Not Reported in Cal.Rptr.3d, 2008 WL 2546175 (Cal.App. 1 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 2546175 (Cal.App. 1 Dist.))

Court of Appeal, First District, Division 5, California.
Emmanuel BECERRA, a Minor, etc., et al.,
Plaintiffs and Appellants,
v.
CONTRA COSTA COUNTY, Defendant and Respondent.

No. A118013.
(Contra Costa County Super. Ct. No. MSC05-01931).
June 26, 2008.

Pamela Elizabeth Dunn, Daniel Joseph **Koes**, Dunn Appellate Law pc, Pasadena, CA, Jeffrey Scott Mitchell, Bostwick & Associates, San Francisco, CA, for Plaintiff and Appellant.

W. David Walker, Craddick, Candland & Conti, Danville, CA, for Defendant and Respondent.

JONES, P.J.

***1** Emmanuel Becerra, a minor by and through his guardian ad litem Carmen Esparza, and his parents, Carmen Esparza and Jaime Becerra, appeal from a summary judgment entered against them in their medical malpractice action against respondent Contra Costa County. Appellants contend: (1) the expert declaration on which respondent's motion and the trial court's ruling was based was insufficient to support summary judgment; and (2) the trial court erred in denying appellants' request for a continuance of the motion for summary judgment. We reject both contentions and affirm the judg- ment.

FACTUAL AND PROCEDURAL BACKGROUND[FN1]

FN1. The facts are taken from respondent's separate statement of undisputed facts filed in support of its motion for summary judgment. Appellants did not object to the evidence on which the separate statement was based.

Carmen Esparza (Esparza) was first seen for prenatal care at Contra Costa County's Pittsburg Clinic on December 31, 2003. Her estimated date of delivery was February 23, 2004. Esparza had three subsequent prenatal visits before she was admitted to the Contra Costa Regional Medical Center on February 15, 2004. At 3:00 p.m. that day, a fetal heart rate monitor was placed on Esparza, who was noted to be breathing well with her uterine contractions. At 3:45 p .m., her contractions became irregular, but returned to normal at 5:45 p.m. At 6:30 p.m., the fetal heart rate was at 110, the same level it had been throughout the course of the monitoring. Contractions continued every three to five minutes. At 7:00 p.m., Esparza was admitted to the perinatal unit. Her labor from 7:59 p.m. to 12:30 a.m. was unremarkable.

At 1:00 a.m. on February 16, 2004, there were some severe decelerations in the fetal heart rate, and by 1:10 a.m., the rate had fallen to the 80's or 90's. At 1:14 a.m., severe decelerations continued, and Esparza was noted to be complete and pushing. At 1:14 a.m., "there was spontaneous rupture of membranes and meconium was noted." Esparza was placed on her side, then on her hands and knees, and became completely dilated at 1:30 a.m. A vacuum extractor was utilized, and after one pull, Emmanuel Becerra (Emmanuel) was delivered at 1:37 a.m. The umbilical cord was wrapped tightly around his leg, and he was characterized as "pale and flaccid."

Emmanuel was placed in a warmer, and a nurse

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assessed heart tones and respirations. Initially, there were no heart tones so CPR was commenced. After artificial respirations and one dose of seven milligrams of epinephrine were given, heart tones were noted and some gasping occurred. Emmanuel's heart rate was recorded, and he was transferred to the nursery.

On September 8, 2005, appellants filed a complaint against respondent. Their second amended complaint, which is the operative complaint, filed on or about December 28, 2005, alleges that Esparza was injured as a result of respondent's negligence in delaying the diagnosis and treatment of fetal distress, failing to provide proper nursing and physician care to Esparza, failing to supervise staff and follow proper policies and procedures, and negligently hiring and training its nurses and physicians. The complaint alleges that Emmanuel "was injured in health, strength and activity, [and] suffered severe physical and emotional injury" as a result of the above negligent acts, and due to respondent's "delay in the recognition and treatment of his conditions" after he was born. The complaint alleges that Jaime Becerra (Emmanuel's father) suffered loss of consortium due to his wife Esparza's emotional distress.

***2** On November 1, 2006, respondent filed a motion for summary judgment, to be heard on January 29, 2007. Respondent relied on the declaration of an obstetrics and gynecology expert, Maurice L. Druzin, M.D. (Dr. Druzin) who opined that respondent had met the applicable standard of care and had not negligently caused injury to Emmanuel. Dr. Druzin explained that respondent acted appropriately in response to fetal heart rate decelerations by increasing Esparza's oxygen intake and turning her to the side, "both of which were necessary measures which led to some increases in the fetal heart rate to over 150 followed by episodes of bradycardia as low as the 70's."

