her condition, Dr. Moritz believed that at some point during Helen's stay in the hospital, her cardiologist would consider placing an internal pacemaker in her heart. Accordingly, Dr. Moritz ordered that she be given fresh

frozen plasma as a means of increasing her ability to form blood clots and that an internal pacemaker be placed by her bedside. After examining Helen and providing orders for her care, at approximately 8:15 p.m. Dr. Moritz dictated her history and the results of his physical examination.

Sharp's records indicate that at 10:30 p.m. a nurse in the ICU contacted a cardiology fellow, Dr. Palmer, who was taking calls for Dr. Gordon. The nurse reported to Dr. Palmer that Helen's heart rate dropped to 30 to 40 beats per minute when the external pacemaker was not on and that Helen stated "I don't feel good." Dr. Palmer told the nurse he would contact Dr. Gordon and develop a treatment plan for Helen. Dr. Palmer contacted the ICU at 1:45 a.m. and told the nurse to turn off the external pacemaker and turn it back on if Helen's heart rate dropped below 35 beats per minute. The cardiologists took no steps which indicated that they planned to place the internal pacemaker in Helen. At 3:20 a.m. the cardiologist ordered the ICU to begin giving Helen normal saline at a rate of 60 milliliters per hour. Again, there is nothing in the record which indicates that at that point the cardiologists planned to place an internal pacemaker on an urgent basis.

At 4:30 a.m. the ICU nurse called Dr. Moritz and told him Helen was unresponsive, had little or no blood pressure and that medical personnel were attempting to save her life. Dr. Moritz came to the hospital as quickly as he could, but Helen died by the time he arrived.

As we indicated at the outset, Helen's husband Andre filed a malpractice action against Dr. Moritz, the hospital and the cardiologist. Dr. Moritz filed a motion for

summary judgment. Dr. Moritz's motion for summary judgment was supported by a declaration from Dr. Paul Wagner, who is board certified in internal medicine and a practicing hospitalist. According to Dr. Wagner, Dr. Moritz acted properly in examining Helen, determining if she needed cardiac care, and in relying on the nurses in the ICU to notify Helen's cardiologist if there was a change in Helen's condition. According to Dr. Wagner, Dr. Moritz's reliance on the cardiologists to respond to any changes was appropriate and met the standard of care for hospitalists. Because Dr. Moritz was not called until Helen was in cardiac arrest, Dr. Wagner further opined that Dr. Moritz's care was not a cause of her death.

In responding to Dr. Moritz's motion for summary judgment, Andre filed a declaration from Dr. Philip C. Mathis. Dr. Mathis is board certified in internal and emergency medicine and practices emergency medicine in San Diego County. According to Dr. Mathis, Dr. Moritz failed to meet the standard of care because Dr. Moritz failed to communicate directly with the cardiologists responsible for Helen's care and failed to ensure that a cardiologist examined Helen on the evening of her admission. Dr. Mathis also believed that had an intravenous pacemaker been placed in Helen's heart, she would not have died.

Dr. Moritz objected to Dr. Mathis's declaration on the grounds his opinion was not supported by a reasoned explanation of why the underlying facts led to the conclusion he reached, as required by the holdings in *Jennings v. Palomar Pomerado Health Systems, Inc*. (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*), and *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*). Dr. Moritz argued that Dr. Mathis

improperly speculated as to how the cardiologists who were treating Helen would have reacted in the event Dr. Moritz contacted them directly.

The trial court issued a tentative ruling in which it sustained Dr. Moritz's objection to Dr. Mathis's declaration and proposed to grant Dr. Moritz's motion for summary judgment. Thereafter, at the initial hearing on the motion for summary judgment, the trial court continued the matter and permitted Andre to submit a supplemental declaration from Dr. Mathis. In his supplemental declaration, Dr. Mathis faulted Dr. Moritz for failing to recognize that Helen's condition was serious, for failing to convey that fact to her cardiologists, and for failing to ensure that they placed an intravenous pacemaker in her heart. "It is my opinion that had Dr. Moritz not fallen below the standard of care and recognized how seriously ill Mrs. Domby really was, and relayed this information to any reasonable cardiologist acting within the standard of care in the community, the cardiologist would have come in directly, evaluated Mrs. Domby and placed a temporary transvenous pacemaker. This would have saved Mrs. Domby's life. These medical mistakes, actions and inactions by Dr. Moritz, contributed directly to Mrs. Domby's death."

