Filed 12/11/12 Pinkney v. Lighthouse Health Center CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MELVIN PINKNEY et al., Plaintiffs and Appellants, v. LIGHTHOUSE HEALTH CENTER et al., Defendants and Respondents.	B231630 (Los Angeles County Super. Ct. No. TC022825)

APPEAL from a judgment of the Superior Court of Los Angeles County. William P. Barry, Judge. Affirmed.

Law Offices of Ivie, McNeill & Wyatt and Allison R. Bracy for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, George E. Nowotny, Kevin L. Eng, Clayton T. Lee, Lisa W. Cooney and Brittany H. Bartold for Defendant and Respondent Lighthouse Health Center.

Reback, McAndrews, Kjar, Warford & Stockalper, Patrick Stockalper and Harlan Petoyan for Defendant and Respondent Mark Chung-Hsun Tsai.

* * * * * *

The trial court granted summary judgment in favor of defendants and respondents Lighthouse Health Center, LLC, dba Fountain Gardens Convalescent Hospital (Fountain Gardens) and Mark Chung-Hsun Tsai, M.D. (Dr. Tsai) on the complaint for professional negligence, wrongful death and elder abuse brought by plaintiffs and appellants Melvin Pinkney, Herman Pinkney and Belvis Pinkney. The trial court ruled that Fountain Gardens and Dr. Tsai met their burden on summary judgment through expert declarations averring that they met the standard of care and their actions were not a substantial factor in causing the death of Lillie Mae Pinkney (Pinkney). After sustaining evidentiary objections to most of one and all of another expert declaration offered by appellants, the trial court ruled that appellants could not meet their burden to establish a triable issue of material fact. It indicated it would reach the same conclusion even if it had considered the excluded evidence.

We affirm. Appellants' failure to reveal—let alone challenge—the trial court's evidentiary rulings amounts to a forfeiture of the issue on appeal. In any event, the trial court properly exercised its discretion in excluding the declarations submitted by appellants. Summary judgment was properly granted because Fountain Gardens and Dr. Tsai met their threshold burden on summary judgment and appellants offered no admissible evidence sufficient to create a triable issue of fact.

FACTUAL AND PROCEDURAL BACKGROUND

The Decedent's Care and Treatment.

Pinkney, then 86 years old, was admitted to Fountain Gardens Convalescent Hospital (Fountain Gardens) on January 29, 2007, with a history and diagnosis of hypertension, non-insulin dependent diabetes mellitus, depression, glaucoma, a history of CVA (cerebral vascular accident) or stroke, congestive heart failure, and bilateral lower extremity edema. Her conditions upon admission included dysphagia—a difficulty in swallowing or inability to swallow—for which she was prescribed speech therapy. Dr. Tsai saw Pinkney an average of once or twice monthly throughout 2007. At some point before May 2007 Pinkney was also diagnosed with dementia.

Pinkney suffered from poorly controlled diabetes, which led to micro and macro vascular disease and ultimately skin breakdowns. In May 2007 she suffered a skin breakdown (also known as a skin ulcer or bedsore) on her left heel which resolved with wound care. In July 2007 she developed a sore on her right heel, which resolved by August 2007. On October 11, 2007, Dr. Tsai ordered that Pinkney be transferred to St. Francis Medical Center (St. Francis) for evaluation after she exhibited facial twitching and slurred speech, and complained of chronic chest discomfort. St. Francis diagnosed her with a fever and urinary tract infection and discharged her the following day. The hospital made no note of Pinkney having skin problems at that time. During November 2007, Pinkney had increased difficulty swallowing, and her diet was progressively changed from pureed food to soft food to liquids.

On December 26, 2007, Dr. Tsai again ordered that Pinkney be transferred to St. Francis due to elevated blood sugar, increased lethargy and decreased oral intake. An examination at St. Francis revealed congestive heart failure and a urinary tract infection, and possibly an undocumented stroke. Pinkney returned to Fountain Gardens on January 3, 2008, with orders for treatment of congestive heart failure, hypertension, diabetes, depression and dementia. A gastroenterologist recommended placement of a gastrostomy tube (G-tube) to augment Pinkney's nutrition, but appellants declined.

