2d Civil No. B164521

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION THREE

ROBERT F. SLACK,

Plaintiff and Appellant,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants and Respondents.

Appeal from Los Angeles County Superior Court, No. SC066079
Honorable Lorna Parnell, Judge Presiding

RESPONDENTS' BRIEF

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INTRODUCTION

Plaintiff Robert Slack appeals from the grant of summary judgment in favor of defendants The Regents of the University of California and Daniel J. Castro, M.D. in his negligence action arising out of nasal surgery performed by Dr. Castro. The trial court granted summary judgment after plaintiff failed to file opposition to defendants' summary judgment motion. The judgment must be affirmed.

First, the trial court properly granted summary judgment in favor of defendants because they submitted expert opinion evidence negating two essential elements of plaintiff's medical malpractice claim: violation of the standard of care and causation. They also presented evidence negating an essential element of plaintiff's informed consent theory: nondisclosure of material information. Because plaintiff's proof on these elements required expert testimony and he presented no evidence – expert or otherwise – in opposition, summary judgment was proper.

Second, the trial court properly denied plaintiff's request for a continuance of the hearing on defendants' summary judgment motion because plaintiff failed to meet the statutory requirements for a continuance. His request was untimely because it was filed long after his opposition was due and he provided no reason for the delay. He also failed to show that any facts essential to opposing summary judgment might exist or to explain why such facts could not have been obtained earlier.

Plaintiff essentially concedes the trial court properly granted summary judgment and denied his request for a continuance, admitting his attorney was "gross[ly] negligen[t]" in handling the case and it was her fault for failing to oppose defendants' summary judgment motion and to properly request a continuance to file such opposition. (AOB 15.) His strategy now

is to attempt to relitigate the case from scratch in this court by raising a number of contentions he never made in the trial court, including a newly minted theory that he is entitled to relief from judgment for the first time on appeal based on his attorney's neglect. Plaintiff has waived these contentions by failing to raise them below, and this court should not consider them. Even assuming plaintiff's arguments are properly before this court, as we will show, they are meritless. The summary judgment must be affirmed.

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff Robert Slack sued The Regents of the University of California and Daniel J. Castro, M.D., alleging a single cause of action for general negligence arising out of nasal surgery performed by Dr. Castro. (CT 9, 12; see CT 58-62, 66-72.)

Defendants filed a motion for summary judgment on August 20, 2002. (CT 41, 105.) In support of the motion, they submitted an expert declaration by Paul Toffel, M.D., who opined that "all of the medical treatment rendered by [defendants] met the standard of care in every respect" and there was "[n]o reasonable medical probability" the treatment caused any injury to plaintiff. (CT 57, 62-63.) He also stated that, before the surgery, Dr. Castro discussed possible risks and complications with plaintiff and plaintiff signed a consent form. (CT 59-60; see CT 68-70.)

Plaintiff filed no opposition to summary judgment, nor did he object to Dr. Toffel's declaration. (See CT 100, 105.) Instead, on September 13, three court days before the hearing and over a week after his opposition was due, he filed an ex parte application requesting a continuance of the hearing on the motion to allow him to depose Dr. Castro. (Corrected Augmented

Record[1] ["CAR"] 1-4; see also CT 90-98, 105-106.) Plaintiff did not explain what he hoped to learn from Dr. Castro that would help him oppose summary judgment. (CAR 2-4.) The trial court denied the ex parte application.[2] (CT 102, 105 107.)

At the hearing on the summary judgment motion on September 18, plaintiff again requested a continuance of the motion to allow him to depose Dr. Castro. Plaintiff also argued for the first time that he needed to depose defendants' expert, Dr. Toffel. (CT 104; RT 2-5.) The trial court again denied a continuance and granted summary judgment, finding that defendants' evidence established "there [was] no triable issue of material fact, and [] defendants [were] entitled to judgment as a matter of law." (CT 105-108.)

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[1] Appellant filed a Motion for Augmentation of the Clerk's Transcript on December 1, 2003, which this court granted on December 18. At the court's request, appellant filed an amended, consecutively paginated version of the documents attached to the motion on March 12, 2004, which he referred to in the accompanying cover letter and proof of service as the Corrected Augmented Record." In this brief, we refer to that record as "CAR."

Although appellant filed the motion and Corrected Augmented Record in this action, Case No. B164521, the court filed it in the related appeal pending in this court, *Slack v. Regents of the University of California*, Case No. B165897. Respondents therefore have filed, concurrently with this brief, a motion requesting this court to take judicial notice of plaintiff's ex parte application requesting a continuance, which appears in the Corrected Augmented Record.

[2] Plaintiff simultaneously filed an ex parte application seeking a continuance of the trial date to allow him to take Dr. Castro's deposition. (CT 74.) The court denied it. (CT 102.)

Judgment was entered on November 14, 2002 (CT 112), and notice of entry of judgment was served on November 21 (CT 115, 124). Plaintiff filed a timely notice of appeal from the judgment on January 13, 2003. (CT 125.)

LEGAL DISCUSSION

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

A. Summary Judgment Must Be Affirmed Where A Defendant's Uncontradicted Evidence Negates An Essential Element Of The Plaintiff's Claim.

This court reviews the trial court's grant of summary judgment de novo. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.)

The court's review is limited to the issues properly raised on appeal. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) The court's review is further limited to "the facts properly before the trial court at the time it ruled on the motion." (*Brantley v. Pisaro, supra*, 42 Cal.App.4th at p. 1601.) Like any judgment, a summary judgment should be affirmed if it can be upheld on any grounds supported by the record. (*Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 538, fn. 4; *Kramer v. State Fire & Casualty Company* (1999) 76 Cal.App.4th 332, 335.)

Summary judgment is required where "there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 223, internal quotations omitted; Code Civ. Proc., § 437c, subd. (c).) "A defendant moving for summary judgment . . . 'has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the [plaintiff's] cause of action . . . cannot be established.'" (*Brantley v. Pisaro, supra*, 42 Cal.App.4th at p. 1594, emphasis omitted; Code Civ. Proc., § 437c, subd. (p)(2).) To make such a showing, the defendant may either present affirmative evidence negating an essential element of the plaintiff's case or rely on the plaintiff's discovery responses demonstrating that he has no evidence to support an essential element. (*Brantley, supra,* 42 Cal.App.4th at p. 1596, 1598; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, 855; Weil & Brown, Civil Procedure Before Trial (The Rutter Group 2003) §§ 10:241, 10:242 p. 10-81-10-82.) The defendant need only make a prima facie showing, i.e., one that is sufficient to support his position. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-879.)

Once the defendant satisfies its initial burden, the burden shifts to the plaintiff to come forward with "admissible evidence" of "specific facts showing that a triable issue of material fact exists as to the cause of action . . ." (Code Civ. Proc., § 437c, subds. (d) & (p)(2).) "An issue of fact is not created by speculation, conjecture, imagination, or guesswork; it can be created only by a conflict in the evidence submitted to the trial court . . . in opposition to the motion." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 115; *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 864 ["Speculation . . . is not evidence"].)

B. There Is No Triable Issue of Material Fact Concerning Plaintiff's Medical Malpractice Claim.

1. Summary judgment was proper because defendants' undisputed evidence negated two essential elements of plaintiff's claim: violation of the standard of care and causation.

Plaintiff's complaint alleged a single cause of action for general negligence arising out of the nasal surgery performed by Dr. Castro. (CT 12.) Violation of the standard of care and causation are essential elements of a negligence claim based on medical malpractice. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

The standard of care "requires that physicians exercise in diagnosis and treatment that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 983-984.) It "'is a matter peculiarly within the knowledge of experts . . . and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman.'" (*Munro, supra*, 215 Cal.App.3d at p. 984; *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844; *Stephenson v. Kaiser Foundation Hospitals* (1962) 203 Cal.App.2d 631, 635.) Thus, "[w]hen a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro, supra*, 215 Cal.App.3d at pp. 983-984, 985 [affirming summary judgment in medical malpractice

claim where defendants' expert declarations established that defendants met the standard of care and plaintiff submitted no expert declaration in opposition]; *Jambazian v. Borden, supra*, 25 Cal.App.4th at p. 844 [same].)

