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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

WILLIAM ROBINSON,

Plaintiff,

vs.

KAWEAH DELTA HOSPITAL, et al.,

Defendants.

CASE NO. CV F 09-1403 LJO GSA

**DECISION ON HOSPITAL DISTRICT'S
SUMMARY JUDGMENT MOTION
(Doc. 26.)**

INTRODUCTION

Defendant Kaweah Delta Health District (“Kaweah Delta”) seeks summary judgment in the absence of expert opinion to support plaintiff William Robinson’s (“Mr. Robinson’s”) medical malpractice claim arising from his treatment for a spinal epidural abscess at Kaweah Delta facilities. Mr. Robinson filed no papers to oppose summary judgment timely. This Court considered Kaweah Delta’s summary judgment motion on the record¹ and VACATES the November 17, 2010 hearing, pursuant to Local Rule 230(c), (g). For the reasons discussed below, this Court GRANTS Kaweah Delta summary judgment.

¹ In the absence of Mr. Robinson’s timely opposition, this Court carefully reviewed and considered the entire record to determine whether Kaweah Delta’s summary judgment motion is well supported. Omission of reference to an argument, document or paper is not to be construed to the effect that this Court did not consider the argument, document or paper. This Court thoroughly reviewed, considered and applied the evidence and matters it deemed admissible, material and appropriate for summary judgment.

1 **BACKGROUND**

2 **Mr. Robinson’s Medical Treatment**

3 In the early morning of January 23, 2007, Mr. Robinson treated at the Kaweah Delta emergency
4 department with complaints of back pain of several days duration and which increased with activity.
5 In his declaration, Kaweah Delta’s emergency medicine expert Michael Bresler, M.D. (“Dr. Bresler”),²
6 explains that Mr. Robinson had “no neurological symptoms” and that his “neurological exam was
7 normal.” Dr. Bresler further notes the absence of “signs or symptoms of infection.”

8 Mr. Robinson returned to the Kaweah Delta emergency department during the late evening of
9 January 23, 2007 and complained of increased pain which Mr. Robinson attributed to a “handstand” he
10 had performed three days earlier. Dr. Bresler again notes that Mr. Robinson had “no neurological
11 symptoms” and that his “neurological exam was normal.” According to Dr. Bresler, an “x-ray of the
12 thoracic spine was negative for evidence of any vertebral trauma or infection.”

13 During the late evening of January 24, 2007, Mr. Robinson returned to the Kaweah Delta
14 emergency department where, Dr. Bresler notes, Mr. Robinson “was found to have sensory and motor
15 deficits in his legs” and that an MRI revealed an epidural abscess from T-2-4. Dr. Bresler notes that
16 “epidural abscesses are often secondary to associated osteomyelitis (infection) at the adjacent site.”

17 Near 5 a.m. on January 25, 2007, Mr. Robinson underwent surgery by which an epidural abscess
18 was found and drained. In the absence of immediate improvement, Mr. Robinson treated at a spine
19 rehabilitation center from which he discharged on March 21, 2007 with normal upper leg strength and
20 strong lower legs.

21 **Mr. Robinson’s Claims**

22 Mr. Robinson’s operative complaint asserts against Kaweah Delta and other defendants a single
23 negligence claim that the defendants negligently failed “to competently and timely diagnose, manage,
24 and treat Plaintiff WILLIAM ROBINSON’s condition, including but not limited to epidural abscess, and
25 render timely medical treatment . . .”³

26 _____
27 ² Dr. Bresler is board-certified in emergency medicine.

28 ³ The complaint further alleges a series of negligent failures in Mr. Robinson’s treatment.

1 **Expert Disclosure**

2 The December 1, 2010 Scheduling Conference Order (“scheduling order”) set an expert
3 disclosure deadline which was later extended to August 2, 2010. The scheduling order provides that
4 expert disclosures “must be made pursuant to F.R.Civ.P. 26(a)(2)(A) and (B) and shall include all
5 information required thereunder.” The scheduling order further provides that failure to comply with
6 expert disclosure requirements “will result in the imposition of appropriate sanctions, which may include
7 the preclusion of testimony or other evidence offered through the expert witness.”