Dr. Druzin stated that according to the guidelines set forth by the American College of Obstetricians and Gynecologists (ACOG), a delivery should take place within 30 minutes of the decision to deliver. Because the decision to deliver Emmanuel was made at 1:14 a.m. when the spontaneous rupture of membranes with meconium was noted, and Emmanuel was delivered at either 1:36 a.m. or 1:37 a.m., the delivery occurred "well within the 30 minute ACOG guideline." Dr. Druzin stated that the standard of care did not require delivery when decelerations initially occurred because the fetal heart rate "returned to baseline." He stated there was nothing in the medical records indicating that a Caesarean section was advisable at any time. He also noted that the compression most likely caused by an umbilical cord that was wrapped around Emmanuel's leg was properly relieved during delivery. He opined that the infant was "correctly resuscitated and sent to the ICU where the care was appropriate. [¶] Overall, the management of mother and child was consistent with the applicable standard of care ."

On January 12, 2007, appellants filed an opposition to the summary judgment motion in which they requested "a continuance of roughly 90 days" under Code of Civil Procedure section 437c, subdivision (h).[FN2] Appellants' counsel submitted a declaration in which he stated that he had substituted into the case in September 2006 and had not had the time to conduct "any significant discovery" because he was preparing for a trial in another case that started on October 23, 2006 and ended in mid-December 2006.[FN3] He stated: "The declarant requests a continuance of the instant motion due to the fact [that] he needs to obtain the depositions of the moving party's agents and employees. By taking these critical depositions and conducting other discovery, the declarant will thereafter possess the facts necessary to resolve the instant motion and further prosecute this action." Also attached to the opposition was a document entitled "Home-Based Early Intervention Program," which showed that Emmanuel "was born full term with hypoxic ischemia encephalopathy with seizure and abnormal EEG," and that his "medical history and high risk for developmental delays make [him] eligible

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to receive early intervention services."

> FN2. All statutory references are to the Code of Civil Procedure unless otherwise specified.
>
> FN3. Appellants were represented by an attorney until April 20, 2006. Thereafter, other attorneys specially appeared on behalf of appellants at three case management conferences. At each case management conference, the court continued the conference and issued orders to show cause why the case should not be dismissed due to lack of counsel for the minor. Appellants retained their current attorney on or about September 20, 2006.

***3** Although later disputed by appellants, the trial court posted a tentative ruling prior to the January 29, 2007, hearing. The tentative, a copy of which was attached to a declaration of counsel for respondent, explained why appellants' counsel's declaration was "woefully inadequate" and did not comply with the requirements of section 437c, subdivision (h). The tentative ruling also indicated that the trial court was inclined to grant the motion for summary judgment and deny counsel's request for a continuance "without prejudice to renew or move for reconsideration." Neither party opposed the trial court's tentative ruling or appeared at the hearing, and judgment was entered against appellants on March 15, 2007. Notice of entry of judgment was served on appellants' counsel on March 21, 2007.

On April 2, 2007, appellants filed a motion for reconsideration. Appellants' counsel reiterated why he was not able to conduct discovery and added that he did not notice any depositions because plaintiffs' depositions had not yet been taken, and it is "the standard policy of every defense firm we deal with ... to not allow the depositions of their clients until plaintiffs' depositions are complete. In other words, it would not have made any sense for us to move and try to set defendant depositions at that point." He explained that he was unable to contest the tentative ruling because the tentative ruling was never posted on the court's website.

In opposition, respondent argued the court lacked jurisdiction to rule on the motion because judgment had already been entered in the case. Respondent argued in the alternative that appellants had not made the requisite showing for reconsideration. Respondent attached to its opposition an exhibit showing the tentative ruling was in fact posted on the court's website. The trial court denied appellants' motion for reconsideration on the ground that the court no longer had jurisdiction to consider the motion.

DISCUSSION

Standard of Review

A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The burden of production involves the presentation of evidence. (*Ibid .*, citing Evid.Code, § 110.) A prima facie showing is one that is sufficient to support the defendant's position. (*Aguilar, supra,* 25 Cal.4th at p. 851.) Once the defendant has made such a showing, 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 as to a defense to the cause of action. (*Id.* at p. 849.)

We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72.) We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) In performing our de novo review, we view the evidence in the light most favorable to the losing party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

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Dr. Druzin's Declaration

***4** Appellants contend the trial court erred in granting summary judgment because Dr. Druzin's declaration was insufficient to satisfy respondent's burden of production. Appellants argue also that Dr. Druzin's declaration was inadequate because it failed to set forth an analysis of when the decision to deliver *"should have* " been made and the reasoning behind such a conclusion. At oral argument appellants urged that Dr. Druzin's opinions were conclusory, and by implication, incompetent. We disagree.