Causation in a medical malpractice claim "must be proven within a reasonable medical probability based on competent expert testimony." (*Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603; *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498-1499, 1504; see also *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385 ["medical causation can only be determined by expert medical testimony"].) As with the standard of care, where a defendant supports a summary judgment motion with an expert declaration showing that his conduct did not cause plaintiff injury, the plaintiff must produce competent expert evidence to raise a triable issue of fact. (*Ochoa v. Pacific Gas & Electric Company* (1998) 61 Cal.App.4th 1480, 1485, 1487-1488 [affirming summary judgment where qualified experts testified methane gas exposure did not cause plaintiff's symptoms and plaintiff failed to produce competent expert declaration in opposition].)

Here, in support of their summary judgment motion, defendants submitted an expert declaration by Paul Toffel, M.D. He opined that all of the medical treatment rendered by defendants met the standard of care and that the treatment did not cause plaintiff injury. (CT 62-64.) Specifically, he opined on the standard of care:

> [1] [A]ll of the medical treatment rendered by Daniel J. Castro, M.D. and the Regents of the University of California met the standard of care in every respect in this case. There is no evidence that [defendants] were negligent.
>
> [2] The operation performed by Dr. Castro . . . was medically appropriate based on Plaintiff's past medical history, the results of the flexible laryngoscopy . . . and the CT scan . . . which revealed a deviated septum, markedly hypertrophic inferior turbinates, and diffuse ethmoid sinusitis.

Moreover, the pathology report after the surgery confirmed the existence of sinusitis.

[3] The operative technique by Dr. Castro was appropriate and within the standard of care.

[4] Dr. Castro's post-operative follow-up care was appropriate and within the standard of care.

(CT 62-64.)

On causation, Dr. Toffel opined that "[n]o reasonable medical probability exists that any of the care and treatment provided to plaintiff contributed to, or was a substantial factor in bringing about, any harm to Plaintiff." (CT 63.) More specifically, he explained that plaintiff's poor post-operative healing, ulcerated turbinates and osteitis or osteomyelitis were not caused by the surgery, and that plaintiff's post-operative crusting, drainage, infections and additional surgery were known risks to which plaintiff had consented:

[1] Plaintiff's poor healing was not the result of the surgery performed by Dr. Castro. Plaintiff had vascular compromise and Hepatitis C which affected his healing. Additionally, plaintiff's history of drug abuse, including reports of snorting cocaine, may also have contributed to plaintiff's poor healing and/or failure to heal. Plaintiff's vascular compromise was likely due to drug abuse, specifically cocaine.

[2] The ulcerated turbinates post-operatively were the result of his poor healing and vasculitis. Plaintiff had a normal healing process two months after surgery and then had an ulceration much later. The ulceration much later in time was not the result of the surgery. Furthermore, any subsequent osteitis or osteomyelitis were not caused by the surgery. Rather, the lining in Plaintiff's sinuses were forever damaged from his drug use. That in conjunction with his immune issues, Hepatitis C, led to his poor healing.

[3] To the extent that Plaintiff had any post-operative crusting, drainage or intermittent infections, those were known risks and complications which Plaintiff consented to. Post-operative drainage and crusting were part

of the normal healing process. At the time of his last examination by Dr. Castro, there was no evidence of exposed bone or infection, although there was a slight discoloration of mucous. Plaintiff may have developed a subsequent infection, a known risk and complication, however, the patient never returned to Dr. Castro. Additional surgery was also a known risk and complication.

[4] No act or omission on the part of Defendants, caused, or was a substantial factor in causing, any alleged injury claimed by Robert Slack.

(CT 62-64.)

Dr. Toffel's declaration thus negated two essential elements of plaintiff's medical malpractice claim: violation of the standard of care and causation. The burden then shifted to plaintiff to raise a triable issue of material fact by presenting competent expert testimony contradicting Dr. Toffel's declaration.

Plaintiff filed no opposition, nor did he object to Dr. Toffel's declaration.[3] Thus, defendants' expert declaration stands *undisputed*, and the trial court was required to grant summary judgment in their favor.

Plaintiff contends summary judgment was improper because defendants failed to show he could not obtain evidence in support of his cause of action. (AOB 6-8.) However, defendants were not required to make any such showing in connection with their summary judgment motion. Code of Civil Procedure section 437c permits a defendant to seek summary judgment *either* by introducing affirmative evidence that negates an element of the plaintiff's cause of action *or* by demonstrating, through the plaintiff's responses to discovery requests, that the plaintiff cannot

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[3] Because plaintiff never objected to Dr. Toffel's declaration, any evidentiary objections are waived. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

establish a necessary element of his cause of action. The moving defendant need not do *both*. (*Brantley v. Pisaro, supra,* 42 Cal.App.4th at p. 1596, 1598; *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 853, 855; Weil & Brown, Civil Procedure Before Trial, *supra*, §§ 10:241-10:242 p. 10-81-10-82.)

Here, defendants introduced affirmative evidence that negated two elements of plaintiff's medical malpractice claim. Defendants were not required to go one step further and prove that plaintiff could not produce evidence on these elements. Rather, once defendants introduced their own evidence on these issues, the burden shifted to plaintiff to introduce contrary evidence. Because he failed to do so, the trial court properly granted summary judgment. (*Munro v. Regents of University of California, supra*, 215 Cal.App.3d at p. 985 [affirming summary judgment].)

2. Defendants' expert's statement regarding plaintiff's preexisting conditions does not create triable issues of material fact concerning whether Dr. Castro negligently performed surgery, failed to take particular preventive measures, or failed to discover the preexisting conditions.

In his declaration in support of summary judgment, defendants' expert, Dr. Toffel, opined that plaintiff's poor healing was not caused by the surgery performed by Dr. Castro, but rather may have been the effect of plaintiff's preexisting conditions – specifically, hepatitis C, vascular compromise and illegal cocaine use. (CT 62-64.) Plaintiff contends this statement raises a triable issue as to whether (1) if Dr. Castro was aware of these conditions, he was negligent in performing the surgery or failing to

take specific precautions to avoid complications, or (2) if Dr. Castro was not aware that plaintiff had these conditions, he was negligent in failing to discover them, for example, by contacting plaintiff's previous physicians or reviewing his past medical records. (AOB 2-4.) These arguments do not refute defendants' showing in support of summary judgment.

First, plaintiff never made these arguments to the trial court, and thus has waived the right to raise them on appeal. (*Munro v. Regents of University of California, supra,* 215 Cal.App.3d at pp. 988-989; *Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1329-1330.) As the court explained in *Munro v. Regents of University of California*:

> The rule which forbids raising a new issue for the first time on appeal takes on added significance in summary judgment proceedings because "[t]he moving party's burden on a motion for summary judgment is only to 'negate the existence of triable issues of fact in a fashion that [entitles] it to judgment on the issues raised by the pleadings. It [is] not required to refute liability on some theoretical possibility not included in the pleadings.'" Accordingly, it would be unfair to a party who successfully moved for summary judgment to permit the opposing party on appeal to raise a new theory not included in the pleadings.

(215 Cal.App.3d at p. 989, citations omitted.)

Here, plaintiff's complaint nowhere alleges that he had preexisting conditions that contraindicated surgery or required special treatment. Nor does it allege that Dr. Castro negligently failed to discover such conditions, failed to contact plaintiff's other physicians, or failed to review his past medical records. (See CT 12.) Thus, defendants were not required to address these contentions to make their prima facie showing on summary judgment. (*Ibid.*; *Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1223-1224 ["In ruling on a summary judgment motion, the issues which are material are limited to the allegations of the

complaint"].) If plaintiff wished to raise these issues, he had to seek leave from the trial court to amend his complaint, or at the very least, raise them in opposition to defendants' summary judgment motion. (See *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265 [party must move to amend complaint before raising unpled factual assertion or legal theory in opposition to summary judgment].) Had he done so, defendants would have had an opportunity, if necessary, to submit additional evidence to clarify Dr. Toffel's declaration and dispose of the issues. (See Weil & Brown, Civil Procedure Before Trial, *supra*, § 10:222.5 p. 10-75 [party moving for summary judgment may request court's permission to file further separate statement and additional evidence in reply to opposition].) Because plaintiff did not do so, he cannot raise for the first time on appeal factual contentions that defendants – because of *plaintiff's* failure to adequately litigate his case – never had an opportunity to address below. (See *Munro v. Regents of University of California, supra,* 215 Cal.App.3d at p. 989 [on appeal, plaintiffs could not raise contention not alleged in complaint because "defendants did not have the opportunity to challenge that contention factually"].)

