Tentative Rulings for June 26, 2024
Department 503

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).) ***The above rule also applies to cases listed in this "must appear" section.***

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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(41)

Tentative Ruling

Re:	***Deanna Luke v. Vasanth M Vishwanath M.D., Inc.*** Superior Court Case No. 21CECG03151
Hearing Date:	June 26, 2024 (Dept. 503)
Motion:	By Defendants Vasanth Vishwanath, M.D. and Vasanth M. Vishwanath, M.D., Inc. dba Fresno Women's Care for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of defendants Vasanth Vishwanath, M.D. (erroneously sued as Vasanth Vishwahath, M.D.) and Vasanth M. Vishwanath, M.D., Inc. dba Fresno Women's Care (erroneously sued as Fresno Women's Care). The prevailing parties are directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

If oral argument is timely requested, it will be entertained Wednesday, July 10, 2024, in Department 503.

Explanation:

The Allegations of the Complaint

In her complaint filed on October 21, 2021, plaintiff Deanna Lynn Luke (also known as Deanna Babcock ["Plaintiff"]) sued defendants Vasanth Vishwanath, M.D. and his professional corporation, Vasanth M. Vishwanath, M.D., Inc. dba Fresno Women's Care (together "Defendants") and others for medical malpractice based on negligence in connection with the implantation and removal of birth control devices.

After experiencing significant pain and discomfort, Plaintiff was treated by Dr. Vishwanath, "who advised Plaintiff that the only procedure to address her pain and discomfort was a hysterectomy[.]"' (Comp., ¶ 17, p. 4:11-12.) Dr. Vishwanath performed the hysterectomy on August 21, 2019. "In October 2019, Plaintiff again began to suffer [pain] and discomfort in her abdomen." (Comp., ¶ 19.)

Plaintiff then sought treatment from a chiropractor, who informed her that "what appeared to be an IUD located near her bowel showed up on an X-ray." (Comp., ¶ 20, p. 4:18-19.) On July 7, 2020, Plaintiff underwent a further surgery, "wherein Russell Martin, M.D. removed two Ensure Coils from Plaintiff's abdomen that had been causing Plaintiff medical difficulties[.]" (Comp., ¶ 21, p. 4: 20-22.)

Grounds for Summary Judgment

Defendants move for summary judgment on the grounds that Dr. Vishwanath met the applicable standard of care at all times and the negligence claim is time-barred. Defendants have carried their burden of proof to establish both grounds and Plaintiff has failed to raise a triable issue of material fact.

The Material Undisputed Facts

In 2012 Plaintiff underwent a procedure for placement of Essure coils as a form of birth control. (Fact No. 3.) When Plaintiff presented to Dr. Vishwanath's office in 2019, the Essure implant placement in 2012 and her worsening pelvic pain were documented. (Fact No. 4.) A radiologist interpreted studies performed on April 5, 2019, as showing Essure implants located bilaterally at the uterine cornu. (Fact No. 6.) After Dr. Vishwanath performed an endometrial biopsy (Fact No. 9) and discussed all treatment options (Fact No. 11), Plaintiff elected to proceed with surgery (Fact No. 11). On August 21, 2019, after Plaintiff signed written consent forms for the proposed surgery (Fact Nos. 15-19), Dr. Vishwanath performed the surgery without any noted complications (Fact No. 20). Dr. Vishwanath documented that he removed the left and right Essure implants. (Fact No. 23.)

On March 13, 2020, Plaintiff underwent an X-ray that was interpreted to note the location of two "migrated ESSURE devises." (Fact No. 25.) A follow-up CT scan reveal "two metal foreign bodies seen in the anterior left mid abdomen and one along the anterior margin of the ascending colon[.]" (Fact No. 26.) Plaintiff was taken back to surgery by general surgeon Russell Martin, M.D. on July 7, 2020. (Fact No. 28.) Dr. Martin's operative notes state he excised two small linear and coiled metallic devices, one from the mid abdomen and the other from a location adjacent to the ascending colon, and a third tiny metallic fragment around the right ovarian pedicle was also excised. (Fact No. 29.)

Defendants Carried Their Initial Burden

As the party moving for summary judgment, Defendants bear the initial burden of production to make a prima facie showing that there are no triable issues of material fact. If they carry their burden, it causes a shift, and Plaintiff is then subject to her own burden of production to make a prima facie showing that a triable issue of material fact exists. A prima facie showing is one that is sufficient to support the position of the party in question. "No more is called for." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861-862.)

The elements of a cause of action for medical malpractice by a physician are (1) the physician's duty to the patient to use such skill, prudence and diligence as other members of the physician's profession commonly possess and exercise; (2) a breach of that duty; (3) injury caused by the breach; and (4) actual damage or loss resulting from the negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.)