At the time of her return, Pinkney was assessed as having a stage II wound on her left buttock, approximately one centimeter in diameter, which had developed at St. Francis. Dr. Tsai ordered wound treatment. In a January 8, 2008 examination, Dr. Tsai determined that Pinkney's prognosis and restorative potential were poor; Pinkney was not mentally capable of understanding her condition. In addition, Pinkney's wound had progressed to a stage III; Dr. Tsai clarified that the wound site was the coccyx and ordered an air mattress for her. At this point, appellants decided to consent to the placement of a G-tube. On January 14, 2008, together with her son Melvin Pinkney, Pinkney presented at St. Francis for its placement. Dr. Tsai ordered that the G-tube site be cleansed regularly.

By February 4, 2008, Pinkney's wound had progressed to a stage IV and continued to enlarge. By February 18, 2008, the wound had grown to approximately 10 centimeters by seven and one-half centimeters, and Pinkney continued to receive wound care. On February 22, 2008, Pinkney was admitted to St. Francis, her chief complaint being congestion. A chest X-ray revealed she was suffering from pneumonia, and other tests revealed she was also suffering from dehydration and renal failure. She was intubated and given antibiotics, intravenous support and hydration.

The following day a nurse discovered leakage from her G-tube, as well as induration (soft tissue or organ hardening) at the site, which were indicative of infection. A cardiologist opined Pinkney's primary problem was septic shock complicated by congestive heart failure. A wound care specialist also described Pinkney's wound as stage IV and recommended surgical debridement if her condition improved. Pinkney's family declined surgical intervention and put her on a "do not resuscitate III" status in the event of extubation.

Pinkney remained intubated for the duration of her stay at St. Francis, and she died on March 3, 2008.

Pleadings and Summary Judgment Motions.

Appellants filed their initial complaint in June 2009 and the operative second amended complaint in December 2009, alleging causes of action for professional negligence, wrongful death and elder abuse under the Elder Abuse and Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Elder Abuse Act) against Fountain Gardens, Dr. Tsai and others. The trial court sustained Dr. Tsai's demurrer to the elder abuse cause of action without leave to amend and overruled Fountain Gardens's demurrer.

In late June 2010, Fountain Gardens and Dr. Tsai filed separate motions for summary judgment. According to Fountain Gardens, the undisputed evidence showed that its staff complied with the applicable standard of care, and no act or omission on its part caused or contributed to Pinkney's death. It also argued the undisputed evidence showed that appellants could not establish it acted with any fraud, recklessness, malice or

oppression or that its administrators, officers or managing agents ratified or authorized such conduct. Dr. Tsai likewise asserted the undisputed evidence established that he complied with the applicable standard of care and that his actions were not a substantial factor in causing Pinkney's death.

In support of its motion, Fountain Gardens offered the declaration of Karen Josephson, M.D., a physician board-certified in geriatrics who averred she was familiar with the duties imposed on the staff of skilled nursing facilities. Dr. Josephson reviewed Pinkney's medical records, the pleadings and appellants' depositions. On the basis of her education, training and experience, she opined that the care and treatment provided to Pinkney at Fountain Gardens did not cause her injury or harm, and that the Fountain Gardens care providers did not neglect or abuse her. She opined to a reasonable degree of medical certainty that the two primary causes of Pinkney's death were pneumonia and sepsis (the presence of pathogenic organisms or their toxins in the blood or tissues). She further opined that the Gemella pathogen which was found in Pinkney's blood had been introduced into her system through her lungs: "In other words, because [Pinkney] was so weak, and had difficulty swallowing and otherwise 'managing' her oral secretions, she aspirated her own oral secretions, causing pneumonia and thereby simultaneously introducing their flora into her blood stream, ultimately resulting in sepsis."

Fountain Gardens also submitted the declaration of registered nurse Margaret Spencer, who had skilled nursing facility experience, reviewed the medical records and discovery, and opined that the care and treatment provided to Pinkney met the standard of care in the community. She opined that the Fountain Gardens's staff appropriately notified Pinkney's family of changes in her condition and complied with Dr. Tsai's orders regarding treatment, nutrition and wound care. She further opined that nothing the staff did or failed to do constituted abuse or neglect.

In support of its motion, Fountain Gardens also submitted pleadings and Pinkney's medical records—specifically nurse assistant daily flow sheets, nurses' notes, resident care plans, nurses' weekly progress notes, physician's orders, daily skilled nurses' notes and records from St. Francis.