Second, plaintiff cannot raise triable issues simply by asserting, without an expert declaration – or any evidence whatsoever – that there are triable issues as to whether Dr. Castro should have refrained from performing surgery, taken particular precautions, determined that plaintiff had particular medical conditions, contacted plaintiff's previous physicians, or reviewed his past medical records. (AOB 2-4.) These arguments are no more than assertions that Dr. Castro violated the standard of care. As discussed above (see section I.B.1, *supra*), expert testimony is *required* on that issue unless the conduct required by the particular circumstances is within the common knowledge of laypeople. (*Munro v. Regents of*

University of California, supra, 215 Cal.App.3d at pp. 983-984; *Jambazian v. Borden, supra*, 25 Cal.App.4th at p. 844; *Stephenson v. Kaiser Foundation Hospitals, supra*, 203 Cal.App.2d at p. 635.) Whether a reasonable physician would perform surgery or take specific preventive measures given plaintiff's conditions, or would discover that plaintiff had such conditions in the first place, were all issues beyond the common knowledge of laypeople. Thus, expert testimony was required. (Cf. *Betterton v. Leichtling* (2002) 101 Cal.App.4th 749, 756 ["the effect of [plaintiff's] aspirin use on the risk of surgical complications was a subject beyond the general knowledge of lay people," requiring expert testimony]; *Munro, supra*, 215 Cal.App.3d at p. 984 ["[t]he circumstances under which genetic testing for Tay-Sachs disease is indicated, are beyond a layman's knowledge. Accordingly, expert testimony was required"].)

Defendants produced expert evidence on the subject. Dr. Toffel's declaration shows that, as an expert reviewing the case, he was aware plaintiff had hepatitis C and vascular compromise and used cocaine.[4] (CT 58, 63-64.) Taking these conditions into account, he opined that "*all* of the medical treatment rendered by [defendants] met the standard of care *in every respect*." (CT 58, 62-63, emphasis added.) Nowhere does the declaration say that *Dr. Castro* knew or should have known plaintiff had

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[4] Plaintiff attempts to impeach Dr. Toffel's testimony on the ground that he based his opinion on medical records not reviewed by Dr. Castro. (AOB 4.) Like the other issues plaintiff has raised for the first time on appeal, plaintiff has waived this issue by failing to raise it below. (*Munro v. Regents of the University of California, supra*, 215 Cal.App.3d at pp. 988-989.) Moreover, plaintiff has cited *no* cases in support of his contention, and there is authority to the contrary. (See *Kelley v. Bailey* (1961) 189 Cal.App.2d 728, 737-738 [medical experts may rely on records prepared by another physician]; *People v. Campos* (1995) 32 Cal.App.4th 304, 307-308 [same].)

such conditions, or that he should have contacted plaintiff's prior physicians or reviewed his past medical records to try to discover them. Thus, the declaration establishes that Dr. Castro's knowledge of plaintiff's preexisting conditions is *irrelevant* to whether the treatment rendered by defendants met the standard of care.

Moreover, the declaration does not, as plaintiff argues, establish that the complications plaintiff suffered were significant risks that contraindicated surgery, required special precautions, or required disclosure by defendants prior to the surgery. (AOB 3-4.) Rather, it establishes only that plaintiff's post-operative problems *were not caused by the surgery performed by Dr. Castro,* but may have resulted instead from plaintiff's preexisting conditions. Specifically, Dr. Toffel stated that "Plaintiff's poor healing was not the result of the surgery performed by Dr. Castro," that his ulceration more than two months after surgery "was not the result of the surgery," and that "any subsequent osteitis or osteomyelitis were not caused by the surgery." (CT 63, emphasis added.) In support of these conclusions, Dr. Toffel explained that plaintiff's hepatitis C, vascular compromise and illegal cocaine use affected his healing and thus may have led to the ulceration and osteitis or osteomyelitis. (CT 63.)

The mere fact that complications *occurred* as a result of plaintiff's conditions does not, as plaintiff argues, establish that Dr. Castro was negligent or that they were significant risks defendants were required to disclose. The complications plaintiff experienced may have been rare, idiosyncratic risks that occur in a medically insignificant number of patients, and a physician might act well within the standard of care to perform surgery in light of the insignificant risk. (Cf. *McKinney v. Nash* (1981) 120 Cal.App.3d 428, 434-435, 440 [plaintiff failed to establish negligence where defendants' uncontradicted expert testified that

administration of spinal anesthetic probably caused plaintiff's post-operative numbness, but that numbness was an unpredictable idiosyncratic reaction and did not indicate a lack of due care in administering anesthetic].) Moreover, the standard of care might not require a physician to discover that plaintiff had these conditions.[5] Since plaintiff has not raised the issue until now, defendants had no duty to refute this theory. (See *Munro v. Regents of University of California, supra,* 215 Cal.App.3d at p. 989.) But in any case, such matters are beyond the common knowledge of laypeople and could be resolved only by an expert. (*Id.* at pp. 983-984.)

In sum, because Dr. Toffel's declaration established prima facie that Dr. Castro's conduct met the standard of care, it was *plaintiff's* burden to present competent expert testimony establishing the contrary. Because he produced none and his unsupported assertion that Dr. Castro's conduct violated the standard of care cannot create a triable issue of fact, the trial court properly granted summary judgment. (*Lewis v. County of Sacramento*, *supra,* 93 Cal.App.4th at p. 116; *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1286-1287 disapproved on another ground in *Aguilar v. Atlantic Richfield, supra*, 25 Cal.4th 826, 855, fn. 23

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[5] As the above discussion makes clear, contrary to plaintiff's suggestion, Dr. Toffel's declaration contains no inconsistency and does not constitute an admission. (AOB 3.)

Moreover, *Price v. Wells Fargo Inc.* (1989) 213 Cal.App.3d 465, 481-482, does not, as plaintiff claims, hold that admissions against interest are entitled to greater weight than affidavits. (AOB 3.) Rather, that case states that "[a] summary judgment should not be based on *tacit* admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." (*Price, supra*, at p. 482, emphasis added.) The court held that the trial court properly relied on admissions in granting summary judgment "only because we find nothing in the record that is materially inconsistent with the admissions." (*Ibid.*)

[party opposing summary judgment must present *evidence* that demonstrates a triable issue of material fact exists].)[6]

C. There Is No Triable Issue Of Material Fact Concerning Plaintiff's Consent To The Surgery Performed By Dr. Castro.

Plaintiff contends there are triable issues of material fact regarding whether he gave informed consent to the surgery performed by Dr. Castro. Specifically, he argues there is a triable issue regarding whether Dr. Castro properly disclosed the risk of complications from his preexisting hepatitis C, vascular compromise and illegal cocaine use. He also argues there are triable issues as to whether he actually consented because he was under sedation when he signed the consent form and Dr. Castro never informed him of the risks of surgery. (AOB 4.) As we show below, these arguments are meritless.

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[6] Even if plaintiff's contentions regarding his preexisting conditions were properly before this court and had merit, summary judgment was nonetheless properly granted because, as discussed above, defendants established that the treatment rendered to plaintiff did not cause his injuries. (See section I.B.1, *supra*.) Plaintiff has presented *no* argument whatsoever regarding causation either below or on appeal.

1. There is no triable issue as to whether Dr. Castro disclosed or was required to disclose the risk of complications from plaintiff's preexisting conditions.

To prevail on a theory of lack of informed consent, a plaintiff must prove that the defendant physician failed to disclose material information to him prior to eliciting his consent. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346; *Contreras v. St. Luke's Hospital* (1978) 78 Cal.App.3d 919, 927-928; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) Specifically, a physician has a duty to disclose "the potential of death or serious harm and significant potential complications." (*Betterton v. Leichtling, supra*, 101 Cal.App.4th at p. 754; *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 531.) Beyond this "minimal disclosure, a doctor must also reveal . . . such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Morgenroth, supra*, 54 Cal.App.3d at p. 531; *Betterton, supra*, 101 Cal.App.4th at p. 754.) Regarding such "additional information," expert testimony is required. (*Morgenroth, supra*, 54 Cal.App.3d at p. 531; *Betterton, supra*, 101 Cal.App.4th at pp. 754-755 [expert testimony is required "to determine the duty to disclose matters other than the risk of death or serious harm and significant potential complications"].)