First, as we have noted, appellants raised no evidentiary objections in the trial court. Therefore, any objection that Dr. Druzin's opinions are conclusory is waived. (See § 437c, subd. (b)(5) ["Evidentiary objections not made at the hearing shall be deemed waived"].) Neither did appellants' opposition to the motion for summary judgment raise any substantive issues. Appellants urged only that they be granted a continuance, pursuant to section 437c, subdivision (h). Because we review the substantive merits of respondent's motion as a pure issue of law, based on undisputed facts, we will consider for the first time on appeal the argument that respondent failed to meet its burden of production. (See *Montes v. Gibbens* (1999) 71 Cal.App.4th 982, 985 [an argument may be raised for the first time on appeal if it involves only questions of law based on undisputed facts]; *Wilson v. Lewis* (1980) 106 Cal.App.3d 802, 805 [same].) Again, we find appellants' argument unpersuasive.

The elements of a medical malpractice claim are: " ' "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." [Citation.]' " (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) A motion for summary judgment must either negate a necessary element of the plaintiff's claim, or establish a complete defense. (§ 437c, subd. (p)(2); *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985 (*Munro*).)

"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 (*Kelley*).) When a defendant moves for summary judgment and supports the motion with an expert declaration that its conduct fell within the standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Munro, supra,* 215 Cal.App.3d at p. 985.) However, "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*).)

***5** Relying primarily on *Kelley, supra,* 66 Cal.App.4th at page 524, appellants assert that Dr. Druzin's declaration was inadequate because it did not explain *"what* this standard [of care] required [respondent] *to do,* as well as *when* and *why.* " (Italics in original.) *Kelley,* however, is distinguishable. There, the court held it was error to grant summary judgment in favor of a defendant doctor whose "conclusory expert declaration" provided, without explanation or reasoning, that no medical malpractice had occurred. (*Id.* at p. 521.) The court noted that the declaration "did not disclose the matter relied on in forming the opinion expressed" and was "unsupported by reasons or explanations ..." (*Id.* at p. 524.) The declaration did not describe the nature of the patient's disease, did not state whether a reasonable doctor should have recognized the possibility of the severe complications allegedly suffered by the plaintiff, and did not state whether earlier intervention would have mitigated the in-

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jury. (*Ibid.*) The court also noted that even if the expert's opinion standing alone had been sufficient to support summary judgment, an expert for the plaintiff had presented an opposing opinion, giving rise to a material issue of fact for trial. (*Ibid.*)

In contrast, here, respondent's motion for summary judgment was not based on a "conclusory expert declaration." Dr. Druzin was a physician licensed to practice medicine in California and a specialist in obstetrics and gynecology. His education and background were detailed in an attached curriculum vitae, and he stated he was familiar with the standard of care applicable to the delivery of infants. He explained that he had reviewed records from Contra Costa Regional Medical Center pertaining to Esparza's delivery of Emmanuel, and external fetal monitoring strips that showed the recorded fetal heart rate at various times during Esparza's labor. He set forth each significant event that occurred during the labor and delivery. He explained why the standard of care did not require delivery when decelerations in the fetal heart rate initially occurred and opined that respondent acted appropriately in response to the decelerations by increasing Esparza's oxygen intake and turning her over to the side. He considered whether other alternatives, including a Caesarean section, would have been advisable "at any point in time in this progression of events." Dr. Druzin opined that under ACOG guidelines, there was no "inordinate delay" in delivering Emmanuel .[FN4] In his opinion, after Emmanuel's birth, respondent acted reasonably by relieving the umbilical cord that was wrapped around his leg and resuscitating and treating him in the ICU. In sum, Dr. Druzin reviewed medical records, set forth the facts on which he relied, provided an explanation of what the standard of care required under the circumstances, and concluded that respondent "met the applicable standard of care and did not negligently cause injury to Emmanuel Becerra."

> FN4. Appellants argue that in evaluating when the decision to deliver should have occurred, Dr. Druzin "ignored" the fact that the decelerations were "severe" at 1:00 a.m. and that the fetal heart rate had dropped to the 80's or 90's *before* that time. They state that this evidence shows that the decision to deliver should have occurred at 1:00 a.m., not at 1:14 a.m. However, appellants' lay opinion, unsupported by an expert's declaration, is insufficient to call into question the adequacy or propriety of Dr. Druzin's opinion.

***6** Appellants also rely on *Powell v. Kleinman* (2007) 151 Cal.App .4th 112 (*Powell*) and *Bushling, supra,* 117 Cal.App.4th 493. *Powell* held that the principle of liberal interpretation applies in determining whether portions of an *expert declaration the plaintiff submitted* in opposition to summary judgment were properly excluded by the trial court. (*Powell, supra,* 151 Cal.App.4th at p. 130.) *Powell* is inapposite because appellants did not file an expert declaration in this case. *Bushling* held that a plaintiff's expert opinion was insufficient to raise a triable issue of fact where it was based on assumed facts for which there was no supporting evidence. (*Bushling, supra,* 117 Cal.App. at p. 511.) Here, Dr. Druzin's expert opinion was not based on assumed facts, but on medical records describing actual events that occurred during delivery. Neither case provides support for appellants' position that Dr. Druzin's declaration was inadequate.