In support of his motion, Dr. Tsai submitted the declaration of Andrew Wachtel, M.D., who outlined his education and training, stated that he had reviewed Pinkney's medical records from Fountain Gardens and St. Francis, and averred he was familiar with the applicable standard of care at the time. After detailing Pinkney's condition and care from the time of her admission to Fountain Gardens to her death, Dr. Wachtel opined that Dr. Tsai's care and treatment of Pinkney at both Fountain Gardens and St. Francis were within the standard of care and that no act or failure to act on his part caused to contributed to Pinkney's death. Dr. Tsai also provided a complete copy of Pinkney's medical records from Fountain Gardens and St. Francis.

In August 2010, appellants sought a continuance of the summary judgment hearing on both motions and the trial date. They sought more time to prepare declarations in opposition to the motions and because counsel was unavailable for the trial date. The trial court denied the motion, finding that appellants had not shown good cause for a continuance. On August 30, 2010, appellants sought to continue the summary judgment hearing on Fountain Gardens's motion on the ground they needed more time to prepare opposing declarations. The trial court agreed to continue the hearing for 10 days to the same date set for hearing on Dr. Tsai's motion.

Appellants filed their oppositions to the summary judgment motions in September 2010. In support of their opposition to Fountain Gardens's motion, they submitted the declaration of Rachelle Zukerman, Ph.D., a gerontologist and clinical social worker whose area of expertise was elder abuse in institutional and family caregiving situations. She averred she was familiar with the standard of care for skilled nursing facilities and had reviewed Pinkney's medical records. She opined that the care provided to Pinkney by Fountain Gardens between January 3, 2008 and February 22, 2008 fell below the standard of care and constituted a pattern of reckless elder abuse concerning the treatment of her skin ulcer—or stage IV wound—to the extent staff insufficiently repositioned her and failed to alert Dr. Tsai to the changing nature of the wound. She further opined that Fountain Gardens's staff failed to take action to prevent Pinkney's malnutrition and dehydration and failed to report the deteriorating condition of her G-tube site. She

concluded that had Pinkney received proper nutrition and timely treatment of her G-tube site, her wound site would have improved.

Appellants' opposition to Fountain Gardens's motion was based in large part on the forthcoming declaration of Loren Lipson, M.D., and their opposition to Dr. Tsai's motion was based exclusively on that declaration. They sought a 20 to 30-day continuance to present it. They also submitted excerpts of Pinkney's medical records in opposition to both motions.

With respect to both separate statements of undisputed fact and conclusions of law, appellants denied, disputed or objected to each and every fact, sometimes relying on Dr. Zukerman's declaration, sometimes referring to Dr. Lipson's pending declaration and sometimes without referring to any evidence.

Appellants also filed evidentiary objections to Fountain Gardens's and Dr. Tsai's declarations. In reply, Fountain Gardens argued that Dr. Zukerman was not qualified to render an opinion as to the standard of care and filed evidentiary objections to her declaration as well as to other documentary evidence offered by appellants.

On September 24, 2010, the date set for the summary judgment hearing, the trial court ruled on the evidentiary objections, overruling appellants' objections and sustaining in part and overruling in part Fountain Gardens's objections. With respect to Dr. Zukerman, the trial court ruled that she would be permitted to render opinions regarding alleged reporting deficiencies, but she would not be allowed to render any opinions concerning medical issues or medical causation. The trial court further permitted appellants one additional week to file Dr. Lipson's declaration, but required him to include in his declaration the specific factual bases for the delay in filing. The trial court ruled that no further evidence would be permitted and continued the matters to October 6, 2010 for the sole purpose of taking the motions under submission.

On October 1, 2010, Dr. Lipson submitted two declarations, together with his curriculum vitae. In his declaration directed to Fountain Gardens, Dr. Lipson opined on the basis of his education, training, experience and review of Pinkney's medical records that Fountain Gardens's staff deviated from accepted standards of care in the medical

community, which increased her risk of harm and further amounted to reckless and oppressive behavior. More specifically, he opined that Pinkney's care plan was inadequate; her skilled nursing notes were substandard; her G-tube was not timely placed and inadequately monitored to assure sufficient nutrition; certain types of daily living care were inconsistently provided and/or recorded; Pinkney's pressure ulcers should have been prevented and were inadequately treated and reported to Dr. Tsai; Pinkney should have received treatment to preserve joint mobility; aspiration precautions were not taken and/or documented; Pinkney's blood sugar level was not adequately maintained; and whatever infection control program was in place was ineffective.