"A physician has no duty to disclose and explain risks that are not medically indicated." (*Jambazian v. Borden, supra*, 25 Cal.App.4th at p. 849.) A physician also has no duty to warn of an extremely rare, idiosyncratic risk. (*McKinney v. Nash, supra*, 120 Cal.App.3d at p. 442 [anesthesiologist's failure to warn plaintiff of risk of administering spinal

anesthetic was not material as a matter of law, even though anesthetic probably caused plaintiff's neurological damage, where the injury was an extremely rare, idiosyncratic reaction].) Thus, if the plaintiff contends he has a condition that created material risks other than those identified by his physician prior to surgery, he must produce properly qualified opinion evidence to support that contention. (See *Jambazian, supra*, 25 Cal.App.4th at pp. 849, 850 [affirming summary judgment where plaintiff failed to present expert evidence that diabetes created surgical risks not identified by defendant prior to surgery]; *Betterton, supra*, 101 Cal.App.4th at p. 756 [expert testimony was required to establish whether plaintiff's aspirin use created significant risk of surgical complications requiring disclosure].)

Here, in support of their summary judgment motion, defendants made a prima facie showing on informed consent. The declaration by their expert, Dr. Toffel, stated that Dr. Castro disclosed the potential risks and complications of surgery to plaintiff and that plaintiff signed a consent form listing the pertinent risks. Specifically, Dr. Toffel stated:

> Dr. Castro discussed the treatment alternatives with plaintiff, documenting the conversation as follows: . . .
>
> > "The pros and cons of continuing conservative medical treatment versus surgical approaches were thoroughly discussed with the patient who desired to proceed with surgery. . . . [T]he pros and cons of [surgery], including *the risks and complications were thoroughly shared with the patient* who desired to proceed with this approach . . ."
>
> . . . [T]he patient signed a handwritten Physician's Note for informed consent that listed the risks to include *bleeding, infection, recurrence, no improvement, worsening, damage to eyes, fracture, blindness, damage to brain/CSF leak, smell, perforation, crusting, tearing, changes in voice, swallowing, cosmetic deformity, further surgery or death.*

> The alternatives included no surgery at all. The consent was signed by the patient in addition to a standard Consent to Operation and Rendering of Other Services.[7]

(CT 59-60 [emphasis added]; see CT 46-47, 68-70.)

In short, defendants made a prima facie showing that they disclosed all material risks to plaintiff, thus negating an essential element of plaintiff's informed consent theory. The burden then shifted to plaintiff to raise a triable issue of material fact. Plaintiff presented *no* evidence in opposition to summary judgment, nor did he object to Dr. Toffel's declaration. Thus, the declaration stands uncontradicted, and summary judgment was proper.

Plaintiff's contention that there is a triable issue regarding whether Dr. Castro informed him of the risk of complications from his hepatitis C, vascular compromise, and illegal cocaine use (AOB 4) is unavailing for two reasons. First, as with the other issues plaintiff has manufactured for this appeal, plaintiff has waived the right to raise this argument by failing to raise it in the trial court. (E.g., *Munro v. Regents of University of California, supra,* 215 Cal.App.3d at pp. 988-989; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [failure to raise an argument below bars party from obtaining reversal thereon].) Plaintiff's complaint nowhere alleges that Dr. Castro improperly failed to disclose the risk of complications from his preexisting conditions.[8]

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[7] The trial court explicitly relied on these portions of Dr. Toffel's declaration in granting summary judgment. (CT 105, 59-60, 68-70.)

[8] The only injuries identified by plaintiff in his complaint were infection and further surgery. (CT 12.) The consent form signed by plaintiff explicitly listed these complications as risks of the surgery performed by Dr. Castro. (CT 60.)

Defendants were permitted to rely on, and plaintiff is bound by, the allegations of the complaint. (*Munro v. Regents of University of California, supra,* 215 Cal.App.3d at pp. 988-989; *Danieley v. Gold Mine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 119.) Because the complaint failed to give defendants notice of the issue, had plaintiff wished to raise it, he needed to seek leave from the trial court to amend his complaint, or at least raise it in opposition to defendants' summary judgment motion, so that defendants would have had an opportunity to respond. (See *Distefano v. Forester, supra*, 85 Cal.App.4th at pp. 1264-1265.) He failed to do so, and he cannot now use this court as a forum to relitigate the case.

Second, once again, plaintiff cannot defeat summary judgment simply by asserting, with no evidentiary support, that there is a triable issue as to whether Dr. Castro was required to disclose possible complications from plaintiff's preexisting conditions. Dr. Toffel's declaration established that defendants disclosed the material risks of the surgery to plaintiff. (CT 59-60; see CT 46-47, 68-70.) Defendants were not required to do more, absent expert evidence establishing a duty to disclose additional information. (*Morgenroth v. Pacific Medical Center, Inc., supra,* 54 Cal.App.3d at p. 531; *Betterton v. Leichtling, supra,* 101 Cal.App.4th at p. 754.) The risks of post-surgical complications from hepatitis C, vascular compromise, and illegal cocaine use are not matters within the common knowledge of laypeople. Thus, if plaintiff wished to assert that these conditions created significant risks that "a skilled practitioner of good standing would [disclose] under similar circumstances" (and that defendants failed to disclose), he was required to present expert evidence to that effect. (*Morgenroth, supra,* 54 Cal.App.3d at p. 531; *Jambazian v. Borden, supra*, 25 Cal.App.4th at pp. 849, 850; *Betterton, supra,* 111 Cal.App.4th at

p. 754.) Because he did not, he failed to raise a triable issue and summary judgment was properly granted.[9]

2. There is no triable issue regarding whether plaintiff actually consented to the surgery.

Plaintiff also contends that the written consent form he signed was invalid because he was under sedation when he signed it, and that Dr. Castro never informed him of the risks of surgery. (AOB 4.) These contentions do not create triable issues of material fact because they do not appear in a response to defendants' separate statement of undisputed facts. Nor are they raised in a memorandum of points and authorities in opposition to defendants' summary judgment motion, since plaintiff filed no opposition. Indeed, they are not even mentioned in plaintiff's ex parte application to continue the summary judgment motion. (See CAR 1-4.) Rather, they are buried in plaintiff's ex parte application to continue the *trial date*, which was completely unrelated to the summary judgment motion. (CT 75-76, 81.)

Of course, any facts that are not part of a separate statement may not be considered by the court in ruling on a summary judgment motion. (*Lewis v. County of Sacramento*, *supra*, 93 Cal.App.4th at p. 116; *North Coast Business Park v. Nielsen Construction Co., supra*, 17 Cal.App.4th at

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[9] As discussed above (see section I.B.2, *supra*), contrary to plaintiff's suggestion, Dr. Toffel's declaration does *not* establish that the complications plaintiff suffered were significant risks that defendants were required to disclose; it states only that plaintiff's preexisting conditions – not the surgery – may have been the cause of the complications. The mere fact that complications occurred does not establish that they were significant risks.

pp. 30-31 ["'if it is not set forth in the separate statement, it does not exist.'"].) Thus, the only evidence properly before the trial court was Dr. Toffel's declaration that Dr. Castro and the written consent form properly disclosed the relevant risks associated with the surgery. (CT 59-60; see CT 46-47, 68-70.) The court was not required to search the record for additional evidence to defeat the summary judgment motion. (See *Lewis v. County of Sacramento, supra*, 93 Cal.App.4th at p. 116.)

In sum, since plaintiff failed to put the informed consent issue properly before the trial court, he has waived the right to raise it on appeal. Moreover, as shown above, the undisputed evidence shows that defendants are entitled to summary judgment as a matter of law.

II. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR A CONTINUANCE.

A. Plaintiff Failed To Meet The Statutory Requirements For A Continuance.

Code of Civil Procedure section 437c, subdivision (h) permits a trial court to continue a summary judgment motion to allow further discovery "[i]f it appears from the affidavit submitted in opposition to [the] motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented. . . ." A continuance under this provision is not granted as a matter of course, simply for the asking. Specifically, it "'is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify

opposition may exist.'"'" (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397.) Moreover, he must demonstrate by affidavit: "(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."[10] (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

Here, plaintiff contends the trial court erred in refusing to grant a continuance of the hearing on defendants' summary judgment motion. (AOB 8-9.) To the contrary, the court's ruling was justified on several independent grounds.