Dr. Mortiz objected to Dr. Mathis's supplemental declaration on the same grounds he objected to Dr. Mathis's original declaration: that it did not set forth a reasoned explanation for his conclusion and was based on speculation. Dr. Moritz also submitted a declaration from Dr. Gordon, the cardiologist who was consulted by the emergency room physician. In his declaration Dr. Gordon stated that at the time Helen was in the

emergency room, placement of a pacemaker did not seem necessary or advisable because her ability to clot blood was diminished therapeutically.

The trial court sustained Dr. Moritz's objections to Dr. Mathis's supplemental declaration and granted his motion. Following entry of judgment, Andre filed a timely notice of appeal.

DISCUSSION

I

In general, summary judgment may be granted only when a moving party is entitled to a judgment as a matter of law. (Code Civ. Proc,, § 437c, subd. (c).) Where the motion is brought by a defendant, the defendant bears the burden of persuasion that " 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) However, a defendant is not required to conclusively negate an element of the plaintiff's cause of action. Rather, in accordance with federal law, "All that the defendant need do is to 'show [] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.] In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action−for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element−for example, himself prove *not* X." (*Aguilar, supra*, 25 Cal.4th at pp. 853-854, fns. omitted.)

Thus, "[i]f a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device." (*Aguilar, supra*, 25 Cal.4th at p. 855.)

We review orders granting summary judgment de novo. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

II

The record here shows that Dr. Moritz met his initial burden on summary judgment. A plaintiff in a medical malpractice case must show that the defendant did not meet the applicable standard of care and that this failure harmed the plaintiff. (See *Bushling*, *supra,* 117 Cal.App.4th at p. 507.) By way of Dr. Wagner's declaration, Dr. Moritz produced evidence that in treating Helen he met the applicable standard of care for hospitalists[1] and that in any event Dr. Moritz's care did not cause her death. Thus Dr. Wagner's declaration, if it was not contradicted, entitled Dr. Moritz to an order granting his motion for summary judgment. (See *Bushling, supra,* 117 Cal.App.4th at p. 511.)

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1 A hospitalist, such as Dr. Moritz, is responsible for supervising and coordinating a patient's medical care while the patient is in a hospital. (See Robert M. Wachter and Lee Goldman L (1996) Vol. 335, pp. 514-517, "The Emerging Role of Hospitalists in the American Health Care System," New England Journal of Medicine.)

As we have noted, Andre attempted to rebut Dr. Wagner's declaration by filing declarations executed by Dr. Mathis. Dr. Moritz then objected to Dr. Wagner's declarations and, as we explain, the trial court properly sustained Dr. Moritz's objections.

In *Jennings, supra,* 114 Cal.App.4th at pages 1117-1118, we summarized limitations on admissible expert testimony. "[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.]

"Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide? (*Summers v. A. L. Gilbert Co.* [1999] 69 Cal.App.4th 1155 at pp. 1168-1169 [expert opinion admitted if it will assist jury and will be excluded when it 'would add nothing at all to the jury's common fund of information'].) Therefore, an expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not

hypothetical possibilities. [Citation.] Similarly, an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury. In this latter circumstance, the jury remains unenlightened in how or why the facts *could* support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts *do* support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by declaring what occurred." (*Jennings, supra,* 114 Cal.App.4th at pp. 1117-1118.)

In *Jennings* the plaintiff alleged he developed an abdominal infection outside his peritoneal cavity because the defendant left a retractor within the cavity following surgery. In support of this theory he offered the testimony of an infectious disease expert, Dr. Miller, who assumed, although he had no basis upon which to make the assumption, that the retractor was contaminated. "[Dr. Miller's] explanation was, in essence, that because the retractor was left in place and was probably contaminated, and a nearby area later became infected, '[i]t just sort of makes sense. We have that ribbon retractor and [it's] contaminated, he's infected.' [The expert's] opinion on the causal linkage between the retained retractor within the peritoneal wall and an infection outside the peritoneal wall was therefore based on an ipso facto explanation." (*Jennings, supra*, 114 Cal.App.4th at p. 1115.) The trial court sustained the defendant's objection to this testimony and on appeal we affirmed. "Although Dr. Miller testified the retractor was a

cause-in-fact of the infection, his conclusion was unaccompanied by any reasoned explanation supporting his opinion. [Citations.] . . . . That opinion is too conclusory to support a jury verdict on causation. [Citation.]" (*Id*. at pp. 1120-1121, fn. omitted.)