With respect to Dr. Tsai, Dr. Lipson opined to a reasonable degree of medical probability on the basis of his education, training, experience and review of Pinkney's medical records that he deviated from acceptable standards of care in his treatment of Pinkney and that such failures were a substantial factor in Pinkney's decline in health and premature death. He described Dr. Tsai's deviations from the standard of care as including his failure to evaluate and treat the infected G-tube site, to adequately treat her pressure ulcers, to assure that aspiration precautions were taken, to assess and treat Pinkney's worsening anemia and to visit Pinkney in a timely manner after February 7, 2008.

Fountain Gardens filed a supplemental reply objecting to Dr. Lipson's declaration and asserting it should be stricken for its failure to include an explanation about the delay in its submission as directed by the trial court. It also sought the exclusion of specific portions of Lipson's declaration and argued that, in any event, the declaration was insufficient to create a triable issue of fact. Dr. Tsai raised similar arguments and filed evidentiary objections to the declaration.

In an October 8, 2010 minute order, the trial court issued a ruling granting both summary judgment motions. It sustained all objections to Lipson's declarations, both on procedural and evidentiary grounds. It concluded the declarations were untimely filed without justification. The trial court further ruled, however, that even if it were to

consider the declarations, it would find no triable issue of material fact as Dr. Lipson's declarations contained no meaningful analysis of medical causation.

Appellants requested an additional hearing on the motions. In support of their request, they attached Dr. Lipson's unsigned draft declaration explaining his unavailability. At an October 14, 2010 hearing, the trial court heard further argument on the summary judgment motions, including permitting appellants to argue why Dr. Lipson's first declarations should be considered. Though it reaffirmed its prior ruling that it would not consider Dr. Lipson's declarations due to their untimeliness, the trial court elicited arguments regarding the substance of the declarations. During the hearing, the trial court identified multiple, specific problems it had with Dr. Lipson's declarations to the extent they contained conclusory opinions without evidentiary support. Appellants identified specific paragraphs of Dr. Lipson's declaration regarding Fountain Gardens that they claimed established triable issues of material fact. Ultimately, the trial court ruled that even if it considered the declarations, its ruling remained unchanged. It found that Fountain Gardens and Dr. Tsai met their threshold burden to show that appellants could not establish the necessary elements of their causes of action, and appellants failed to offer evidence raising a triable issue of material fact. The trial court thereafter entered judgment in favor of Fountain Gardens and Dr. Tsai.

In December 2010, appellants moved to vacate the order granting summary judgment on the ground of excusable neglect. They argued both that Dr. Lipson's declarations contained deficiencies that counsel should have corrected before filing and that the trial court used an incorrect standard in granting summary judgment. Fountain Gardens and Dr. Tsai opposed the motion, characterizing it as an improper motion for reconsideration. At a February 1, 2011 hearing, after outlining the chronology of the case and discussing at length appellants' previous continuances requests and the asserted reasons therefor, the trial court denied the motion.

Appellants appealed from the judgment.

DISCUSSION

Appellants' sole argument on appeal is that the trial court erred in granting summary judgment because Dr. Lipson's and Dr. Zukerman's declarations raised triable issues of fact. They neglect to mention that the trial court excluded Dr. Lipson's declarations in their entirety and Dr. Zukerman's declaration beyond reporting deficiencies. While appellants' forfeiture could end our inquiry, we further conclude that the trial court's evidentiary rulings were a proper exercise of discretion and that summary judgment was properly granted.

I. Standard of Review.

Summary judgment is warranted when the moving party shows by admissible evidence that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) To satisfy this burden, a moving defendant is not required to "conclusively negate an element of the plaintiff's cause of action. . . . All that the defendant need do is to 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853, fn. omitted.) Once the defendant makes this showing, the burden shifts to the plaintiff to show the existence of a triable issue of material fact, which must be demonstrated through specific facts based on admissible evidence and not merely the allegations of the pleadings. (Code Civ. Proc., § 437c, subd. (p)(2); *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1188.)

"The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues. Thus, where the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in his or her favor, in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing. [Citations.] For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be

regarded as substantial, and is insufficient to establish a triable issue of material fact. [Citations.]" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162–163.)

