Filed 4/15/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CELINE BURK et al.,

Plaintiffs and Appellants,

v.

THE REHABILITATION CENTRE OF BEVERLY HILLS,

Defendant and Respondent.

B245467

(Los Angeles County
Super. Ct. No. BC432426)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Barbara M. Scheper, Judge. Affirmed.

Ramey Law, John F. Ramey, James Doddy for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Arezoo Jamshidi, Kathleen M. Walker, and Staci L. Trang for Defendant and Respondent.

INTRODUCTION

Plaintiffs and appellants Celine Burk and Francesca Gasaway appeal from a summary judgment under Code of Civil Procedure section 437(c)[1], in favor of defendant and respondent The Rehabilitation Centre of Beverly Hills on plaintiffs' claims for wrongful death and elder abuse. Plaintiffs contend that the trial court abused its discretion in granting defendant's motion for summary judgment because instead it should have either ordered a continuance of the hearing on the motion or deny the motion. We affirm.

FACTUAL BACKGROUND[2]

In December 2008, Beatrice Burk,[3] who was 89-years-old, was admitted to Cedar-Sinai Medical Center for difficulty swallowing. Her admitting diagnoses included swallowing dysfunction, dementia, dehydration, and anemia. Ms. Burk was also noted as having aspiration pneumonia, and had a history of dementia, hypothyroidism, progressive supranuclear palsy, and colon cancer.

A few days after she was admitted to Cedar-Sinai Medical Center, she was transferred to Providence St. Joseph Medical Center where she was treated for aspiration pneumonia and urinary tract infection with fungus. She had abnormal blood test results, and was diagnosed with having "respiratory problems" and enterococcus faecalis.

On February 18, 2009, Ms. Burk was transferred to defendant's facility. On Ms. Burk's second day at defendant's facility, she experienced shortness of breath. Plaintiffs contend that while Ms. Burk was at defendant's facility, she aspirated on food. Ms. Burk

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[1] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

[2] Pursuant to the applicable standard of review, we normally state the facts in the light most favorable to plaintiff as the party against whom summary judgment was entered. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) The record, however, does not contain substantive facts asserted by plaintiffs. We therefore base the factual background on the declaration of Alvin Chang, M.D., submitted by defendant in support of its motion.

[3] Plaintiffs state that they were Ms. Burk's daughters.

was provided with breathing treatment, and defendant's staff contacted her doctor. The doctor ordered that Ms. Burk be transferred to an emergency room "due to oxygen desaturation." The supervising registered nurse called paramedics, who transported Ms. Burk to Olympia Medical Center.

While at Olympia Medical Center, Ms. Burk was examined by an emergency physician, a cardiologist, a pulmonary critical care specialist, and several other doctors for pneumonia, tachycardia, acute respiratory insufficiency, high risk of aspiration, leukocytosis, and dehydration, renal failure. On February 26, 2009, about six days after she was admitted to Olympia Medical Center, Ms. Burk passed away. Ms. Burk was over 89 years old when she died.

Ms. Burk's death certificate stated that her cause of death was "Overwhelming Sepsis," due to recurrent bacteremia enterococcus, coagulase recurrent staphylococcus, and metasastatic colon cancer. Other conditions contributing to her death were probable colitis, advanced dementia, possible progressive supranuclear palsy, spontaneous left femoral fracture, and pneumonia.

PROCEDURAL BACKGROUND

On February 24, 2010, plaintiffs filed a complaint alleging causes of action against defendant for wrongful death and elder abuse.[4] On September 22, 2010, plaintiffs filed a first amended complaint (FAC) alleging causes of action against defendant and others for wrongful death and elder abuse. Plaintiffs alleged, inter alia, that defendant did not train, screen or supervise the caregivers, and as a result, the caregivers allegedly did not properly feed or care for Ms. Burk, causing her to aspirate on food and contract pneumonia. Plaintiffs also alleged that defendant did not transport Ms. Burk "to the nearest competent emergency medical facility, Cedars Sinai [Medical Center] but instead had her transported to Olympia [Medical Center] where she was negligently treated and shortly thereafter died." Plaintiffs also alleged that defendant neglected to select

[4] The complaint is not part of the record.

adequately a competent medical and nursing staff and failed to review periodically the competency of and monitor their staff.

On June 6, 2012, defendant filed a motion for summary judgment, or in the alternative, summary adjudication as to both causes of action asserted against it—wrongful death and elder abuse. The declarations of Doctor Chang and a registered nurse, Margaret Spencer, were submitted in the support of the motion, in which declarations they opine that defendant met the standard of care in treating Ms. Burk during her approximately 48-hour admission to defendant and defendant did not cause Ms. Burk's death. The motion was scheduled to be heard on August 22, 2012.