The court in *Bushling, supra,* 117 Cal.App.4th at page 510, discussed a similarly inadmissible expert opinion. In *Bushling* the plaintiff woke up from gall bladder surgery with pain in his left shoulder which was subsequently diagnosed as suprascapular neuropathy. In his malpractice action against the hospital where the gall bladder procedure was performed and the surgeon and anesthesiologist who were in attendance, the plaintiff argued his shoulder injury was the result of some negligence on their part. In their respective motions for summary judgment, the defendants submitted the declarations of an expert anesthesiologist, a surgeon and the orthopedic surgeon who treated the plaintiff's injury. The declarations stated nothing in the hospital's records indicated that plaintiff's surgery caused his shoulder injury and further that the type of injury the plaintiff suffered often occurs for no apparent reason and in the absence of any negligence. In opposing the defendant's motion, the plaintiff submitted the declarations of an anesthesiologist and orthopedic surgeon who believed that it was more likely than not that the injury occurred because the plaintiff was either dropped during surgery or was not properly positioned. The trial court found the plaintiff's declarations were not sufficient to rebut the defense declarations and granted the defendant's respective motions for summary judgment. The Court of Appeal affirmed.

With respect to the plaintiff's expert declarations, the court in *Bushling* stated: "In this case, [both experts] were of the opinion that plaintiff's injury was caused by

defendants' negligence in that 'more probably than not,' plaintiff had been dropped, his arm had been improperly positioned during surgery, or his arm had been stretched. The difficulty that plaintiff encounters in his attempt to avoid summary judgment by relying on [his experts] opinions is that there is no evidence that plaintiff was dropped, that he was improperly positioned, or that his arm was stretched during the procedure or recovery. The doctors assume the cause from the fact of the injury. [The experts'] opinions are nothing more than a statement that the injury could have been caused by defendants' negligence in one of the ways they specify. But, 'an expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist' [citation], has no evidentiary value. [Citation.]." (*Bushling, supra*, 117 Cal.App.4th at pp. 510-511.)

Dr. Mathis's declarations suffer from the defect identified in *Jennings* and *Bushling*. First, he speculates Helen died because she did not receive an intravenous pacemaker. As Dr. Moritz points out, there is no evidence in the record as to the cause of Helen's death. We also note that in light of Helen's depressed blood clotting ability, there is no evidence that such a procedure could have been safely performed. From his assumptions as to the cause of death and the safety of placing an intravenous pacemaker, Dr. Mathis reasons backwards to find that the failure to have an intravenous pacemaker was caused by Dr. Moritz's failure to communicate directly with Helen's cardiologists. In light of the fact that there is no dispute the cardiologists responded more than once to calls from the ICU about Helen's condition during the course of the evening and did not attempt to place an intravenous pacemaker, Dr. Mathis's conclusion that any information

Dr. Moritz could have provided to the cardiologists would have altered their treatment of Helen following her admission is still further speculation. Importantly, nothing in the record indicates Dr. Moritz should have or could have overridden the instructions of Helen's treating cardiologist. We can only conclude that Dr. Gordon, who ordered the external pacemaker be used prophylactically, expected Helen might need the assistance of the external pacemaker and that her need for it during the course of the evening did not change his conclusion that it was not appropriate, given her medications, to place an internal pacemaker in her. Thus, it is difficult to conclude that even if the pacemaker was on at the time Dr. Moritz examined Helen earlier in the evening and he communicated that fact to Dr. Gordon, Dr. Gordon would have done anything differently.

In sum, like the inadmissible expert opinions in *Jennings* and *Bushlin*g, Dr. Mathis's opinion assumes facts−the cause of death and the impact Dr. Moritz's communication might have had−and from those facts concludes a breach of duty and causation. Because there is no evidence in the record which supports Dr. Mathis's assumptions, as in *Jennings* and *Bushling*, the experts' opinions are entirely speculative and would be of no assistance to a trier of fact. Thus the trial court properly sustained Dr. Moritz's objection.

Andre did not present any admissible evidence as to either the standard of care or causation. Thus he failed to meet his burden on a motion for summary judgment and the trial court properly granted Dr. Moritz's motion. (*Bushling, supra*, 117 Cal.App.4th at p. 511.)

Judgment affirmed. Respondent to recover his costs.

BENKE, J.

I CONCUR:

McCONNELL, P. J.

I concur in the result.

HUFFMAN, J.