NANCY McCORMICK-GORDON et al., Plaintiffs and Appellants, v. CEDARS-SINAI MEDICAL CENTER, Defendant and Respondent.

B172622

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2005 Cal. App. Unpub. LEXIS 597

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC279606. Jon M. Mayeda, Judge.

DISPOSITION: Affirmed.

COUNSEL: Lascher & Lascher, Wendy C. Lascher and Alfred Vargas for Plaintiffs and Appellants.

Carroll, Kelly, Trotter, Franzen & McKenna, Richard D. Carroll and David P. Pruett; Greines, Martin, Stein & Richland, Robin Meadow and Jens B. Koepke for Defendant and Respondent.

JUDGES: GRIMES, J.; HASTINGS, J., Acting P. J., CURRY, J. concurred.

OPINION BY: GRIMES

OPINION:

BACKGROUND

Appellants Nancy McCormick-Gordon and the Estate of Gerald Gordon seek reversal of a summary judgment granted in favor of respondent Cedars-Sinai Medical Center in this wrongful death action. In the operative complaint appellants alleged that their decedent was catheterized when treated for a urological condition secondary to immunosuppression following a lung transplant; **[*2]** the catheter ruptured during its removal, leaving a small fragment lodged inside his bladder. Appellants further alleged that before the fragment was removed, it was the focus of a urinary tract infection and prevented treatment of the infection. Consequently, decedent developed a highly resistant bacterial infection and died of sepsis (blood poisoning). Appellants pleaded that respondent negligently failed to detect the broken catheter.

Respondent moved for summary judgment arguing it did not breach the standard of care and the catheter fragment was not the cause of death.

n1 Respondent's expert witness, Dr. J. Bradley Taylor, a board certified urologist, declared that respondent's treatment of decedent met the requisite standard of care in the community. Dr. Taylor also declared that the catheter fragment and respondent's treatment of decedent did not cause his death. Dr. Taylor explained that catheters are designed to stay inside the body for extended periods of time, and the presence of the fragment would not have differed from the presence of an actual catheter. Decedent, who was 67, was treated at respondent hospital for a hip replacement, removal of cataracts, a lung transplant **[*3]** followed by immunosuppression, and the treatment and removal of extensive urethral condyloma (warts). He had suffered a heart attack and had chronic anemia, chronic lung disease, severe bronchitis, and many complex infections. Dr. Taylor testified that he most likely died of a bacterial infection unrelated to the presence of the catheter fragment.

n1 The summary judgment motion is directed only as to a medical negligence cause of action. Presumably, appellants abandoned their other causes of action.

Relying on the declaration of Dr. Marc Rifkin, a general surgeon whose practice for the past 12 years had been devoted to hair restoration, who has no special training or experience in the removal of catheters, appellants argued that there were triable issues of material facts. Dr. Rifkin declared that the improper removal of catheters is not an uncommon occurrence. Thus, respondent's employee should have examined the catheter to make sure it was intact, and the failure to do so and take corrective action fell below **[*4]** the community standard of care. Dr. Rifkin declared that the catheter fragment played a "major role" in decedent's death. Appellants alternatively contended that the doctrine of res ipsa loquitur relieves them of their burden to present expert testimony regarding the standard of care. Respondent objected to Dr. Rifkin's declaration on the ground that he is not qualified to provide expert testimony about urological matters.

The trial court ruled that Dr. Rifkin failed to demonstrate that he had a reasonable basis for his opinion regarding the standard of care in the community. In particular, Dr. Rifkin failed to declare that he was familiar with the standards about which he was testifying. Absent such testimony, he failed to establish that he possessed the requisite special knowledge, skill, or expertise to offer his opinions. Accordingly, the court found that there was no evidence to demonstrate a triable issue of material fact and granted respondent's summary judgment motion.

Judgment was entered for respondent and this timely appeal followed. Appellants contend on appeal that the trial court improperly sustained the objections to Dr. Rifkin's declaration, that the doctrine of res **[*5]** ipsa loquitur applies to establish a breach of the standard of care, and that triable issues of material fact preclude summary judgment. We disagree and affirm the judgment.