On about June 13, 2012, counsel for plaintiff Gasaway, and on about June 14, 2012, counsel for plaintiff Burk, filed motions to be relieved as counsel,[5] supported by counsels' declarations stating that "the reasons" for the motion is that plaintiffs breached their retainer agreement; plaintiffs and counsel had a direct conflict of interest that places counsel in "an untenable ethical bind" by continued representation; plaintiffs had been provided substitution of attorney forms, but they failed to return them to counsel in a timely manner; and "remaining facts . . . [that] must be kept confidential," but would be disclosed to the trial court at an in camera hearing. There is no evidence in the record that plaintiffs opposed the motions to be relieved as counsel.

At the July 11, 2012, hearing on the motions to be relieved as counsel, plaintiff Burk was present. Plaintiff Burk did not oppose the motions. The trial court granted the motions of plaintiffs' counsel to be relieved as counsel after noting that there was no opposition to them. The trial court asked plaintiff Burk whether she is going to be hiring a new attorney, and she responded, "I'm diligently working on that as of this morning." Plaintiff Burk requested that the trial court take defendant's motion off calendar until such time that she "can get new counsel, hire experts to respond to the motion for summary judgment, and reset it for a calendar day. In light of the fact that the trial date's been vacated, I don't feel it would harm the other side in any way." The trial court

[5] The motions to be relieved as counsel are not in the record.

responded, "Well, this case has been going on for an awful long time, Ms. Burk. I don't have that motion in front of me at this time, but I know that it had to be served at least 75 days before the hearing date. And I understand that there's been a breakdown in the relations with counsel, but . . . either you or a new attorney would have to bring an ex parte application for that . . . . [¶] . . . [¶] [A]nd it would be important for the court to know what was done in preparation for opposing the motion. As old as this case is, I don't know that I would be inclined to grant a continuance to allow discovery to occur. [¶] I might agree to some more time for a new attorney representing you to prepare an opposition, but because of the fact that you were represented, I'm not going to restart the whole process because a new attorney may be coming in. [¶] . . . [¶] [Plaintiff Burk], I can't just keep continuing this out while there's maybe some efforts to get an attorney. If you're going to have an attorney, you need to get the person in as soon as possible . . . ." The trial court scheduled a status conference and trial setting conference for August 15, 2012.

On August 8, 2012, plaintiffs retained new counsel. On August 10, 2012, over two months after defendant filed its motion and after plaintiffs' opposition to the motion was due,[6] plaintiffs' new counsel filed substitution of attorney forms, substituting in the action as counsel for plaintiffs. On the same day, plaintiffs, through their new counsel, filed an ex parte application for an order to continue the hearing on defendant's motion, supported by a declaration from plaintiffs' new counsel, stating, "My clients were represented by counsel until July 26, 2012, when my clients' former counsels' motions to be relieved as counsel were granted. [¶] My clients were diligent in finding new counsel and my office was retained on August 8, 2012. [¶] At this point I do not believe that previous counsel conducted the necessary discovery and retained the necessary expert to prepare an opposition on the merits of the motion. Thus I believe that at least 90 will be

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6 As stated above, the motion was scheduled to be heard on August 22, 2012. Section 437c, subdivision (b)(2) provides, "Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise."

required to conduct the necessary discovery; retain experts and prepare a meaningful opposition." Defendant opposed the ex parte application. The trial court denied it on the ground of plaintiffs' failure to show good cause.

On August 14, 2012, plaintiffs filed an opposition to defendant's motion, supported by a declaration from plaintiffs' counsel, stating, "Shortly after being contacted by [plaintiffs], and prior to being retained by them, I contacted a potential medical expert to review portions of the medical file to determine if the defendants including [defendant] had caused or contributed to the death of my clients' mother. I was informed that based on a cursory review that the expert had concerns about some of the care provided by [defendant]. [¶] Due to a previously scheduled trip to Europe the expert has been unavailable to further review the records in this matter and has not reviewed the pending motion or the declarations of Dr. Alvin Chang and Margaret Spencer. I have been informed that the expert will not return to the United States until August 20, 2012. [¶] It is my understanding from speaking with my clients and reviewing the available records, that previous counsel had not retained an expert to review the records or the declarations filed in support of the Motion. [¶] I believe that the opinions of this expert may raise triable issues of fact that would cause the Motion to be denied. I believe that this expert may also raise issues as to the opinions expressed by Dr. Alvin Chang and Margaret Spencer as stated in their declarations. [¶] It is my understanding that the depositions of Dr. Alvin Chang and Margaret Spencer have not taken place. Their declarations form the basis for the Motion and I believe that taking these depositions will be crucial to develop an argument that the Motion fails to meet its burden. My office has already noticed these depositions. [¶] At this point I do not have access to the entire file for this matter including the discovery that has been completed. However, it is my understanding that previous counsel did not conduct the necessary discovery and did not retain the necessary expert or experts to prepare an opposition on the merits of the Motion. Thus I believe that additional time is needed to conduct this discovery and to prepare the opposition."