We review a grant of summary judgment de novo, independently examining the evidence and determining whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404; *Peart v. Ferro* (2004) 119 Cal.App.4th 60, 69.) We limit our review of the trial court's ruling to the evidence presented in the supporting and opposing papers submitted to the trial court, except that to which objections have been made and sustained, and the uncontradicted inferences reasonably deduced from the evidence. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65–66; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 282.)

While we independently review a grant of summary judgment, we review the trial court's evidentiary rulings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) But in order to demonstrate an abuse of discretion, an appellant must affirmatively challenge the evidentiary rulings on appeal. In other words, the assertedly erroneous evidentiary rulings must be identified "as a distinct assignment of error" and be supported by analysis and citation to authority. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) When an appellant does not challenge the trial court's sustaining objections to evidence offered in connection with a summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

II. Appellants May Not Rely on Evidence Excluded by the Trial Court.

A. Appellants Forfeited Any Challenge to the Trial Court's Evidentiary Rulings.

On appeal, appellants contend that they offered sufficient evidence to defeat summary judgment. In support of their contention, they quote extensively from

Dr. Lipson's declarations regarding his opinions on the standard of care and causation. They also quote from Dr. Zukerman's declaration concerning her opinions on the medical standard of care and causation.

In doing so, appellants simply ignore the trial court's evidentiary rulings sustaining multiple objections to both declarations. In an October 8, 2010 order, the trial court ruled: "Each defendant objected to the Lipson declaration. For the reasons set forth in their papers, the court sustains their objections, on evidentiary grounds and for the unjustified lateness of his declarations." The trial court explained that neither Dr. Lipson nor appellants' counsel had ever offered a sufficient explanation why the declarations were not timely filed in accordance with its prior order, and concluded "[i]t is therefore fair to assume that there is no good reason why his declarations were not filed on time." At the subsequent October 14, 2010 hearing, the trial court reiterated its prior ruling, finding no basis for reaching a different decision. It stated: "So for the record I am not considering his [Dr. Lipson's] declaration for purposes of motion for summary judgment on the grounds that [he] didn't provide a reason for why it wasn't on time, even though I think plaintiffs' counsel made best efforts to get it on time." Though Dr. Zukerman's declaration was timely filed, the trial court ruled that any opinions concerning medical practice were outside her area of expertise, as she was not a medical doctor or medical practitioner. She was permitted to render opinions solely about reporting deficiencies and Fountain Gardens's failure to comply with the standard of care regarding informing Pinkney's doctors and family about her changing condition.

Here, as in *Roe v. McDonald's Corp., supra,* 129 Cal.App.4th at page 1114, "[i]nstead of affirmatively tackling the court's evidentiary rulings, [appellants] simply weave[] the content of [Dr. Lipson's] declaration throughout [their] brief, as if no objections had been sustained below." Appellants' "brief on appeal fails to identify the court's evidentiary ruling as a distinct assignment of error, and there is no separate argument heading or analysis of the issue. That alone is grounds to deem the argument waived. [Citation.]" (*Ibid.*; accord, *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [no triable issue of fact raised where plaintiffs forfeited

challenge to declaration's exclusion by failing to challenge evidentiary rulings on appeal]; *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196–1197 [same]; *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 285, fn. 3 [same].) In view of appellants' failure to acknowledge the trial court's evidentiary rulings, we deem forfeited any challenge to the exclusion of Dr. Lipson's declarations in their entirety and Dr. Zukerman's declaration concerning medical care and causation.

B. The Trial Court Properly Exercised Its Discretion in Excluding the Declarations.

In any event, even if we were to address the bases for the trial court's evidentiary rulings, we would find no error. (See generally *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 [that declarations opposing a summary judgment motion should be liberally construed "does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration"].)

1. Dr. Lipson's declarations.

a. Untimeliness.

The trial court excluded Dr. Lipson's declarations on the ground they were untimely filed without any good cause for the delay. Particularly given that the trial court afforded appellants additional time to complete the declarations, we find no abuse of discretion. (See *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

At the outset, we note that none of appellants' multiple continuance requests satisfied Code of Civil Procedure section 437c, subdivision (h),[1] which mandates that the trial court grant a continuance "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented . . . ." (§ 437c, subd. (h); see *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 318; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) It is insufficient to indicate merely that more discovery or

---

[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

investigation is needed. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397–398; *Roth v. Rhodes, supra,* at p. 548.) Rather, counsel's declaration must show that the facts to be obtained are essential to oppose the motion, that there is reason to believe those facts exist, and the reasons why additional time is needed to obtain them. (*California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305.) When the declaration fails to make the showing required by statute, a continuance is not mandatory and the request is left to the trial court's discretion. (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 254.)