Appellants alleged three causes of action against respondent, consisting of two for medical negligence as to Esparza and Emmanuel, and one for loss of consortium as to Jaime Becerra. Because all causes of action were founded on the claim that respondent's care of Esparza and Emmanuel fell below the standard of care and that respondent's negligence caused injury to Emmanuel, and therefore, to his parents, Dr. Druzin's expert opinion that respondent had met the standard of care and had not negligently caused injury to Emmanuel was sufficient to meet respondent's initial burden of production. And, because appellants did not produce *any*

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evidence in opposition to the summary judgment motion, it was proper for the trial court to grant the motion and enter judgment in favor of respondent. (See *Munro, supra,* 215 Cal.App.3d at p. 985.)

Continuance

Appellants assert the trial court erred in denying their request for a continuance of the motion for summary judgment. This argument is without merit.

Section 437c, subdivision (h), provides in part: "If it appears from the affidavits submitted in opposition to a motion for summary judgment ... that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." Under this section, a continuance is "virtually mandated" where the nonmoving party makes the requisite showing. (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34.) A continuance is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633-634.) "[I]n the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

*7 An affidavit in support of a request for continuance under this section must show "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations]." (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.) The purpose of the affidavit is to inform the court of outstanding discovery that is necessary to resist the summary judgment motion. (*Cooksey v. Alexakis, supra,* 123 Cal.App.4th at p. 254.) "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated," as "[t]he statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.)

As noted, appellants' counsel submitted a declaration in support of appellants' request to continue the summary judgment motion. The declaration, however, simply provided that appellants did not have the time "to obtain the depositions of the moving party's agents and employees ... [or] conduct [ ] other discovery...." It did not explain what, if any, facts these depositions or "other discovery" may reveal, or how discovery may assist appellants in contradicting the facts set forth in respondent's motion or in its expert declaration. It also provided no explanation as to how the outstanding discovery relates to any of the issues raised by respondent's motion. Thus, the declaration was inadequate.

Further, "[a]lthough the statute does not expressly mention diligence, it does require a party seeking a continuance to declare why 'facts essential to justify opposition ... cannot, for reasons stated, then be presented' [citation], and courts have long required such declarations to be made in good faith. [Citations.]" (*Cooksey v. Alexakis, supra,* 123 Cal.App.4th at p. 257, italics omitted [applied abuse of discretion standard in determining whether diligence was shown].) "A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner." (*Ibid.;* see also *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356-357 [a continuance is not warranted under section 437c, subdivision (h) where the supporting declaration does not explain what efforts were made to take the necessary depositions or why they could not have been taken earlier].)

Appellants' counsel's declaration provided no showing of diligence by appellants. Counsel explained that shortly after he substituted into the case, he began preparing for a trial in another case, and was thereafter engaged in trial from the end of October to the middle of December 2006. He did

not explain, however, why he was unable to serve respondent with deposition notices for depositions to be taken after the completion of his trial, or whether any potential experts had been contacted after his September 2006 substitution, or at least during the 12 1/2 weeks between the date the motion for summary judgment was served on November 1, 2006, and the date the motion was heard on January 29, 2007. The declaration also did not explain what, if any, discovery had been completed since the date the operative complaint was filed in December 2005, and why the necessary discovery could not have been initiated sooner.

***8** We also note that in denying the request for a continuance, the trial court provided appellants with an opportunity to make a showing with new evidence or submit additional information in support of their request for a continuance. Appellants failed to take advantage of this opportunity, waiting until two weeks after judgment was entered to file a motion for reconsideration. (See *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236 ["after entry of judgment, a trial court has no further power to rule on a motion for reconsideration"].) Because counsel's declaration failed to make the necessary showing under section 437c, subdivision (h), and no showing of diligence was made, the trial court did not err in denying the request for a continuance.[FN5]

FN5. Appellants argue in the alternative that the trial court abused its discretion in denying the continuance under California Rules of Court, rule 3.1332(c), which sets forth the circumstances under which a continuance of a trial may be appropriate. Assuming, without deciding, that the rule applies to a request for a continuance of a motion for summary judgment, we conclude that appellants' counsel's declaration did not satisfy the requirement under this rule that "an affirmative showing of good cause requiring the continuance" be made. (See Cal. Rules of Court, rule 3.1332(c).)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

We concur: SIMONS, and Reardon, JJ.[FN*]

FN* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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