8 On August 2, 2010, Kaweah Delta filed and served its disclosure to designate experts Martin
9 Weiss, M.D., and Dr. Bresler whose reports concluded that Kaweah Delta and its employees provided
10 appropriate and timely care to Mr. Robinson. In his declaration, Dr. Bresler opines:

11 . . . the staff and personnel of Kaweah Delta Hospital acted within the standard of care
12 in the management of this patient. There was no reason to suspect an epidural abscess
13 during the first two visits to the ED [emergency department]. Mr. Robinson’s
14 complaint’s suggested a traumatic cause of the pain. The negative neurological exam
15 and spine x-rays ruled out significant trauma to the spine and infection of the vertebral
16 spine.

17 The rapid progression on the afternoon of 1/24/07, is typical of ischemia
18 (compromised blood flow) in case of epidural abscess compounded by the mass effect
19 from the abscess. The resources of the facility were properly mobilized for a late evening
20 emergency requiring mobilization of an MRI team and then surgical team.

21 The fact that the patient demonstrated significant improvement in his leg function
22 during his stay at [the spine rehabilitation center] relates to the timely decompression of
23 the spinal cord relative to the mass effect of the abscess.

24 Any residual neurological deficit undoubtedly relates to the effect of the ischemia
25 to the cord that occurred during the afternoon of 1/24/07, that resulted in an irreversible
26 stroke that is unresponsive to any surgical manipulation.

27 Dr. Bresler concludes in finding “absolutely no deviation of the standard of care by any
28 employees of Kaweah Delta District Hospital.”

Mr. Robinson, on the other hand, failed to disclose an expert witness and lacks an expert on the
standard of care, its breach, or causation of Mr. Robinson’s injury.

29 **DISCUSSION**

30 **Summary Judgment Standards**

31 Kaweah Delta seeks summary judgment in the absence of an expert for Mr. Robinson to
32 “establish a violation of the standard of care and causation.”

1 F.R.Civ.P. 56(b) permits a “party against whom relief is sought” to seek “summary judgment on
2 all or part of the claim.” “A district court may dispose of a particular claim or defense by summary
3 judgment when one of the parties is entitled to judgment as a matter of law on that claim or defense.”
4 *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1st Cir. 1999).

5 Summary judgment is appropriate when there exists no genuine issue as to any material fact and
6 the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c)(2); *Matsushita Elec. Indus.*
7 *v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *T.W. Elec. Serv., Inc. v. Pacific*
8 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The purpose of summary judgment is to
9 “pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial.”
10 *Matsushita Elec.*, 475 U.S. at 586, n. 11, 106 S.Ct. 1348; *International Union of Bricklayers v. Martin*
11 *Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985).

12 On summary judgment, a court must decide whether there is a “genuine issue as to any material
13 fact,” not weigh the evidence or determine the truth of contested matters. F.R.Civ.P. 56(c)(2); *Covey*
14 *v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997); *see Adickes v. S.H. Kress & Co.*,
15 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467, 82
16 S.Ct. 486 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir.
17 1984). The evidence of the party opposing summary judgment is to be believed and all reasonable
18 inferences that may be drawn from the facts before the court must be drawn in favor of the opposing
19 party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986); *Matsushita*, 475 U.S.
20 at 587, 106 S.Ct. 1348. The inquiry is “whether the evidence presents a sufficient disagreement to
21 require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”
22 *Anderson*, 477 U.S. at 251-252, 106 S.Ct. 2505.

23 To carry its burden of production on summary judgment, a moving party “must either produce
24 evidence negating an essential element of the nonmoving party’s claim or defense or show that the
25 nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of
26 persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th
27 Cir. 2000); *see High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir.
28 1990). A “complete failure of proof concerning an essential element of the nonmoving party's case

1 necessarily renders all other facts immaterial” to entitle the moving party to summary judgment. *Celotex*
2 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

3 “[T]o carry its ultimate burden of persuasion on the motion, the moving party must persuade the
4 court that there is no genuine issue of material fact.” *Nissan Fire*, 210 F.3d at 1102; *see High Tech*
5 *Gays*, 895 F.2d at 574. “As to materiality, the substantive law will identify which facts are material.
6 Only disputes over facts that might affect the outcome of the suit under the governing law will properly
7 preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

8 “If a moving party fails to carry its initial burden of production, the nonmoving party has no
9 obligation to produce anything, even if the nonmoving party would have the ultimate burden of
10 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; *see Adickes*, 398 U.S. at 160, 90 S.Ct. 1598.
11 “If, however, a moving party carries its burden of production, the nonmoving party must produce
12 evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103; *see High Tech Gays*, 895 F.2d
13 at 574. “If the nonmoving party fails to produce enough evidence to create a genuine issue of material
14 fact, the moving party wins the motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see*
15 *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548 (“Rule 56(c) mandates the entry of summary judgment,
16 after adequate time for discovery and upon motion, against a party who fails to make the showing
17 sufficient to establish the existence of an element essential to that party’s case, and on which that party
18 will bear the burden of proof at trial. In such a situation, there can be no ‘genuine issue as to any
19 material fact,’ since a complete failure of proof concerning an essential element of the nonmoving
20 party’s case necessarily renders all other facts immaterial.”)