Standard of Care

The first element requires Plaintiff to establish that Dr. Vishwanath's care and treatment fell below the applicable medical standard of care. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408.) A physician meets that standard when the physician exercises "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Burgess v. Superior Court, supra,* 2 Cal.4th at p. 1081, citations and internal quotation marks omitted.)

Expert testimony is required in medical negligence cases to prove the defendant performed in accord with the prevailing standard of care. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

> The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman.

(*Ibid*., citations and internal quotations marks omitted.)

As explained in the CACI jury instructions, the trier of fact must determine the appropriate level of skill required "based only on the testimony of the expert witnesses[.]" (CACI No. 501.) Therefore, when a defendant moves for summary judgment, supported by expert declarations that the care and treatment rendered to the plaintiff fell within the applicable community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.)

To establish the standard of care, Defendants submitted the declaration of their expert, Dr. Michael Frields, a licensed physician who is Board-Certified by the American Board of Obstetrics and Gynecology. Dr. Frields identified the documentary evidence he considered, copies of which are attached to his declaration. He reached an opinion, based on his review of the documents and his education, training and experience. He explained Dr. Vishwanath's decision to perform the August 21, 2019 surgery on Plaintiff was appropriate and within the standard of care.

Dr. Frields also addressed the fact that Essure coils or fragments were later discovered in Plaintiff's abdominal cavity. He opined this fact "does not mean that Dr. Vishwanath was negligent in his performance of the August 21, 2019 surgery." (Fact No. 37.) Dr. Frields explained "it is my medical opinion, to a reasonable degree of medical probability, that Dr. Vishwanath met the standard of care and did exactly what was expected of him during the August 21, 2019 surgery given the information that was available to him at the time." (Fact No. 38.) Dr. Frields noted Dr. Vishwanath relied on pre-operative imaging studies that were interpreted as showing only two Essure coils located at the uterine cornua bilaterally. As an ob-gyn, Dr. Vishwanath was not required by the standard of care to interpret the imaging studies independently; instead the standard of care allows the doctor to rely on the information contained in the radiology reports. (Fact No. 40.) Given the information in the reports and his own observations

during the surgery, it was reasonable for Dr. Vishwanath to believe he had removed all of the Essure coils when he removed Plaintiff's uterus and fallopian tubes. (Fact No. 41.) Furthermore, the standard of care did not require Dr. Vishwanath to conduct exploratory surgery because the radiology reports did not call out the possibility of foreign bodies located elsewhere in the abdomen. (Fact No. 41.)

The coils that Dr. Martin removed were not located where one would expect to find an Essure coil, nor were these coils located anywhere close to the surgical field of the August 21, 2019 surgery. (Fact No. 43.) Not only did the standard of care not require surgical exploration of the abdomen, but given Plaintiff's medical history, such a surgery would have added an unnecessary and significant risk to the operation. (Fact Nos. 44, 45.)

Dr. Vishwanath met his burden to produce competent expert testimony that his conduct was within the community standard of care. His evidence makes a prima facie showing that there is no triable issue of material fact on the first required element of medical malpractice. The inability to prove this element is a bar to Plaintiff's claims against Dr. Vishwanath.

Plaintiff's claim for medical negligence against Fresno Women's Care, which is Dr. Vishwanath's professional corporation (Fact No. 2), also fails. The vicarious liability of an employer is dependent upon liability of the employee. (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 461.) Thus, the vicarious liability of the defendant professional corporation is derived from the liability of its employee, Dr. Vishwanath, and any substantive defense that is available to the employee inures to the benefit of the employer. (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423.) Therefore, Dr. Vishwanath's defense that Plaintiff cannot prove an essential element inures to the benefit of his employer, his professional corporation. Because Defendants have made their prima facie showing, the burden then shifts to Plaintiff to raise a triable issue of fact regarding the standard of care element.

<u>Statute of Limitations</u>

Defendants move for summary judgment on the additional ground that Plaintiff's action is barred by the statute of limitations applicable to her claim, which sets the limitations period in this case at "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury[.]" (Code Civ. Proc., § 340.5.) The one-year period is based on the knowledge of facts rather than the discovery of a legal theory. "If plaintiff believes because of injuries she has suffered that someone has done something wrong, such a fact is sufficient to alert a plaintiff 'to the necessity for investigation and pursuit of her remedies.' (*Sanchez v. South Hoover Hospital*, [1976] 18 Cal.3d [93], 102; [citation].)" (*Graham v. Hansen* (1982) 128 Cal.App.3d 965, 972–973 [in medical malpractice action affirming trial court's granting of motion for summary judgment based on plaintiff's failure to file action within applicable one-year limitation period].)