Here, approximately six weeks after the summary judgment motions were filed, appellants filed an ex parte application seeking to continue both the summary judgment hearings (then scheduled on separate dates) and the trial date. According to counsel's declaration, appellants were diligent but would "be unable to complete opposition papers without additional discovery and therefore request additional time to obtain such." A mandatory continuance was not warranted on the basis of this request. (See *Bahl v. Bank of America, supra,* 89 Cal.App.4th at p. 397 ["the mere indication of a desire to conduct further discovery [is] insufficient to support a continuance"].) Likewise, the trial court acted within its discretion to conclude that appellants' generalized request for additional discovery failed to set forth good cause for a continuance.

Three weeks later—one day before its opposition was due—appellants sought another continuance of the hearing on Fountain Gardens's summary judgment motion. This time, counsel's declaration indicated that only one of three intended expert declarations had been completed, additional editing on the other two had not been completed due to both counsel's and the experts' unavailability and two days of communication would be lost due to her office building's closure. Though expressing its concern that appellants were essentially asking for reconsideration of the trial court's previous denial, the trial court granted appellants' 10-day continuance request.

When appellants filed their opposition papers two weeks later on September 13, 2010 without Dr. Lipson's declarations, they requested another continuance. Counsel's declaration, expressly made pursuant to section 437c, subdivision (h), averred that at an

unspecified time during the preparation of his declaration, but before the second continuance request, Dr. Lipson developed atrial flutter; he was placed on medication and underwent electric shock therapy. On September 9, 2010, Dr. Lipson underwent an unspecified treatment at a hospital in Seattle, Washington. Appellants requested a 20 to 30-day continuance to enable Dr. Lipson to complete his declaration.

On the date set for the summary judgment hearing, September 24, 2010, the trial court gave appellants an additional week to file Dr. Lipson's declarations. But because of the vagueness of the timeline provided in counsel's declaration, the trial court required Dr. Lipson's declaration to include the date he was first contacted by appellants' counsel, the reasons why his medical condition had prevented him from timely preparing his declarations, and whether—as suggested by Fountain Gardens—he had testified in another trial in mid-September 2010. When Dr. Lipson submitted his declarations on October 1, 2010, he did not include any information responsive to the trial court's specific inquiries. Fountain Gardens and Dr. Tsai highlighted the declarations' omission in supplemental reply briefs.

The trial court initially ruled by minute order that Dr. Lipson's declarations would not be considered because he never explained why he did not timely file them and the court could only assume that he had no explanation. Appellants sought relief under section 473 on the ground that counsel had not realized Dr. Lipson's declarations inadvertently omitted the requested information. In support of their motion, they submitted Dr. Lipson's unsigned declaration, which stated that appellants' counsel had first contacted him in April 2010. It further provided that the declarations offered in support of the summary judgment motions were first mailed to him on August 9, 2010 and he then began to prepare a response. The declaration further provided: "During my preparation, I developed a medical condition known as atrial flutter. I was initially placed on medications, then underwent electric shock therapy. During this treatment, I continued to work on my declaration in support of Plaintiffs' oppositions. During this time, I discovered good results with cardiac ablation therapy for which I was referred to Virginia Mason Clinic in Seattle, Washington. [¶] On September 9, 2010, I underwent

treatment at Virginia Mason Clinic. Although the recovery time for the procedure was estimated for 10 days, I attempted to finalize his [*sic*] declaration. At some point, however, it became clear that I would not be able to do that. Thereafter, [appellants' counsel] informed me she would ask the Court for additional time for me to complete my declaration. [¶] After my recovery, I did return to work on this case and other cases where I was retained to act as an expert. I did, in fact, appear for deposition and trial during the week of on [*sic*] September 17, 2010 [in Ventura, California]."