21 F.R.Civ.P. 56(e)(2) requires a party opposing summary judgment to “set out specific facts
22 showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should,
23 if appropriate, be entered against that party.” “In the absence of specific facts, as opposed to allegations,
24 showing the existence of a genuine issue for trial, a properly supported summary judgment motion will
25 be granted.” *Nilsson, Robbins, et al. v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988). When
26 a summary judgment motion is unopposed, a court must “determine whether summary judgment is
27 appropriate – that is, whether the moving party has shown itself to be entitled to judgment as a matter
28 of law.” *Anchorage Associates v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3rd Cir. 1990). A court

1 “cannot base the entry of summary judgment on the mere fact that the motion is unopposed, but, rather
2 must consider the merits of the motion.” *United States v. One Piece of Real Property, etc.*, 363 F.3d
3 1099, 1101 (11th Cir. 2004). A court “need not sua sponte review all of the evidentiary materials on file
4 at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary
5 materials.” *One Piece of Real Property*, 363 F.3d at 1101.

6 As discussed below, Kaweah Delta is entitled to summary judgment in the absence of necessary
7 evidence to support Mr. Robinson’s medical malpractice claim.

8 Standard Of Care And Causation

9 Kaweah Delta holds Mr. Robinson to “use experts to establish a violation of the standard of care
10 and causation” and contends that in the absence of such experts, Mr. Robinson “cannot meet his burden
11 of proof.” Kaweah Delta notes that medial malpractice is a state law claim. *See Baker v. Adventist*
12 *Health, Inc.*, 260 F.3d 987, 993 (9th Cir. 2001).

13 Under California law, the elements for professional negligence, such as medical malpractice, are:
14 “(1) the duty of the professional to use such skill, prudence, and diligence as other members of his
15 profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection
16 between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the
17 professional's negligence.” *Turpin v. Sortini*, 31 Cal.3d 220, 229-230, 182 Cal.Rptr. 337 (1982).

18 The general rule applicable to medical practice cases is:

19 The standard of care against which the acts of a physician [or medical treater] are to be
20 measured is a matter peculiarly within the knowledge of experts; it presents the basic
21 issue in a malpractice action and can only be proved by their testimony [citations], unless
22 the conduct required by the particular circumstances is within the common knowledge
23 of the layman. The “common knowledge” exception is principally limited to situations
24 in which the plaintiff can invoke the doctrine of *res ipsa loquitur*, i.e., when a layperson
is able to 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 care
had been exercised. The classic example, of course, is the X-ray revealing a scalpel left
in the patient's body following surgery. Otherwise, expert evidence is conclusive and
cannot be disregarded.

25 *Flowers v. Torrance Memorial Hospital Medical Center*, 8 Cal.4th 992, 1001, 35 Cal.Rptr.2d 685
26 (1994).

27 “What is or what is not proper practice on the part of the physician is uniformly a question for
28 experts and can be established only by the testimony of such experts.” *Sansom v. Ross-Loos Medical*

1 *Group*, 57 Cal.App.2d 549, 553, 134 P.2d 927 (1943).

2 Moreover, in a tort action, such as the present one, “causation must be proven within a
3 reasonable medical probability based upon competent expert testimony. Mere possibility alone is
4 insufficient to establish a prima facie case.” *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal.App.3d 396,
5 402-403, 209 Cal.Rptr. 456 (1985); *see Gotschall v. Daley*, 96 Cal.App.4th 479, 484, 116 Cal.Rptr.2d
6 822 (2002) (“[E]xpert testimony was essential to prove causation. Without testimony on causation,
7 plaintiff failed to meet his burden on an essential element of the cause of action.”) “In California,
8 causation must be founded upon expert testimony and cannot be inferred from the jury's consideration
9 of the totality of the circumstances unless those circumstances include the requisite expert testimony on
10 causation.” *Cottle v. Superior Court*, 3 Cal.App.4th 1367, 1384, 5 Cal.Rptr.2d 882 (1992).