The trial court issued a tentative ruling regarding defendant's motion, stating, "Plaintiffs represented themselves when they filed the complaint in February of

2010. However, by June 2, 2010, plaintiffs were represented by counsel. Over the course of the next two years, the matter was hotly contested. Numerous demurrers were filed as well as discovery motions. On June 6, 2012, over two years after the case had been filed and over which time the matter was actively litigated, defendant filed the instant motion for summary judgment which was set for hearing on August 22, 2012. Thereafter, on June 13, 2012, counsel for plaintiffs . . . advised the court that they intended to move to be relieved as counsel. Plaintiffs' counsel indicated to the court that their clients were not communicating with them among other issues. The court heard the motions to be relieved and granted them on July 11, 2012. The motions were unopposed by plaintiffs. A substitution of attorney was filed on August 8, 2012 [*sic*], the same day plaintiffs' opposition to this motion was due. [¶] On August 10, 2012, plaintiffs' new counsel applied ex parte for a continuance of the hearing. The motion was denied. [¶] On August 14, 2012, plaintiffs filed their untimely opposition to the motion for summary judgment which relies on the same argument for a continuance already rejected by the court on August 10, 2012. Namely, plaintiffs assert that the motion should be denied or continued pursuant to CCP Section 437c(h) because they do not have an expert to rebut defendant's experts regarding the standard of care and alleged breach thereof. Plaintiffs' argument is without merit therefore the motion is granted. [¶] . . . [¶] Here, plaintiffs have provided no reason why, after two years of litigation, plaintiffs apparently have no expert. From its inception, this case required the testimony of a competent expert to establish the applicable standard of care and provide an opinion that it had been breached as to the decedent's care while at defendant's facility. The decedent was only at defendant's facility for a matter of days making the discovery relevant to defendant's actions relatively discrete. [¶] Plaintiffs have been represented by counsel for over two years prior to the filing of the instant motion yet no declaration is offered from any of plaintiffs' prior attorneys regarding any efforts to retain an expert and the declarations offered are silent on the issue. Indeed, plaintiffs' new attorney has not yet retained an expert. Although apparently one was consulted he or she was not retained. Surely there is more than one possible expert in the relevant field yet plaintiffs

apparently made no effort to contact anyone else when the first expert indicated his unavailability. There is simply no good cause for a continuance of this motion on the record before the court."

At the August 22, 2012, hearing on defendant's motion, the trial court granted defendant's motion[7] stating, "[Plaintiffs' counsel], I appreciate that you're new in this matter, and I realize this is a drastic action in the case, but the case is not new, and it's my feeling that when counsel come into the case, they take it as they find it. And I think, . . . the clients in this case have at least or bear some responsibility for the time that it took to get you involved in the case. [¶] The motions to be relieved were first—the court was at least first notified of them in June. I think some of the individual clients were present at some of the hearings, but I presume that there were conversations or at least attempting conversations between counsel and their clients before this came to the point of having to . . . request the court to grant them a relief. [¶] So it seems to me there were at least several months' time before the court even granted the motion to be relieved that the plaintiffs, your current clients, should have been on notice that they needed an attorney. And particularly with the summary judgment motion pending as of June the 6th, there should have been added urgency. And as I think was noted in the papers, the court has held firm on that summary judgment date and has refused to move it. [¶] I also think that it is incumbent upon former counsel to cooperate with new counsel and their former clients, not just in providing the files but, if necessary, providing a declaration explaining how in . . . essentially [a] medical negligence case, which they filed in 2010, there's no expert on board. [¶] This case never could have been proved by the plaintiffs without an expert. Frankly, I am surprised that any case these days alleging this doesn't have an expert, at least a consultant, before the case is even filed. [¶] The decedent passed away in 2009; so there is a year before the complaint was filed. And so without having any information from either the clients themselves or their former attorneys to

[7] The record does not contain a notice of ruling regarding defendant's motion or a written order by the trial court stating that it granted the summary judgment in favor of defendant.