On October 14, 2010, the trial court heard both appellants' motion for relief and additional argument on the summary judgment motions. The trial court indicated that it would find counsel's conduct excusable neglect to the extent she did not realize that Dr. Lipson's initial declarations failed to comply with the trial court's order. But it further concluded that it still lacked a signed declaration from Dr. Lipson that complied with its order. Nonetheless, the trial court reasoned that even if it considered Dr. Lipson's unsigned declaration, it would not find his explanation for the delay satisfactory. It found that Dr. Lipson's declaration failed to show that a medical condition prevented him from finalizing his declarations; instead, it showed that he prioritized his cases, putting other commitments ahead of his declarations. Accordingly, the trial court reaffirmed its decision not to consider Dr. Lipson's declarations.

We find no basis to disturb the trial court's discretionary ruling. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [trial court has discretion whether to consider evidence not submitted in connection with the separate statement].) Appellants received multiple continuances in order to submit Dr. Lipson's declarations, which were not filed until one week after the hearing on the summary judgment motions was scheduled. Dr. Lipson's subsequent declaration—which he later signed in connection with the December 2010 motion to vacate—revealed that any delay was not due to his medical condition, but rather, was created by his not receiving the declarations offered by Fountain Gardens and Dr. Tsai for six weeks after they were filed, and by his electing to prioritize other case commitments after he received those materials.

Under these circumstances, we conclude the trial court acted within its discretion to disregard Dr. Lipson's declarations as untimely. (See *Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 259 ["Although appellant's counsel conceded that Dr. Larsen [appellant's expert] had formed a contrary opinion six months before the summary judgment hearing, appellant failed to offer Dr. Larsen's opinion in a timely opposition to respondent's motion. The trial court could properly have disregarded Dr. Larsen's declaration as untimely"].)

b. Lack of evidentiary value.

The trial court's second basis for exclusion was its sustaining Fountain Garden's and Dr. Tsai's evidentiary objections to the declarations.[2] It found the declarations conclusory and without foundational basis. Again, we find no abuse of discretion. (See *Carnes v. Superior Court*, *supra*, 126 Cal.App.4th at p. 694 [evidentiary rulings in connection with summary judgment motion reviewed for an abuse of discretion].)

"It is undisputed that qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation. [¶] However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.]" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003)

---

[2] Fountain Gardens' evidentiary objections were not submitted in the format specified by rule 3.1354(b) of the California Rules of Court. But because appellants have not raised the issue of noncompliance on appeal, we deem it forfeited. (E.g., *Public Utilities Com. v. Superior Court* (2010) 181 Cal.App.4th 364, 376, fn. 9.)

114 Cal.App.4th 1108, 1117; see *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 525 [summary judgment standard is "not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation"].)

Applying these principles, the court in *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510–511, concluded that two expert declarations submitted in opposition to summary judgment lacked evidentiary value on the questions of negligence and causation. In their declarations, both doctors described their training and experience and averred that they had reviewed the plaintiff's medical records. They opined that the plaintiff's shoulder injury more probably than not occurred "'from either a traumatic injury such as dropping the patient or from improper positioning of the patient or stretching of the extremity and but for the negligence of one of his care providers this injury would not have occurred.'" (*Id*. at pp. 503–504.) Affirming summary judgment, the court found the declarations lacked evidentiary value because there was no evidence that the plaintiff had suffered the dropping, positioning or stretching that the doctors opined were the cause of his injury. In other words, "[t]he doctors assume the cause from the fact of the injury. Dr. Katz's and Dr. Mar's opinions are nothing more than a statement that the injury could have been caused by defendants' negligence in one of the ways they specify. But, 'an expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist' [citation], has no evidentiary value." (*Id*. at p. 510.)

Here, the trial court properly exercised its discretion in concluding that Dr. Lipson's declarations similarly lacked evidentiary value. It characterized them as "generic declarations" that failed to address the key issue of medical causation and found them insufficient in view of the "generalized nature of [Dr. Lipson's] conclusions without factual support." In his declaration directed to Fountain Gardens, Dr. Lipson outlined a number of deficiencies in Pinkney's care plan and in the documentation of her treatment, yet he never opined as to how this conduct caused or contributed to her death. Likewise, while he rendered a number of opinions as to the manner in which Fountain Gardens's staff acted below the standard of care in treating her pressure ulcers, ensuring joint

mobility, monitoring her blood sugar and avoiding infection, he did not utilize his expertise to explain how those breaches caused or contributed to her death. (See *Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1117 [declaring inadmissible "an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion"].) Instead, he summarily concluded that at the time Pinkney was admitted to St. Francis in February 2008, "[g]iven her overall status, she was not going to survive the multiple health issues."