1. *Plaintiff's request for a continuance was untimely.*

At the time the court denied the continuance, subdivision (h) provided that a continuance is proper "[i]f it appears from the affidavits submitted *in opposition* to a motion for summary judgment . . . that facts essential to justify opposition may exist . . . ."[11] (Code Civ. Proc., § 437c, subd. (h), emphasis added.) Thus, as the trial court noted, plaintiff's "request for a continuance had to be properly sought in an opposition" to defendants' summary judgment motion. (CT 106.) However, as the court further noted, plaintiff filed no opposition, and he filed his ex parte application on September 13 – over a week after the opposition was due and

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[10] This court reviews the trial court's denial of a continuance under the abuse of discretion standard. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170, 172.) "The burden is on the party complaining to establish an abuse of discretion." (*Id.* at p. 170.)

[11] The section was amended in 2002 to allow a request for a continuance to be made by ex parte application. (Code Civ. Proc., § 437c, subd. (h).) However, even under the amended statute, the ex parte application must be made "*on or before* the date the opposition in response to the motion is due." (*Ibid.*, emphasis added.)

just three court days before the hearing on the motion. (CT 105.) Thus, plaintiff's application was untimely. Moreover, as the court noted, "there was no valid reason for plaintiff's counsel to have waited for at least three weeks after receiving the motion to have sought relief." (CT 105-107.) This by itself "was a sufficient basis for the denial of the continuance." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547-548 ["No reason was given for the lateness of the request"].)

2. *Plaintiff failed to demonstrate that any facts essential to opposing defendants' summary judgment motion might exist.*

Counsel's declaration in support of plaintiff's ex parte application requesting a continuance baldly asserted that Dr. Castro's deposition was "vital to responding to the Motion, as well as for review by an expert," and that counsel "believed that his testimony would reasonably lead to further discovery." (CAR 2-3.) There is no statement regarding how Dr. Castro might testify at his deposition or, more important, how anything he might say was essential to opposing defendants' motion. What plaintiff needed to oppose the motion was an expert opinion to refute Dr. Toffel's declaration. Yet it seems highly unlikely that Dr. Castro, the defendant in the case, would supply that opinion. Thus, the trial court was correct in finding that a continuance was not warranted because "plaintiff has not set forth how he believes that the deposition of [Dr. Castro] would provide facts essential to justify opposition to the summary judgment motion." (CT 107; cf. *Wachs v. Curry, supra*, 13 Cal.App.4th at pp. 623-624 [continuance properly denied where experts' opinions, reports and documents plaintiffs sought to obtain were irrelevant].)[12]

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[12] See also *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 75-76 [declaration failed to show that facts essential to (continued...)

Counsel's declaration also baldly asserted that unspecified "additional discovery could and would reasonably lead to facts essential to justify Plaintiff's Opposition." (CAR 4.) But this assertion, like the statement that counsel needed to depose Dr. Castro, evinced nothing more than counsel's unsupported *opinion* that additional discovery might disclose evidence to support plaintiff's theories. It, too, does not come close to meeting plaintiff's burden to show that "'*facts* essential to justify opposition may exist.'" (*Bahl v. Bank of America, supra*, 89 Cal.App.4th at p. 397, emphasis added.) Plaintiff's failure to demonstrate what facts he expected to uncover with further discovery is fatal to his request for a continuance. (*Roth v. Rhodes, supra*, 25 Cal.App.4th at pp. 547-548 [declaration indicating that two depositions remained to be completed and that plaintiff was awaiting expert opinions, but that did not identify what facts might exist to support opposition to summary judgment, was insufficient to support a continuance]; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 263 [trial court properly denied continuance where plaintiff did not explain how outstanding discovery related to issues raised by summary judgment motion].)

3. *Plaintiff failed to explain why additional time was needed and why the discovery could not have been completed earlier.*

As explained in *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356-357, a declaration in support of a request for a continuance is insufficient where it "does not explain what efforts

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[12] (...continued)
justify opposition may exist where facts plaintiff sought to discover did not relate to dispositive issues]; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 129 [trial court properly denied continuance to obtain expert testimony on immaterial issue].

were made to take the necessary depositions or why they could not have been taken earlier."

Counsel's declaration did explain that she had noticed Dr. Castro's deposition and that she and defendants' counsel communicated several times in an attempt to schedule the deposition for a mutually agreeable date. (CAR 2-3; see also CT 90-98.) However, as the trial court noted, even though the case "ha[d] been pending for nearly one and one-half years" and trial was less than a month away, plaintiff "unilaterally noticed the deposition of [Dr. Castro] at a late stage in the proceeding without checking the dates in advance with defendants," and, when Dr. Castro and defendants' counsel were not available, "rejected alternative dates suggested by defendants." (CT 107.) Moreover, counsel provided *no* explanation whatsoever for failing to notice Dr. Castro's deposition in the year and a half after filing the complaint. (See CAR 2-4.) Thus, the court appropriately found that "the responsibility for not having deposed [Dr. Castro] lies with plaintiff." (CT 107.) Plaintiff has not shown otherwise on appeal. (Cf. *Wachs v. Curry*, *supra*, 13 Cal.App.4th at p. 624 [continuance properly denied where declaration of intent to conduct depositions "contains no showing . . . why [such evidence] could not have been obtained in the three months between the state's filing of the motion for summary judgment and the hearing"]; *Hartenstine v. Superior Court* (1987) 196 Cal.App.3d 206, 221 [continuance properly denied where plaintiff failed to show he could not have obtained evidence in two-year period between filing complaint and motion for summary judgment].)

Counsel also provided no explanation why the unspecified "additional discovery" could not have been completed sooner. (See CAR 4.) To the contrary, the trial court properly found that plaintiff was *not* diligent in pursuing discovery. Plaintiff had not designated or even

hired an expert, even though he claimed medical malpractice and defendants had designated an expert and made a timely demand for exchange of expert witnesses. (CT 107.) Nor had plaintiff even attempted to notice the deposition of defendants' expert, Dr. Toffel. (CT 105-107.) Under the circumstances, not only was there no error by the trial court in denying a continuance, it would have been an abuse of discretion to have *granted* one. (See *FSR Brokerage, Inc. v. Superior Court, supra*, 35 Cal.App.4th at pp. 75-76 [trial court erred in granting continuance where there was abundant time to conduct discovery between filing of actions and summary judgment hearing approximately one to two years later].)

Plaintiff attempts to use his attorney's negligence in pursuing the case as a basis for reversing the judgment. He states:

> The record is replete with neglect of the plaintiff's case by his attorney. . . . The [trial] court stated that the plaintiff's counsel waited three weeks after receiving the motion before asking the court for relief, "plaintiff's counsel admitted that she had not retained any expert to testify for plaintiff in this medical malpractice action," filed no opposition to the defendants' Motion for Summary Judgment, . . . failed to depose the defendants expert, improperly noticed the deposition of [Dr. Castro] (by not clearing the date of the deposition before sending notice thereof), rejected the alternative dates provided by the defendants counsel and failed to set forth how the deposition of Dr. Castro would raise a triable issue of fact.

(AOB 15.) However, plaintiff, not defendants, must bear the consequences of his attorney's conduct. While counsel's mishandling of the case may support an action by plaintiff against his attorney for malpractice, it does not provide a basis for reversing a judgment properly granted. (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, citations omitted [attorney's negligence "'is imputed to his client and may not be offered by

the latter as a basis for relief.' The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice"].)

In sum, plaintiff did not even come close to making the required showing under subdivision (h). The trial court's order should be affirmed.

B. Contrary To Plaintiff's Assertion, Plaintiff Had Sufficient Time To Depose Defendants' Expert.

Plaintiff's counsel asserted at the hearing on summary judgment that she needed a continuance to depose defendants' expert, Dr. Toffel. (RT 2.) The trial court rejected this contention, reasoning that plaintiff "never noticed or attempted to notice [Dr. Toffel's] deposition." (CT 107.) Plaintiff contends the trial court erred based on a misrepresentation by defendants regarding the timing of their expert witness disclosure. (AOB 19-20.) This contention is meritless.