give the court some indication as to how it's possible we've come to this far down the road and there's no expert available, and then, granted you—it seems like you immediately grasp the issue and you did your best to find someone, but I guess one person was consulted, they weren't readily available, and then that was the end of it. [¶] And I just don't think that is sufficient to establish what's necessary for continuance under the summary judgment standard or to cause the court to exercise any discretion I may have to continue it in the interest of justice. [¶] . . . [¶] All [plaintiffs] needed was one expert, one expert to which . . . I can't imagine that there isn't at least a consultant in this matter. I don't think it's necessary that you depose them, counsel, to oppose the motion. [¶] In fact, I'm not sure that would—you know, you're submitting to me any—I mean, unless they flat-out contradicted themselves in a deposition, I'm not going to evaluate whether you, you know, effectively cross-examined them. All you needed was a contrary declaration from an expert saying that the standard of care was breached and here's why. [¶] And I also—frankly I think that because there is such a short period of time that the decedent was at this particular defendant's facility, you know, while—and I would need to talk about, counsel, all the medical records you submitted. I realize that her, you know, decision regarding what the standard of care was and whether it was breached cannot be made in a vacuum, but certainly it would not have required a lot of time to at least look at the records from the rehabilitation centre and see if there was anything there. [¶] The defendants, the moving parties in this case obviously had their experts look at many, many records of the deceased, demonstrating, all of the preexisting problems that she had. But be that as it may, I think, you know, one declaration from one person with the necessary expertise would have created a triable issue of fact, and that's why I'm struggling, for how, you know, two years plus, none could be found. [¶] . . . [¶] All right. So I am going to adopt my tentative ruling as the ruling of the court. [Plaintiffs' counsel], as I say, . . . in terms of you personally and your firm, I'm sympathetic, but I don't think it's proper for the court only to focus on the short time you've been in the case, and I won't go over all the reasons again. [¶] This case is

too old. . . . [¶] . . . [¶] I think in terms of summary judgment, there is no good cause to continue this matter, and so I will grant the summary judgment."

Judgment was entered in favor of defendant and against plaintiffs. Plaintiffs timely filed a notice of appeal.

DISCUSSION

Section 437c, subdivision (h) provides that, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

"Subdivision (h) was added to section 437c '"[t]o mitigate summary judgment's harshness," . . . [citations]' [citation] 'for an opposing party who has not had an opportunity to marshal the evidence[.]' [Citation.] The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion. [Citation.]" (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.) A declaration in support of a request for continuance under section 437c, subdivision (h) must show: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.)

Both plaintiffs' August 10, 2012, ex parte application for an order to continue the hearing on defendant's motion, and their August 14, 2012, opposition to the motion requesting a continuance of the hearing were untimely. Section 437c, subdivision (h), requires that a request for a continuance of the hearing on a motion for summary judgment be submitted in opposition to a motion or made by ex parte motion "at any time on or before the date the opposition response to the motion is due." As stated *ante*, plaintiffs' ex parte application and their opposition to the motion were filed after plaintiffs' opposition to the motion was due. (§437c, subd. (b)(2).)

In addition, plaintiffs were dilatory in retaining an expert witness and new counsel. The courts of appeal differ regarding whether lack of diligence in completing discovery should be a factor in granting or denying a continuance pursuant to section 437c, subdivision (h). (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038; *Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 255.) "In exercising its discretion the court may properly consider the extent to which the requesting party's failure to secure the contemplated evidence more seasonably results from a lack of diligence on his part. (*Desaigoudar v. Meyercord* [(2003)] 108 Cal.App.4th [173,] 190 ['Where a lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion.']; *Knapp v. Doherty* [(2004)] 123 Cal.App.4th 76, 102, quoting *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 76 [41 Cal.Rptr.2d 404] [request for discovery properly denied where requesting party offered '"no justification for the failure to have commenced the use of appropriate discovery tools at an earlier date"']; *Cooksey v. Alexakis*[, *supra*,] 123 Cal.App.4th [at p.] 257 [19 Cal.Rptr.3d 810] ['majority of courts' have held that 'lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing']; but see *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398 [107 Cal.Rptr.2d 270] [questioning whether diligence plays any proper role in the

matter, given absence of any statutory reference to it].)" (*Rodriguez v. Oto, supra*, 212 Cal.App.4th at p. 1038.)