DISCUSSION

I

Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334.)* In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom and must view such evidence and such inferences in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843* (*Aguilar*).)

A defendant moving for summary judgment has met his burden of showing that a cause of action has no merit 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. After the defendant has met that burden, the burden then shifts to the plaintiff **[*6]** to demonstrate that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar, supra, 25 Cal.4th at p. 849; Code Civ. Proc., § 437c,* subd. (p)(2).)

A trial court's determination underlying an order is reviewed under the appropriate test for that determination. (*Aguilar, supra, 25 Cal.4th at p. 859.)* An appellate court may not disturb the trial court's ruling on the admissibility of opinion evidence absent an abuse of discretion. (*Westbrooks v. State of California (1985) 173 Cal. App. 3d 1203, 1210, 219 Cal. Rptr. 674.)*

II

Dr. Rifkin Was Not Qualified to Render Expert Testimony on the Standard of Care

Appellants contend the trial court erred in concluding that they failed to establish Dr. Rifkin's qualifications to render his opinions in this case. We disagree.

A plaintiff in a medical negligence action must demonstrate: 1) the professional's duty to meet the standard of care set by other professionals in the community; 2) the breach of that duty; 3) proximate cause; and 4) damages. (*Elcome v. Chin (2003) 110 Cal.App.4th 310, 317.)* **[*7]**

Expert testimony is ordinarily required to demonstrate a breach of the standard of care and causation. (*Jambazian v. Borden (1994) 25 Cal.App.4th 836, 844* [standard of care]; *Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, 1498* [causation].) "Whether the standard of care in the community has been breached presents the basic issue in a malpractice action and can only be proved by opinion testimony unless the medical question is within the common knowledge of laypersons." (*Jambazian,* at p. 844.) Ordinarily, the absence of admissible expert opinion evidence on the standard of care is fatal to a malpractice cause of action. (*Ibid.*)

An expert must have the proper qualifications to give an opinion. A person with special knowledge, skill, experience, training, or education is qualified to testify as an expert on a subject within his or her area of expertise. (Evid. Code, § 720, subd. (a).) Practical experience in a specific area is unnecessary if the expert has special knowledge about that particular subject. (*Brown v. Colm (1974) 11 Cal.3d 639, 643, 114 Cal. Rptr. 128.)*

We conclude that the trial court **[*8]** did not abuse its discretion here. Dr. Rifkin's declaration and his curriculum vitae did not establish that he had special knowledge, skill, experience, training, or education regarding the appropriate procedure for the safe removal of catheters that would qualify him to give an opinion on the standard of care in this case. Dr. Rifkin's education, training, and experience as a general surgeon alone are not sufficient. Contrary to appellants' assertions, it is not reasonable to assume that a general surgeon is familiar with the removal of a catheter as part of the treatment for a urological condition that developed over a year after the patient underwent surgery. (See *Moore v. Belt (1949) 34 Cal.2d 525, 531-532* [expert who was autopsy surgeon for 29 years, who did not practice urology and did not conduct genito-urinary examinations, not qualified to opine on cause of urinary tract infection].)

The two cases cited by appellants, *Mann v. Cracchiolo (1985) 38 Cal.3d 18, 210 Cal. Rptr. 762* and *Chadock v. Cohn (1979) 96 Cal. App. 3d 205, 157 Cal. Rptr. 640,* are factually distinguishable. In *Mann,* a neurosurgeon who regularly read **[*9]** x-rays and radiologists' reports was found competent to testify regarding the standard of care for reading x-rays and preparing radiology reports. *(38 Cal.3d at p. 38.)* In *Chadock,* a podiatrist with specialized education about foot ailments and who had performed foot surgeries including the specific procedure at issue was found competent to

render an opinion concerning the standard of care for foot surgery. *(96 Cal. App. 3d at pp. 209-215.)*