Defendants served their summary judgment motion by mail on August 16. (CT 65; see CT 105.) Plaintiff's counsel claims she did not actually receive the motion, which was mailed to her post office box, until August 23. (CT 106; CAR 2.) Plaintiff's opposition was due on September 4.[13]

At the hearing, defendants argued that plaintiff had sufficient time to depose Dr. Toffel before the opposition was due because he could have taken the deposition on 10 days' notice. (RT 6.) This statement was

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[13] The appellant's opening brief erroneously states that the summary judgment opposition was due on September 8. (AOB 20.) However, the summary judgment statute provides that the opposition is due "not less than 14 days preceding the . . . hearing." (Code Civ. Proc., § 437c, subd. (b)(2).) Since the hearing was scheduled for September 18, plaintiff's opposition was due on September 4.

correct. A party opposing a summary judgment motion may seek leave of court to depose an expert whose declaration is offered in support of the motion to determine the foundation for the expert's opinion, even if the expert has not yet been formally designated under Code of Civil Procedure section 2034. (*St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1538-1539.) A deposition may be scheduled on 10 days' notice, and the court may, on motion or ex parte application, shorten the time for scheduling a deposition. (Code Civ. Proc., § 2025, subd. (f).) Thus, even if plaintiff's counsel did not in fact receive the summary judgment motion until August 23 (which likely was her own fault for failing to check her post office box), she could have noticed Dr. Toffel's deposition immediately and taken it by September 2 (or September 3).

If counsel needed more time, she could have moved ex parte for an order shortening time to take the deposition. (*Ibid.*) Or, she could have moved ex parte for an order shortening time to allow her to file plaintiff's opposition later than 14 days before the hearing. (Code Civ. Proc., § 437c, subd. (b)(2); Cal. Rules of Court, rule 317.) Even if she did not receive the transcript in time to submit it with the opposition, she would have had sufficient information to inform the court, in support of a timely request for a continuance, that facts essential to justify opposition existed but could not then be presented – if indeed such facts did exist. (See *Wachs v. Curry, supra,* 13 Cal.App.4th at p. 623.) At the very least, she was obligated to attempt to schedule the deposition and inform the court that she had done so. (*A & B Painting & Drywall, Inc. v. Superior Court, supra,* 25 Cal.App.4th at pp. 356-357 [declaration in support of request for a continuance must "explain what efforts were made to take the necessary depositions [and] why they could not have been taken earlier"].)

Instead, plaintiff's counsel did nothing. As the trial court noted, she did not even *try* to notice Dr. Toffel's deposition in the three weeks between the date she admitted she received the summary judgment motion and the summary judgment hearing. (CT 107.) Thus, the court properly found that plaintiff was not diligent.

Plaintiff's focus on defendants' expert witness designation for trial is a red herring. (AOB 19-20.) The designation has nothing to do with whether plaintiff had time to notice Dr. Toffel's deposition before his opposition to the summary judgment motion was due, since, as explained above, plaintiff would have a right to depose the expert even if he were not designated to testify at trial. (*St. Mary Medical Center v. Superior Court*, *supra*, 50 Cal.App.4th at pp. 1538-1539.) Moreover, plaintiff misrepresents defense counsel's statement in court. Referring to the expert designation served on August 30 and Dr. Toffel's name on that list, defense counsel stated, "Roughly 10 days to two weeks before that individual was formally disclosed under [Code of Civil Procedure section] 2034, [plaintiff's counsel] could have sat and taken his deposition on 10 days' notice before her opposition to this motion was due." (RT 6; Defendants' Designation of Expert Witnesses, p. 6, attached to Appellant's Motion for Augmentation of the Clerk's Transcript, filed January 20, 2004 in this appeal, and granted February 18.) By inserting a comma *that is not there* after the word "before," plaintiff argues that defendants misrepresented that the designation of expert witnesses was served two weeks before the summary judgment motion was served. (AOB 19.) Clearly, that is not what happened and it is *not* what defense counsel said. What defense counsel said was that plaintiff's counsel could have noticed Dr. Toffel's deposition 10 days to two weeks *before the designation was filed.*

The trial court properly denied a continuance for another reason – plaintiff's counsel argued that she needed to depose Dr. Toffel for the first time at the summary judgment hearing. The statute requires that a party moving for a continuance must demonstrate *by affidavit* that facts essential to justify opposition may exist and that the facts could not have been obtained sooner. (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281; *Wachs v. Curry, supra*, 13 Cal.App.4th at p. 623.) Counsel's oral statement failed to satisfy this requirement, and plaintiff does not contend otherwise on appeal.

In short, there was no error in denying a continuance. The trial court's order must be affirmed.

III. PLAINTIFF IS NOT ENTITLED TO STATUTORY OR EQUITABLE RELIEF FROM THE JUDGMENT.

Plaintiff contends, yet again for the first time on appeal, that he is entitled to relief from the judgment due to the neglect of his former attorney, June Teecher. (AOB 1-2, 11-19.) Plaintiff's contention is based primarily on a declaration by Ms. Teecher, which plaintiff, by a motion filed with the appellant's opening brief, requested this court to accept as new evidence on appeal. (AOB 18-19; Appellant's Motion for the Appellate Court to Accept New Evidence on Appeal, filed January 20, 2004.) This court *denied* plaintiff's motion on February 18, 2004. Thus, Ms. Teecher's declaration is not part of the record, and plaintiff's contention that the court should take new evidence on appeal (AOB 18-19) is moot. Moreover, as explained below, the record does not entitle plaintiff to relief under either Code of Civil Procedure section 473 or equity.

A. Plaintiff's Attempt To Obtain Relief Under Code Of Civil Procedure Section 473 For The First Time On Appeal Is Improper.

Code of Civil Procedure section 473, subdivision (b), permits a trial court to set aside a judgment due to a party's "mistake, inadvertence, surprise, or excusable neglect." Relief becomes mandatory if the party submits an attorney's affidavit attesting to his "mistake, inadvertence, surprise or neglect." (Code Civ. Proc., § 473, subd. (b).)

Plaintiff's attempt to obtain relief under this section on appeal is patently improper. First, as with virtually all of his contentions, plaintiff never sought relief from the judgment under section 473 in the trial court and, therefore, cannot seek such relief on appeal. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279 [issues not raised in the trial court are waived on appeal].)

Second, the language and structure of the statute make clear that an application for relief under section 473 must be directed to the trial court, not the court of appeal in the first instance. Section 473 is part of Title VI, entitled "Pleadings in Civil Actions," which deals exclusively with trial court pleadings. It is also part of Chapter 8, entitled "Variance – Mistakes in Pleadings and Amendments," which deals with matters such as amending a complaint, answer, or other trial court pleading. Section 473 itself also addresses matters such as amending trial court pleadings, extending the time to answer or demur to a complaint, and postponing trial. Clearly these subjects pertain only to the trial court. (See *TrafficSchoolOnline, Inc. v. Superior Court* (2001) 89 Cal.App.4th 222, 235 ["Quite obviously, no trial in the traditional sense can occur before the Court of Appeal"]; *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 [court

of appeal cannot adjudicate summary judgment in the first instance; "Fundamentally, unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error"]; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 667 ["It is axiomatic that the trial court is the proper place for making factual decisions, and [the appellate court's] role is limited to reviewing its decision . . . . Thus, if the trial court has taken no action, we have nothing to review"].)

Finally, plaintiff's attempt to obtain relief under section 473 is untimely. The trial court granted summary judgment on September 18, 2002, and judgment was entered on November 14. (CT 112, 121.) Plaintiff seeks relief from judgment for the first time in his appellant's opening brief, filed on January 20, 2004 – over a year later. Section 473 explicitly provides that an application for relief from judgment must be made within six months after judgment or entry of judgment. (Code Civ. Proc., § 473, subd. (b).) The six-month limit is jurisdictional; a court has no power to grant relief under section 473 after that time. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981; *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 735, fn. 3; *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147.) Because an application for relief under section 473 would be untimely even if brought in the trial court, this court cannot grant such relief in the first instance. (Cf. C*respo v. Cook* (1959) 168 Cal.App.2d 360, 361, 363 [refusing to accept affidavits in support of motion for new trial based on jury misconduct after expiration of statutory time limit for filing such affidavits].)

In sum, plaintiff's attempt to obtain relief under Code of Civil Procedure section 473 on appeal is clearly improper.

B. Plaintiff Is Not Entitled To Seek Equitable Relief From Judgment In This Appeal.

Plaintiff contends he is entitled to equitable relief from the judgment even though the six-month limit for seeking relief under Code of Civil Procedure section 473 has expired. (AOB 12.) Although a party may seek equitable relief from a default judgment obtained through extrinsic fraud or mistake (*Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 146), that relief is not available to plaintiff in this appeal. First, just as he never sought relief under section 473, he never sought equitable relief from the judgment in the trial court. Thus, he cannot seek that relief on appeal. (E.g., *Estate of Westerman, supra*, 68 Cal.2d at p. 279.)

Second, a claim for equitable relief from judgment must be addressed to the trial court, either by a motion in the same action or by a separate equitable action. (*Bloniarz v. Roloson, supra*, 70 Cal.2d at p. 146; *Olivera v. Grace* (1942) 19 Cal.2d 570, 574; *Desper v. King* (1967) 251 Cal.App.2d 659, 662.) These are the *only* permissible methods for raising such a claim. (See *Bloniarz v. Roloson, supra*, 70 Cal.2d at pp. 148-149.)

Plaintiff cites *Hallett v. Slaughter* (1943) 22 Cal.2d 552, 556, for the proposition that "relief may be granted by *this court* even though the 6 month period within which to file for CCP 473 relief has expired." (AOB 12, emphasis added.) That case says no such thing. Plaintiff there sought equitable relief from judgment *in the trial court* by an independent suit in equity. (*Id.* at pp. 553-555.) The trial court granted the relief and set aside the judgment, and the court of appeal affirmed. (*Id.* at p. 558.) Thus, the issue on appeal was whether the *trial court's* ruling was proper. (*Id.* at pp. 555-558.) Nothing in *Hallett* authorizes an appellate court to grant

equitable relief from judgment where the issue was not first raised in the trial court, and such relief is clearly improper. (Cf. *Monsan Homes v. Pogrebneak* (1989) 210 Cal.App.3d 826, 829-830 [refusing to accept evidence and make factual findings on appeal in support of relief from judgment because appellate courts may not weigh evidence]; *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780-781 ["the general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear [below]"].)

In short, plaintiff's attempt to salvage his case by seeking relief from judgment on appeal is futile because this court has no authority to grant such relief in the first instance. But even assuming the issue is properly before this court, plaintiff cannot prevail because, as we explain next, he has not satisfied the substantive requirements for obtaining relief from judgment.

C. Even Assuming Plaintiff's Request For Relief From Judgment Is Properly Before This Court, He Is Not Entitled To Relief Because He Is Charged With His Attorney's Neglect.

1. Plaintiff is not entitled to relief under the mandatory provision of section 473 because the record contains no attorney's affidavit of fault.

Code of Civil Procedure section 473, subdivision (b), provides for mandatory relief from a default or default judgment if the application for relief is accompanied by "an attorney's sworn affidavit attesting to his or

her mistake, inadvertence, surprise, or neglect," even if the "neglect" is inexcusable. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608, 615.)

Contrary to his assertion (AOB 16-17, 18-19), plaintiff is not entitled to relief under this provision because his former attorney, June Teecher, never submitted such an affidavit in the trial court. Instead, plaintiff attempted to salvage his case on appeal by filing a motion requesting this court to accept a declaration by Ms. Teecher as new evidence on appeal. (Appellant's Motion for the Appellate Court to Accept New Evidence on Appeal, filed January 20, 2004, denied February 18.) This court *denied* the motion. Thus, there is no attorney's affidavit of fault in the record, and the mandatory provision of section 473 is inapplicable.

2. Plaintiff is not entitled to relief under the discretionary provision of section 473 or equity.

Under either the discretionary provision of Code of Civil Procedure section 473, subdivision (b), or equity, a court may relieve a party from his counsel's "*excusable* neglect" – an "act or omission which might have been committed by a reasonably prudent person under the same circumstances." (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1602-1603.) In contrast, an attorney's *inexcusable* neglect – "'[c]onduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument'" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1400) – generally is imputed to the client and does not provide a basis for relief, with one exception: If the attorney abandons the client through a "total failure on the part of counsel to represent the client," the client will be relieved of the consequences of that

abandonment if he himself was reasonably diligent. (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at pp. 898 900; *People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 583, 584 [equity]; *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 352-354 [equity].) The burden of demonstrating entitlement to relief is on the party seeking it. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 623-624.) Moreover, "[t]o the extent the court's equity power to grant relief differs from its statutory power [under section 473], the equity power must be considered narrower, not wider." (*Orange Empire Nat. Bank v. Kirk, supra*, 259 Cal.App.2d at p. 353; see *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1074 [party seeking relief from judgment in equity "must make a substantially stronger showing of the excusable nature of his or her neglect than is necessary to obtain relief under Code of Civil Procedure section 473"].)

Here, plaintiff does not attempt to demonstrate that his attorney's neglect was excusable – nor could he do so, as an attorney's failure to oppose a dispositive motion repeatedly has been held not to constitute excusable neglect. (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 316, 318-319; see also *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 683-685.) To the contrary, plaintiff argues that his attorney's conduct was inexcusable and he is entitled to relief because the neglect was so extreme as to constitute abandonment. (AOB 11-17; see also AOB 18-19.) As explained below, plaintiff is not entitled to have the judgment set aside because he has not shown *either* (1) that his attorney "total[ly] fail[ed]" to represent him (*Carroll v. Abbott Laboratories, Inc., supra,* 32 Cal.3d at pp. 899-900; *Orange Empire National Bank v. Kirk, supra,* 259 Cal.App.2d at pp. 352-354 [equity]), *or* (2) that he was "reasonab[ly] diligen[t]" in prosecuting his own action (*Clark v. City of*

Compton (1971) 22 Cal.App.3d 522, 528; *People v. One Parcel of Land, supra,* 235 Cal.App.3d at p. 584 [equity]).

a. Plaintiff was not diligent in prosecuting his own action.

To obtain relief under Code of Civil Procedure section 473, a party must show that he was reasonably diligent in prosecuting his own action. (*Clark v. City of Compton, supra*, 22 Cal.App.3d at pp. 528-529; see also *Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1018-1019.) The same principle applies where a party seeks equitable relief from judgment. (*Stiles v. Wallis, supra*, 147 Cal.App.3d at p. 1149 [party seeking relief must make a "strong showing" he acted diligently to set aside judgment]; *People v. One Parcel of Land, supra,* 235 Cal.App.3d at p. 584.)

Here, plaintiff has made no showing whatsoever that he was diligent either in "seeking to discover his attorney's neglect" or in "moving for relief thereafter." (*Clark v. City of Compton, supra*, 22 Cal.App.3d at pp. 528-529.) The record does not show when he learned his former attorney failed to oppose summary judgment, whether he attempted to inquire about his case, what efforts he made to retain new counsel, why he waited over a year from entry of judgment to seek relief, or why he did not seek it first in the trial court. Without any such evidence, there is no basis to set aside the judgment, even if his claim were properly before this court. (See *Ludka v. Memory Magnetics International* (1972) 25 Cal.App.3d 316, 321-322 [trial court properly denied relief from default where defendant provided no explanation for three-month delay between entry of default and motion for relief under section 473]; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 908-909 & fn. 3 [affirming denial of motion to set

aside default judgment under section 473 where evidence did not show when moving party discovered judgment had been rendered against him]; *In re Marriage of Stevenot, supra,* 154 Cal.App.3d at pp. 1073-1074 [client failed to show diligence warranting equitable relief where she made no showing why she did not seek legal advice until year and a half after entry of default].)

b. Plaintiff was not abandoned by his attorney because the attorney did not totally fail to represent him.

To demonstrate that he was abandoned by his counsel, a plaintiff must show more than that the attorney was grossly negligent in prosecuting his action: he must show "a *total failure* on the part of counsel to represent" him. (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 900, emphasis added; *People v. One Parcel of Land, supra,* 235 Cal.App.3d at pp. 583, 584 [applying same standard where plaintiff seeks equitable relief from judgment].) The courts have narrowly delineated the circumstances in which an attorney's misconduct amounts to such a total failure. The court found that standard to have been met in *Orange Empire Nat. Bank v. Kirk, supra,* 259 Cal.App.2d 347, cited by plaintiff (AOB 11-12), an early case addressing the issue. There, the attorney, despite repeatedly assuring the client that he was taking care of the case, never filed an appearance on the client's behalf and – although he had actual notice that a default had been entered against his client and that the case had been set for trial – neither sought relief from default nor appeared at trial. (*Id.* at pp. 350-352, 354.)

The California Supreme Court limited *Orange Empire* to its facts, stressing that the "total failure" standard

> should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to even greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship.