Here Plaintiff testified that she saw her chiropractor for complaints of abdominal pain and discomfort in October 2019. (Fact No. 46.) Plaintiff also testified that the chiropractor performed an X-ray in his office in October 2019 and told her she had an

IUD floating in her abdomen. (Fact No. 48.) Plaintiff further testified that she understood the reference to an IUD was a reference to an Essure coil. (Fact No. 50.) She was "surprised and upset" when she saw the coil on the imaging study because she had undergone the hysterectomy to remove the Essure coils. (Fact No. 51.)[1]

These facts and the additional facts referenced in Defendants' moving papers amply demonstrate that Plaintiff knew as early as October 2019 that at least one coil or fragment remained in her abdomen after the hysterectomy had been performed to remove the coils. This is sufficient to place a reasonable person on inquiry notice of Defendants' negligence. Therefore, Plaintiff had one year to file her complaint, or until October 2020. The action, which was filed on October 21, 2021, is barred by the applicable statute of limitations.

Even if the court were to apply Emergency Rule 9 to toll the period for six months, the period would have been extended to April 2021. Nor would a later discovery date of December 9, 2019, which is the date of an X-ray in the chiropractor's medical chart, cause the complaint to be timely. Therefore, Defendants have met their burden to make a prima facie showing that there is no triable issue of material fact on the issue of the statute of limitations. The burden then shifts to Plaintiff to raise a triable issue of fact on the statute of limitations.

Plaintiff Fails to Meet Her Burden

As Defendants point out in their reply, Plaintiff fails to produce any evidence that establishes a triable issue of fact. Her responses to the separate statement include no citations to evidence to dispute Defendants' facts. Specifically, she fails to present any expert opinion evidence to dispute the opinions of Defendants' expert and she presents no evidence to dispute the showing that the action is time-barred.

Plaintiff contends the excerpted medical records are inadmissible because the attached custodial affidavits fail to comply with Evidence Code section 1271 and 1561. Plaintiff fails to explain how the affidavits are purportedly deficient. The court overrules the evidentiary objections to Dr. Frields declaration for the reasons stated in Defendants' reply.

On the issue of the statute of limitations, Plaintiff nonsensically challenges the authenticity of excerpts from her own deposition transcript. The court overrules the evidentiary objections to the excerpts of Plaintiffs' deposition testimony for the reasons stated in Defendants' reply.

The court overrules Plaintiff's evidentiary objections for the additional reason that she fails to comply with the format for objections set forth in California Rules of Court, rule 3.1354. The trial court has discretion to overrule objections that fail to meet the standards set forth in the California Rules of Court. (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118.) Thus, all of Defendants' proffered facts are undisputed and Plaintiff fails to Smeet her burden to raise a triable issue of material fact.

[1] The court notes the references to Plaintiff's deposition testimony for the facts in this paragraph are correct, but the page numbers in the evidence appendix are slightly different.

Request for Judicial Notice

The court grants the request for judicial notice of the complaint and the articles of incorporation.

Conclusion

The court finds Defendants met their burden to show Plaintiff cannot prove an essential element of medical malpractice. The burden then shifted to Plaintiff to raise a triable issue of material fact, which she failed to do. Therefore, the court grants Defendants' motion for summary judgment.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 6/24/24.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Brock Torresdal v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 22CECG02321

Hearing Date: June 26, 2024 (Dept. 503)

Motion: By Defendant Brent Castle, D.O. for Summary Judgment

Tentative Ruling:

To grant the continuance request. (Code Civ. Proc., § 437c, subd. (h).) The new hearing date is Tuesday, August 27, 2024, at 3:30 p.m. in Department 503. The opposition and reply due dates shall run from the new hearing date.

If oral argument is timely requested, it will be entertained Wednesday, July 10, 2024, in Department 503.

Explanation:

"If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).)

Furthermore, " 'a summary judgment is a drastic measure which deprives the losing party of trial on the merits.' [Citations.]" (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) "To mitigate summary judgment's harshness, the statute's drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated ' "upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." [Citation.]' " (*Ibid*.)

Plaintiff requests defendant's motion for summary judgment be continued for two months because plaintiff's consultant requires the deposition of the emergency room technician who performed the subject procedure. Since the anticipated subject matter of the opinion is the standard of care, it is essential to plaintiffs' opposition to the motion for summary judgment. Furthermore, this information is set forth in plaintiffs' counsel's supporting declaration. Accordingly, plaintiffs' request for a continuance is granted. (Code Civ. Proc. § 437c, subd. (h).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 6/25/24 .
(Judge's initials) (Date)