An expert's opinion must be based on reliable matter. This may include personal observations and examinations, or matters "that [are] of a type that reasonably [and lawfully] may be relied upon" by experts in forming an opinion on a specific subject. (*Evid. Code, § 801,* subd. (b).) Here, appellants offered no evidence to demonstrate the basis for Dr. Rifkin's opinion of the standard of care or his conclusion that respondent breached it. His declaration lacked the foundation to demonstrate competence to offer his opinions. The value of an expert's opinion depends not on the conclusion reached but on the factors considered and the reasoning employed. (*Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1135.)* **[*10]** Since appellants failed to establish that Dr. Rifkin met the threshold test of general testimonial qualification, the trial court correctly found appellants failed to demonstrate a triable issue of material fact.

III

Res Ipsa Loquitur

Appellants argue they did not need an expert declaration to demonstrate a triable issue of fact because in this case, the proper standard of care required of respondent is a matter of common knowledge. Where a medical condition and its proper treatment are commonplace and simple, then the jury may rely on its common knowledge in determining whether an infection or injury would not have occurred in the absence of someone's negligence. (See *Bardessono v. Michels (1970) 3 Cal.3d 780, 789-791, 91 Cal. Rptr. 760,* and cases cited therein.)

Appellants contend the doctrine of res ipsa loquitur and "the common knowledge exception" to the rule that expert testimony is required in a medical malpractice case, apply here. Expert evidence is unnecessary when a layperson can say """as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due **[*11]** care had been exercised."""" (*Elcome v. Chin, supra, 110 Cal.App.4th at p. 317.)*

The doctrine of res ipsa loquitur is an evidentiary presumption impacting the burden of producing evidence. (*Brown v. Poway Unified School Dist. (1993) 4 Cal.4th 820, 825.)* In *Elcome v. Chin, supra, 110 Cal.App.4th 310, 318,* the court explained how the doctrine is applied in the context of a summary judgment motion in a medical malpractice action. Once the defendants, a physician and a hospital, met their initial burdens of producing evidence that they did not breach the standard of care, the burden then shifted to the plaintiff to raise a triable issue of material fact on that issue. Plaintiff could meet this burden by either "producing direct evidence of each defendant's negligence and causation . . . or by producing evidence of the three elements of res ipsa loquitur." (*Ibid.*) The three elements include the following: 1) the incident must be the type which generally does not happen absent someone's negligence; 2) an agency or instrumentality within the defendant's exclusive control must have caused the incident; and 3) the plaintiff must not have **[*12]** caused it. (*Brown, supra, 4 Cal.4th at pp. 825-826.)*

The doctrine of res ipsa loquitur does not apply where an injury or infection could have happened without anyone being negligent. Here, decedent had suffered the rejection of a lung transplant, a heart attack, and multiple, chronic infections, beginning before the catheter fragmented. Appellants' own expert, Dr. Rifkin, acknowledged that decedent's "medical history appears to be quite complex. He underwent a right single lung transplant in June of 1999. [P] . . . The patient had a fairly complicated course after his transplant. At one time he had a chronic rejection problem, also cytomegalovirus and herpes vital [*sic*] colonization as well. He was well-known to the urologists for a chronic venereal wart problem thought to be secondary to his immunosupression [*sic*]." Dr. Rifkin also testified that, "Approximately 50% of lung transplantation patients die in the first five years

after transplantation." Decedent's condition was not commonplace, and it is not common knowledge that an infection would not have occurred if respondent had detected and removed the catheter fragment.

Since the doctrine of res **[*13]** ipsa loquitur does not apply and appellants failed to present competent expert evidence regarding the breach of the standard of care, there is no triable issue of material fact concerning this element of appellants' medical negligence claim. Thus, summary judgment is warranted.

Given the lack of a triable issue of material fact regarding the element of breach of the standard of care, we deem it unnecessary to address the parties' causation arguments.

DISPOSITION

The judgment is affirmed.

GRIMES, J. *

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

We concur:

HASTINGS, J., Acting P. J.

CURRY, J.