In *Cooksey v. Alexakis, supra*, 123 Cal.App.4th 246, the plaintiff submitted declarations in support of an ex parte application for continuance of the hearing on a motion for summary judgment to allow her expert to finalize reviewing written discovery and deposition testimony in order to prepare a declaration in opposition to the summary judgment motion. (*Id*. at p. 254.) The trial court denied the plaintiff's request for continuance, and granted the motion for summary judgment. (*Id*. at pp. 253-255.) We affirmed the judgment, stating, "We agree with the majority of courts holding that lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing. Although the statute does not expressly mention diligence, it does require a party seeking a continuance to declare why 'facts essential to justify opposition . . . cannot, for *reasons stated, then* be presented' (§ 437c, subd. (h), italics added), and courts have long required such declarations to be made in good faith. [Citations.] There must be a justifiable reason why the essential facts cannot be presented. An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. The statute itself authorizes the imposition of sanctions for declarations presented in bad faith or solely for purposes of delay. [Citation.] A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner. [¶] In the instant case, the declarations of appellant's counsel in support of the request for a continuance contained no explanation of why the discovery sought could not have been initiated sooner. . . . This lack of diligence may be a factor justifying the refusal to grant a continuance under section 437c, subdivision (h)." (*Id.* at p. 257; see *Rodriguez v. Oto*, *supra*, 212 Cal.App.4th 1020.)

Plaintiffs filed suit for wrongful death and elder abuse almost two years and four months before defendant filed its motion. Even though the case had been litigated for over two years, and over three years from Ms. Burk's death, plaintiffs did not retain or

otherwise have available an expert to opine that defendant's did not meet the standard of care in treating Ms. Burk, and that defendant caused Ms. Burk's death.

On June 13, 2012, about one week after defendant filed its motion, plaintiffs' attorneys notified the trial court that they would be filing motions to be relieved as counsel. That same day, counsel for plaintiff Gasaway filed a motion to be relieved as counsel, and the next day, on about June 14, 2012, counsel for plaintiff Burk filed a motion seeking the same relief. In support of their motions to be relieved as counsel, plaintiffs' attorneys declared that they gave plaintiffs substitution of attorney forms prior to filing their motions, but plaintiffs failed to return timely signed copies for filing or respond to their attorneys' requests. Thus, plaintiffs were aware of their attorneys' intent of to withdraw from the case by or shortly after the time defendant filed its motion.[8]

At the July 11, 2012, hearing for the motions to be relieved as counsel, the trial court told plaintiff Burk that "this case has been going on for an awful long time" and she needed to retain new counsel "as soon as possible." Plaintiffs' new counsel did not substitute in the action as counsel of record for plaintiffs until August 10, 2012—about 58 days after plaintiffs' previous attorneys indicated they would be filing motions to be relieved as counsel, and two days after the due date for the opposition to defendant's summary judgment motion.

There is no evidence in the record as to what plaintiffs' prior counsel did or did not do in this action, or why counsel did or did not do those actions. Plaintiffs did not provide evidence of any excusable justification for not retaining an expert. New counsel declared that he "contacted" a "potential medical expert," but there is no evidence in the record that he ever retained that expert. In addition, although new counsel apparently contacted a potential medical expert, that person had a planned vacation to Europe. There is no evidence in the record that plaintiffs' new counsel attempted to retain other

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[8] "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) [release to client of the clients papers, property and fees], and complying with applicable laws and rules." (Rules Prof. Conduct, rule 3-700(A)(2).)

medical experts who may have been available to review Ms. Burk's medical records for her 48-hour stay at defendant's facility.

Finally, plaintiffs have failed to establish that the claimed error of the trail court was prejudicial. Ordinarily, the appellant has the burden of affirmatively demonstrating prejudicial error. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) As one commentator has observed: "The 'prejudicial error' rule effectively imposes a *dual burden* on appellants: They must first prove *error*, and then must show that the error was prejudicial. The burden of demonstrating prejudice is particularly onerous in civil appeals because many (if not most) trial court errors are found to be 'harmless.'" (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:291, p. 8-184.2.) Plaintiffs have failed to establish that had the trial court granted their request to continue the hearing on the motion, they would have retained an expert who would have supported their position and prevailed in opposing the motion.

If there was any deficiency in the performance of plaintiffs' prior attorney, that deficiency is "constructively attributable to the client." (*Holland v. Florida* (2010) 560 U.S. 631, 657.) There is no showing of gross negligence of the prior attorney that would vitiate the "general policy of attributing to the client the acts of his attorney[s]." (*Community Dental Services v. Tani* (9th Cir. 2002) 282 F.3d 1164, 1171.)

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

KRIEGLER, J.

MINK, J.*

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