(*Carroll v. Abbott Laboratories, Inc.*, *supra*, 32 Cal.3d at p. 900.) Thus, the court held that the trial court abused its discretion by granting plaintiff's request to set aside a dismissal where, although counsel "grossly mishandled" a routine discovery matter, he nonetheless continued to provide the plaintiff with some representation, attending plaintiff's deposition, propounding a set of interrogatories, and answering several others. (*Id.* at p. 900.)

Numerous other courts since *Carroll* have denied requests for relief from judgment, concluding that an attorney's neglect, although inexcusable, did not amount to a total failure of representation. (See, e.g., *Beeman v. Burling, supra,* 216 Cal.App.3d at pp. 1603-1604 [trial court properly denied section 473 motion where $197,000 default judgment was entered against defendant after counsel failed to answer complaint or seek relief from default but "continued to act, albeit ineffectively, as appellant's representative"]; *Monsan Homes, Inc. v. Pogrebneak, supra*, 210 Cal.App.3d 826 [trial court properly denied section 473 motion where defendant's attorney failed to answer complaint or seek relief from default]; *Kendall v. Barker, supra*, 197 Cal.App.3d at p. 626 [reversing trial court's grant of relief under section 473, where counsel failed to respond to complaint or to request for entry of default].)

Here, while counsel's prosecution of plaintiff's case was admittedly neglectful, it was not so grossly negligent as to constitute attorney abandonment. Although counsel failed to represent plaintiff effectively, she did not fail to represent him at all: She moved to continue the summary judgment hearing (CAR 1-7; 102) and the trial date (CT 74-89, 102) and represented plaintiff at the hearing on defendants' summary judgment motion (CT 104; RT 106). She also attended a mediation (CT 75), defended plaintiff's deposition (CT 76, 81-82), propounded discovery (CT 75), noticed Dr. Castro's deposition and communicated with defendants' counsel regarding scheduling that deposition (CT 76-77, 83-88; CAR 2-3, 6-7; see also CT 90-98). After summary judgment was granted, she filed a timely notice of appeal from the judgment (CT 125), filed a designation of record on appeal (CT 127-128), filed a motion to tax costs (B165897 CT[14] 33-36, 39-51, 86), filed a notice of appeal from the trial court's award of costs to defendants (B165897 CT 87), and filed a designation of record on appeal in the cost appeal (B165897 CT 89-91, 92-93). Plaintiff clearly has not met his burden under section 473 or equity to show that his attorney abandoned him.

Plaintiff's reliance on *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, *Buckert v . Briggs* (1971) 15 Cal.App.3d 296, and *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.3d 201 is misplaced. (AOB 10-11, 14, 16-17.) In all three cases, the courts based the plaintiffs' entitlement to relief on their attorneys'

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[14] Respondents have filed, concurrently with this brief, a motion requesting this court to take judicial notice of documents that appear in the clerk's transcript in the related appeal pending in this court, *Slack v. Regents of the University of California*, Case No. B165897. We refer to that transcript as "B165897 CT" to distinguish it from the clerk's transcript in the instant appeal, which we refer to as simply "CT."

longstanding inaction. For example, in *Buckert, supra*, the court reasoned that the attorney-client relationship was "obliterated" when plaintiff's attorney failed to advise plaintiffs of the trial date and failed to appear for trial; told plaintiff, when plaintiff contacted him, that he thought plaintiffs had lost interest in the case; failed to contact opposing counsel to set aside the judgment by stipulation; and refused to cooperate with plaintiffs to obtain an order vacating the judgment through substituted counsel. (15 Cal.App.3d at pp. 299-301; see also *Seacall*, 73 Cal.App.3d at pp. 204, 206 [counsel's inaction persisted for *two years* in which she took no action on the case and failed to appear at two hearings, prompting the court to comment that she "substituted herself out of the case de facto long before she did so de jure"]; *Daley, supra*, 227 Cal.App.2d at pp. 383-384, 387-388, 391-392 [counsel *never appeared* at any motion or pretrial conference, waited a year and a half before amending plaintiff's complaint to name a new party, never served the new party, and held a substitution of attorney form for more than five months before signing it].) Here, in contrast, plaintiff's counsel took numerous actions on the case throughout the action and into the appeal.

Moreover, both the *Buckert* and *Daley* courts emphasized that the attorneys falsely assured their clients that their cases were being properly prosecuted, thus affirmatively misleading them. (See *Buckert v. Briggs, supra,* 15 Cal.App.3d at pp. 299-301; *Daley v. County of Butte, supra*, 227 Cal.App.2d at p. 394.) In contrast, here there is no evidence plaintiff received any such assurances.

Plaintiff's reliance on *Avila v. Chua* (1997) 57 Cal.App.4th 860, is also misplaced. (AOB 13-14.) There, the court of appeal held that section 473 mandated relief from judgment based on an attorney affidavit of fault. (*Id.* at pp. 868-869.) Here, there is no attorney affidavit in the record; this

court has already denied plaintiff's motion requesting it to accept his former attorney's declaration as additional evidence on appeal. (See Appellant's Motion for the Appellate Court to Accept New Evidence on Appeal, filed January 20, 2004 and denied February 18, 2004.) *Avila* thus is inapplicable.

Leader v. Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, and *Garcia v. Hejmadi, supra*, 58 Cal.App.4th 674, which cited *Avila*, also do not help plaintiff. (AOB 13-14.) In *Garcia*, the court surmised in dicta that the facts in *Avila* might have permitted the same result under the discretionary provisions of section 473 because counsel's mistake was excusable. (*Id.* at pp. 682-683.) Because plaintiff here does not contend that his counsel's mistake was excusable, *Garcia* is inapplicable. In *Leader*, the court cited *Avila* in addressing whether the mandatory provisions of section 473, which provide for relief from a "default judgment or dismissal," apply where plaintiffs fail to timely file an amended complaint. (*Id.* at pp. 620-621.) *Leader* is, thus, wholly inapposite to this case, which does not involve a default judgment or dismissal and where mandatory relief is unavailable because the record contains no attorney affidavit of fault.

Plaintiff's citation to *Douglas v. Todd* (1892) 96 Cal. 655, a case over 100 years old, is equally unavailing. The court there held that a party may be relieved from his attorney's mistake of law when that mistake prevents him from asserting a defense, and that an attorney's *excusable* neglect may support granting relief. (*Id.* at pp. 658, 660.) Here, plaintiff has alleged no mistake of law on the part of his former attorney, nor has he attempted to show that his attorney's neglect was excusable.

Finally, *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654, is completely inapposite. (AOB 16.) That case holds that inadvertent disclosure of documents protected by the attorney-client

privilege does not waive the privilege. (*Id.* at pp. 651, 654.) It says nothing about relief from judgment under section 473 or equity.

In short, even if plaintiff were entitled to seek relief from judgment in this court, such relief would be inappropriate because he has not met his burden of showing that he was reasonably diligent in prosecuting his own action or that his attorney abandoned him.

CONCLUSION

Summary judgment was properly granted in favor of defendants. Defendants negated essential elements of plaintiff's medical malpractice claim and his informed consent theory, and plaintiff filed no opposition. Plaintiff's newly manufactured contentions that there are triable issues of material fact regarding the effect of his preexisting conditions are waived by his failure to raise them below. Even assuming these contentions are properly before this court, summary judgment is proper because plaintiff failed to present expert evidence – or any evidence – to support them.

The trial court acted well within its discretion in denying plaintiff's request for a continuance because plaintiff failed to meet the statutory requirements for obtaining a continuance.

Finally, the court should summarily reject plaintiff's contention that he is entitled to relief from the judgment based on his attorney's neglect for the first time on appeal. Plaintiff has waived the right to such relief by failing to seek it in the trial court. Even if this court could reach the issue, plaintiff is not entitled to relief. This court has already denied plaintiff's motion requesting it to accept his former attorney's declaration as new evidence on appeal, rendering the mandatory provisions of Code of Civil

Procedure section 473 inapplicable, and plaintiff has not made the requisite showing for discretionary or equitable relief.

For all of these reasons, the summary judgment should be affirmed.

Dated: May 26, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14 (c)(1), the attached Respondents' Brief is proportionately spaced, has a typeface of 13 points and contains 12,556 words.

Dated: May 26, 2004

Respectfully submitted,

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By______________________________
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