11 Kaweah Delta notes that Mr. Robinson “does not allege a case of *res ipsa loquitur*” and is thus
12 “required to provide expert testimony on the standard of care” and causation.

13 In the absence of expert opinion on the applicable standard of care and causation, Mr. Robinson
14 is unable to establish essential elements of his claim to warrant summary judgment for Kaweah Delta.
15 Kaweah Delta demonstrates that its alleged negligence is not a matter of common knowledge and easily
16 observed by the untrained eye. Mr. Robinson may not rely on a mere possibility that Kaweah Delta’s
17 treatment caused Mr. Robinson’s alleged injuries or on jury consideration of the totality of
18 circumstances. Mr. Robinson requires requisite expert opinion which he lacks.

19 **Failure To Satisfy F.R.Civ.P. 26(a)(2)**

20 Kaweah Delta further contends that summary judgment is warranted given Mr. Robinson’s
21 failure to satisfy expert disclosure and report requirements to further bar necessary expert opinion for
22 his medical malpractice claim.

23 F.R.Civ.P. 26(a)(2) sets forth requirements for expert disclosure and reports. F.R.Civ.P.
24 26(a)(2)(A) requires a party to “disclose to the other parties the identity of any witness it may use at trial
25 to present evidence under Federal Rule of Evidence 702, 703, or 705.” F.R.Civ.P. 26(a)(2)(B) requires,
26 without a stipulation or order otherwise, that expert disclosure “be accompanied by a written report –
27 prepared and signed by the witness – if the witness is one retained or specially employed to provide
28 expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert

1 testimony.” The expert report must contain, among other things, “a complete statement of all opinions
2 the witness will express and the basis and reasons for them” and “the data or other information
3 considered by the witness in forming them.” F.R.Civ.P. 26(a)(2)(B)(i), (ii). “A party must make these
4 disclosures at the times and in the sequence that the court orders.” F.R.Civ.P. 26(a)(2)(C).

5 This Court set an August 2, 2010 deadline for expert disclosures and reports and required
6 compliance with F.R.Civ.P. 26(a)(2)(A) and (B), including “all information required thereunder.” The
7 scheduling order admonished that failure to comply with expert disclosure requirements “will result in
8 the imposition of appropriate sanctions, which may include the preclusion of testimony and other
9 evidence offered through the expert witness.”

10 A party failing to satisfy expert disclosure requirements “is not allowed to use that information
11 or witness to supply evidence . . . at trial, unless the failure was substantially justified or is harmless.”
12 F.R.Civ.P. 37(c)(1). “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of
13 any information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by Molly,*
14 *Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). “[E]ven absent a showing in the
15 record of bad faith or willfulness, exclusion is an appropriate remedy for failing to fulfill the required
16 disclosure requirements of Rule 26(a).” *Yeti*, 259 F.3d at 1106. The exclusion sanction is “self-
17 executing” and “automatic” to “provide[] a strong inducement for disclosure of material.” *Yeti*, 259 F.3d
18 at 1106 (quoting F.R.Civ.P. 37 advisory committee’s note (1993)).

19 Kaweah Delta correctly notes that Mr. Robinson’s “failure to secure and timely disclose expert
20 testimony means that he cannot establish the essential elements of his claim” and “lacks evidence” of
21 negligence. Kaweah Delta is also correct that in the absence of admissible expert testimony, Mr.
22 Robinson “cannot meet his burden of proof as to either the breach of an applicable standard of care or
23 causation.” Mr. Robinson’s failure to satisfy F.R.Civ.P. 26(a)(2) requirements bars his use of expert
24 opinion necessary to establish elements of his negligence claim. Without expert opinion, Mr. Robinson
25 lacks a meritorious negligence claim to warrant summary judgment for Kaweah Delta.

26 CONCLUSION AND ORDER

27 For the reasons discussed above, this Court:

- 28 1. GRANTS Kaweah Delta summary judgment; and

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2. DIRECTS the clerk to enter judgment in favor of defendant Kaweah Delta Health Care District and against plaintiff William Robinson in that there is no just reason to delay to enter such judgment given that Mr. Robinson's claims against Kaweah Delta and Kaweah Delta's alleged liability are clear and distinct from the claims against and liability of other defendants. *See* F.R.Civ.P. 54(b).

IT IS SO ORDERED.

Dated: November 5, 2010

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE