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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NCO FINANCIAL,

Plaintiff,

v.

JOHN KIM KOMURKA,

Defendant.

E042232

(Super.Ct.No. RIC416929)

OPINION

JOHN KIM KOMURKA,

Plaintiff and Appellant,

v.

RIVERSIDE COMMUNITY HOSPITAL,

Defendant and Respondent.

(Super.Ct.No. RIC420515)

APPEAL from the Superior Court of Riverside County. Thomas H. Cahraman,
Judge. Affirmed.

John Theodore Dean for Plaintiff and Appellant.

Dummit, Briegleb, Boyce & Buchholz and Steven E. Kushner for Defendant and Respondent.

On Friday, August 8, 2003, John Kim Komurka went to Riverside Community Hospital (the Hospital), complaining of abdominal pain. An emergency room doctor concluded that Komurka had passed a kidney stone; he sent him home with antibiotics and a pain killer and told him to follow up with his own doctor.

By Monday, August 11, 2003, when Komurka duly saw his doctor, he was suffering from kidney failure and sepsis. His doctor immediately had him admitted to the Hospital's intensive care unit. Komurka remained in the Hospital for about two weeks. He claims that for months afterward, he continued to suffer from pain, weakness, and dizziness.

Komurka therefore filed this malpractice action against the Hospital and the two doctors who treated him in the emergency room. The trial court granted summary judgment for the Hospital; it sustained most of the Hospital's objections to the declarations of Komurka's experts, and it ruled that the remainder of the expert declarations raised "no triable issues of fact as to breach of duty and causation."

Komurka appeals. We will affirm.

FACTUAL BACKGROUND

We accept all facts listed in the Hospital's separate statement that Komurka did not dispute. We also accept all facts listed in the Hospital's separate statement that Komurka *did* dispute, to the extent that (1) there is evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and (2) there is no evidence to support the dispute (*id.*, subd. (b)(3)). Finally, we accept all facts listed in Komurka's separate statement, to the extent that there is evidence to support them. (*Ibid.*) We disregard any evidence not called to the trial court's attention in the separate statement of one side or the other, except as necessary to provide nondispositive background, color, or continuity. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 314-316.)

On Friday, August 8, 2003, Komurka went to the Hospital's emergency room, complaining of abdominal pain. The nursing staff took his vital signs and gave him "an additional nursing assessment" He reported that he had been seen earlier that day at the Riverside Medical Clinic (RMC), which had sent him to the Hospital.

The first emergency room doctor to see Komurka was Dr. Ryan L. Brenchley. Dr. Brenchley ordered various laboratory tests, including blood tests, which revealed a high white blood cell count. He also ordered a CT scan. He gave Komurka a number of medications, including pain medication (morphine) and an antibiotic (Flagyl).

Later, Dr. Matthew B. Underwood took over from Dr. Brenchley. Based on the CT scan results, Dr. Underwood believed that Komurka had passed a kidney stone. He

tried to contact the urologist at RMC but was unable to do so. The Hospital had specialists on call, including a urologist, but Dr. Brenchley did not contact any of them. It is undisputed that the decision to consult a specialist is a medical decision for which the Hospital would not be legally responsible.

At this point, Komurka was no longer in pain. Dr. Underwood therefore decided to give him pain medication (Vicodin) and an antibiotic (Cipro) and send him home. He instructed Komurka to follow up with his own doctor.

Komurka saw his own doctor on Monday, August 11. He was feverish and suffering from “pain all over his body.” His doctor sent him back to the emergency room by ambulance, and he was admitted to the intensive care unit.

II

PROCEDURAL BACKGROUND

In 2004, Komurka filed this action against the Hospital, Dr. Underwood, and Dr. Brenchley.

In response to interrogatories asking Komurka to state “all facts” supporting his contentions, he indicated that the Hospital’s negligence consisted of failing to have a urologist on call. The Hospital therefore filed a motion for summary judgment on the ground that it did, in fact, have a urologist on call.

Komurka filed an opposition to the motion, including an expert declaration by Dr. de Ann Martin. In his opposition, however, he argued that the hearing on the motion

should be continued to allow him to conduct additional discovery. (See Code Civ. Proc., § 437c, subd. (h).) The trial court granted Komurka’s request for a continuance.

Meanwhile, the Hospital filed objections to Dr. Martin’s declaration. After obtaining the continuance, Komurka filed a second expert declaration, by Nurse Linda L. Feldman. The Hospital then filed objections to Nurse Feldman’s declaration.

At the end of the continued hearing, the trial court sustained most of the Hospital’s objections to the declarations of Dr. Martin and Nurse Feldman, then granted the motion for summary judgment. Accordingly, the trial court entered judgment in favor of the Hospital and against Komurka.

III

DISCUSSION

A. *Standard of Review.*

“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.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) “[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden . . . if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .’ [Citation.]” (*Aguilar v. Atlantic*

Richfield Co. (2001) 25 Cal.4th 826, 849, quoting former Code Civ. Proc., § 437c, subd. (o)(2).)

“We review the trial court’s decision de novo [Citations.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

B. *Admissibility of Expert Opinion.*

To be admissible, an expert’s opinion testimony must be “[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates” (Evid. Code, § 801, subd. (b).)

“‘The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value.’ [Citation.]” (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563, quoting *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

“‘A trial court exercises discretion when ruling on the admissibility of expert testimony under Evidence Code section 801, subdivision (b). If the court excludes expert testimony on the ground that there is no reasonable basis for the opinion, we review the exclusion of evidence under the abuse of discretion standard. [Citations.]’ [Citation.]” (*Geffcken v. D’Andrea* (2006) 137 Cal.App.4th 1298, 1311, quoting *In re Lockheed Litigation Cases, supra*, 115 Cal.App.4th at p. 564.) “‘[A]ppellate courts give wide

latitude to trial courts in determining whether the matters relied upon by experts in forming opinions are too speculative.’ [Citation.]” (*Thai v. Stang* (1989) 214 Cal.App.3d 1264, 1276, quoting *Redevelopment Agency v. First Christian Church* (1983) 140 Cal.App.3d 690, 703.)

C. *Waiver/Forfeiture.*

Preliminarily, Komurka never really explains exactly how the trial court erred in excluding his experts’ testimony. He simply repeats the experts’ testimony in full, adds a series of uncontroversial but not particularly relevant legal principles, then baldly declares: “[T]he opposing expert declarations submitted by Komurka were well reasoned and sufficient to overcome a summary judgment.” (Capitalization omitted.)

We therefore deem this contention forfeited. “[A]n appellant must affirmatively demonstrate error through reasoned argument and discussion of legal authority. [Citations.] Simply hinting at an argument and leaving it to the appellate court to develop it is not adequate.” (*Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.) Although we will go on to discuss the contention on the merits below, we do so only as an alternative basis for the same result.

D. *Dr. Martin’s Expert Declaration.*

1. *Admitted Testimony.*

The following testimony by Dr. Martin was admitted.

Dr. Martin had reviewed the medical records from Komurka’s August 8 visit to the Hospital’s emergency room, as well as his August 11 admission to the Hospital.

In Dr. Martin's opinion, the Hospital breached the applicable standard of care by (1) failing to provide a screening examination; (2) failing to maintain a "functional" on-call system; and (3) failing to provide stabilizing care.

If Komurka "had been properly diagnosed and treated (with the assistance of a urologist) in a timely manner," he would not have suffered from complications.

2. *Excluded Testimony.*

The following testimony by Dr. Martin was excluded.

"One of the primary reasons for the failure of [the Hospital] to properly examine and treat this patient[] was its apparent failure to maintain a functional on-call system for specialists (including a urologist). While Dr. Underwood may have been mistaken in his decision to discharge the patient . . . , it is my opinion that a substantial factor in this decision was a failure of the hospital to have either the on-call urologist available, or the on-call system functional.

". . . In my opinion, the hospital cannot delegate its duty to maintain an on-call system to provide physician coverage on-call to respond to assist in evaluating and stabilizing patients. In this instance, the hospital appears to argue that its duty was fully delegated to the Emergency Department physician and that the hospital therefore fully complied with its duties to the patient. Such is not a correct statement of the standard of care for hospitals.

". . . In my opinion, the standard of care (as well as the law) calls for the hospital to maintain an operating and functional on-call system. Typically, this would involve . . .

the employment by the hospital of a 'ward clerk' or emergency room clerk that would make contact of consulting specialists for the Emergency Department physician. The Emergency Department physician would at all times have direct assistance from hospital staff in completing such contact. In this instance, the records and evidence offered by the hospital in this proceeding do not disclose compliance with these duties of a hospital."

3. *Analysis.*

Komurka listed as *undisputed* the fact that "[t]he decision to obtain additional medical consults for a patient in the Emergency Department is a medical decision which can be made only by the licensed physician, as such a decision involves medical judgment." He also listed as undisputed the fact that the Hospital *did* have a urologist on call.

Dr. Martin did not explain in what way the Hospital's on-call system was not "functional." The Hospital's on-call system would have allowed Dr. Underwood to consult a urologist. Perhaps unfortunately, he decided to try to contact Komurka's RMC urologist instead. While Dr. Martin testified that the Hospital should have had a ward clerk, who could have contacted consulting specialists at the request of a physician, Dr. Underwood (and Dr. Brenchley) never made any such request. Thus, there was no foundation for the opinion that the Hospital breached a duty to have a functional on-call system.

Dr. Martin offered no foundation whatsoever for her opinions that the Hospital failed to provide a screening examination or failed to provide stabilizing care. We disregard these opinions entirely.

Accordingly, the trial court did not err by excluding these portions of Dr. Martin's testimony. The remaining portions of Dr. Martin's testimony failed to raise a triable issue of fact.

E. *Nurse Feldman's Expert Declaration.*

1. *Admitted Testimony.*

The following testimony by Nurse Feldman was admitted.

Nurse Feldman had reviewed Komurka's medical records from his August 8 visit to the Hospital's emergency room, as well as his August 11 admission to the Hospital.

In Nurse Feldman's opinion, the Hospital breached the applicable standard of care by (1) failing to obtain an appropriate medical history, and (2) failing to provide appropriate discharge instructions.

It was the responsibility of the triage nurse to obtain a medical history going back at least 30 days, including all recent medical consultations.

According to Nurse Feldman, in July 2003, Komurka had been seen at RMC for an abscess of the right upper eyelid. RMC had treated this appropriately, by cutting and draining the abscess. In addition, Augmentin, an antibiotic, was prescribed. A sample from the abscess was sent to a laboratory for testing. On July 29, the RMC

ophthalmologist received a laboratory report indicating that the bacteria from the abscess were resistant to Augmentin.

2. *Excluded Testimony.*

The following testimony by Nurse Feldman was excluded.

On August 8, in the afternoon, Komurka went back to RMC, complaining of abdominal pain. Because he had no medical insurance, RMC referred him to the Hospital.

“[T]he medical records disclose that the hospital nurses conducted an incomplete history . . . , and therefore did not discover the then[-]recent treatment for bacterial abscess.” As a result, despite Komurka’s high white blood cell count, the treating physicians failed to realize that he had a systemic blood infection and also failed to prescribe the medically appropriate antibiotic. They did give him Cipro and Flagyl; however, the RMC laboratory report had indicated that the abscess bacteria were resistant to Cipro, and the report had not indicated that they would respond to Flagyl.

The hospital nurses also failed to discover that Komurka was a plumber. “This type of work exposes the patient to a higher than average number of bacteria. Uncovering this information may have led the staff to be more attentive to the possibility of an infection This extra attention to the medical history was additionally important here[,] where the patient’s medical history included [e]ndocarditis, or inflammation of the heart tissue. This particular medical history puts medical professionals on alert for infections because the heart tissue, having previously

experienced inflammation, [i]s more susceptible to future episodes of heart tissue inflammation, especially in the event of an infection elsewhere in the body.”

Finally, the nursing staff failed to give Komurka appropriate discharge instructions. He had been given morphine and a prescription for Vicodin; “these medications contributed to the patient’s over-all sense of well-being, thereby essentially masking any further symptoms of the systemic blood infection raging in the patient’s body . . . and delaying the seeking of additional medical care by the patient. This included the patient delaying further medical care when he developed chest pain, shortness of breath, lightheadedness and a feeling of off balance, all of which were his complaints when he presented to his primary care physician’s office just three days later. Without appropriate discharge instructions, the patient had no reason to suspect that these complaints were significant.” (Capitalization omitted.)

3. *The Trial Court’s Reasoning.*

The Hospital objected to Nurse Feldman’s testimony about Komurka’s earlier treatment at RMC, based on lack of foundation. The trial court overruled this objection, “because . . . Feldman says, ‘I reviewed the record of Riverside Medical Clinic, and I learned all of this.’”

Nevertheless, it then ruled that Nurse Feldman’s testimony about the failure to discover Komurka’s previous abscess was speculative. It agreed that the Hospital nurse who took Komurka’s history did not write down anything about the abscess. However, it added: “[T]he fact that the nurses didn’t write down he had an eyelid abscess doesn’t

mean that we know what happened there. In other words, there's no declaration from plaintiff that says that 'they never asked me what medical care I had gotten in the last thirty days.' It may be that they had asked just fine and that he didn't think his eyelid thing was worth mentioning. Who knows."

The trial court also reasoned: "[E]ven if they did take an incomplete medical history, where is the causation nexus? Because they did do a complete blood count and found a bacterial infection. [¶] Now, if one speculates that if they had done a complete medical history, then they would have attributed the bacterial infection . . . to the eyelid abscess, and then the doctors that night would have gotten the records from the Riverside Medical Clinic, and then they would have known which antibiotic was more effective or less for this patient, that is speculation. Because the idea that they might could do all that and learn all that, I'm not sure they could have. And there's no evidence that they could have."

Similarly, the trial court also ruled that Nurse Feldman's testimony about the failure to give proper discharge instructions was speculative. It stated: "There's no declaration . . . from the plaintiff saying, 'I had an overall sense of well-being from taking the Vicodin.' And there's no . . . competent expert declaration saying whether Vicodin would mask symptoms of a systemic blood infection. [¶] There's no declaration from the plaintiff saying that he felt no discomfort because of the use of pain medications. [¶] There's nothing that suggests that the patient's deteriorating medical condition was not apparent. Indeed, a sentence later, Nurse Feldman states that he

developed chest pain, shortness of breath, light-headedness, and a feeling of off-balance.

[¶] Further, she infers that the patient did not suspect that these complaints were significant. That's inconsistent with saying that the Vicodin masked the symptoms. . . .

[¶] And I don't see how Vicodin would keep you from knowing chest pain is significant. And he went to the doctor when he had chest pain according to this nurse's declaration."

4. *Analysis.*

Nurse Feldman should not have been allowed to testify concerning Komurka's treatment at RMC. The trial court erred by overruling the Hospital's objection to this testimony. Nurse Feldman testified that she had reviewed the records of Komurka's August 8 emergency room visit and his August 11 hospital admission. However, she did not testify that she had reviewed any of the records of his treatment at RMC. Moreover, while Komurka's hospital records were in evidence, as attachments to Dr. Martin's declaration, his RMC records (with one insignificant exception¹) were not. Komurka's own declaration did not mention the abscess or its treatment.

Thus, Nurse Feldman's testimony that Komurka has been treated for an abscess and that RMC records would have revealed that the bacteria causing the abscess were resistant or unresponsive to the antibiotics prescribed at the Hospital should have been

¹ On August 8, when RMC referred Komurka to the Hospital, it generated a one-page "treatment record," which evidently was sent along to the Hospital as part of the referral. Thus, this document was included among Komurka's hospital records. However, none of the records of the July treatment of Komurka's abscess at RMC are in the court record.

excluded. Without it, there was also no foundation for her opinion that the nurses at the Hospital conducted an incomplete history by failing to discover the abscess. Likewise, there was no foundation for her opinion that taking a more complete history might have prevented Komurka's rehospitalization.

Because we are holding that the trial court should not have admitted *any* testimony about the abscess, we express no opinion on its ruling that the testimony that the Hospital nurses failed to ask about other recent medical consultations was speculative.

We do agree, however, with the trial court's ruling that the evidence of causation was speculative. As it noted, the doctors did discover that Komurka had a high white blood cell count and did prescribe antibiotics. Nurse Feldman testified that "[b]ecause" the nurses failed to take a complete history, the doctors failed to prescribe the *correct* antibiotic. This assumes that if the nurses had taken a more complete history, the doctors would have obtained Komurka's RMC records and, based on those records, they would have prescribed a different antibiotic. However, neither Nurse Feldman nor anyone else ever actually testified to this. ". . . "[A]n 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.]' [Citation.]" (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 126-127, quoting *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

Moreover, while Nurse Feldman testified that the knowledge that Komurka was a plumber and had previously had endocarditis "may have led the staff to be more attentive

to the possibility of an infection,” she did not explain what they could or would have done differently. As already noted, the doctors did give him antibiotics, even if they were (at least in retrospect) the wrong ones.

Finally, we also agree with the trial court’s ruling concerning the failure to give appropriate discharge instructions. Significantly, Komurka failed to testify that he experienced additional symptoms over the weekend or that he delayed in seeking further medical treatment because of an overall sense of well-being. Absent such testimony, Nurse Feldman could only speculate that this was the case.

We therefore conclude that the trial court did not err by excluding the crucial portions of Nurse Feldman’s declaration. Indeed, in our opinion, it should have excluded more of it. We further conclude that the admissible portions of Nurse Feldman’s declaration failed to raise a triable issue of fact.

IV

DISPOSITION

The judgment is affirmed. The Hospital shall recover costs on appeal against Komurka.

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RICHLI
J.

We concur:
McKINSTER
Acting P.J.

MILLER
J.