With respect to Dr. Lipson's opinions concerning elder abuse, his declaration was similarly conclusory. He averred that it was the responsibility of Fountain Gardens's ownership, management, governing body and administration to assure that the facility was adequately staffed and the staff was adequately trained to care for patients such as Pinkney. Referring to the breaches he had previously identified, Dr. Lipson opined: "Given the number of care providers of multiple disciplines breaching the standard of care in regards to Ms. Pinkney, one can only conclude that those individuals responsible for the recklessness and inexcusable deviations from the standard of care were those who were responsible for the operation of Fountain Gardens—the ownership, management, governing body and the administration." This was precisely the type of speculative and conjectural opinion that has no evidentiary value and may be excluded from evidence. (*Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1117.)

The trial court excluded Dr. Lipson's declaration concerning Dr. Tsai's conduct for the same reasons. Relative to his declaration regarding Fountain Gardens, Dr. Lipson's declaration more specifically described the precise manner in which he averred Dr. Tsai breached the standard of care, which primarily involved Dr. Tsai's repeated failure to follow up and conduct assessments on observed conditions. But again, the declaration lacked "a reasoned explanation connecting the factual predicates to the ultimate conclusion" regarding medical causation. (*Jennings v. Palomar Pomerado*

Health Systems, Inc., supra, 114 Cal.App.4th at p. 1117.) He opined that Dr. Tsai's breaches of the standard of care were a substantial factor in causing the worsening of several conditions, including her pressure ulcers, respiratory distress and protein malnutrition. Yet he further opined that following her February 22, 2008 hospitalization, Pinkney "later developed pulmonary edema on top of her pneumonia, from which she died." His declaration contained no opinion connecting Pinkney's pulmonary edema—the condition from which he opined she died—to any action or inaction on the part of Dr. Tsai. (See *Bushling v. Fremont Medical Center, supra*, 117 Cal.App.4th at p. 510 ["an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value"]; see also *People v. Diaz* (1992) 3 Cal.4th 495, 547 [describing pulmonary edema as fluid in the lungs].) In view of this omission, we cannot conclude that the trial court abused its discretion in determining the declaration lacked evidentiary value.

2. Dr. Zukerman's declaration.

In her declaration, Dr. Zukerman opined that the medical care provided to Pinkney by the Fountain Gardens's staff fell below the standard of care in several respects during January and February 2008, and that such action and/or inaction caused harm to Pinkney. The trial court sustained Fountain Gardens's objections to the declaration in part, ruling that Dr. Zukerman was not qualified to render an opinion regarding the standard of medical care or medical causation because she was not a medical doctor. Again, we review the trial court's ruling for an abuse of discretion. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

Evidence Code section 720, subdivision (a) provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." The key determination regarding the competency of a proposed expert witness is whether "the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance." (*Brown v. Colm* (1974) 11 Cal.3d

639, 645.) "Nor is it critical whether a medical expert is a general practitioner or a specialist so long as he exhibits knowledge of the subject. Where a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly engaged but as to which he has an opinion based on education, experience, observation or association with that specialty, his opinion is competent." (*Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128.)

We acknowledge there has been a "general trend in recent years . . . toward liberalizing the rules relating to the testimonial qualifications of medical experts." (*Brown v. Colm, supra,* 11 Cal.3d at p. 645.) Nonetheless, we cannot conclude that the trial court abused its discretion in finding that Dr. Zukerman did not possess the qualifications necessary to render opinions regarding the standard of medical care and medical causation. While Dr. Zukerman explained her training and experience regarding "techniques that will maintain the well-being and safety" of dependent elders, neither her declaration nor her curriculum vitae described what would render her qualified to express an opinion on specific medical treatments or medical causation.

Dr. Zukerman's declaration was unlike the evidence offered in *People v. Catlin* (2001) 26 Cal.4th 81, 131–132, where the appellate court rejected the claim that a clinical toxicologist—or non-medical doctor—was unqualified to render an opinion as to cause of death from paraquat ingestion. The court determined it was a proper exercise of discretion to allow his testimony given that the evidence showed "Dr. Ford had advanced training in occupational medicine, physiology, and pharmacology, and had worked in the area of agricultural poison toxicology for 18 years. He had specialized experience in paraquat toxicology, having been employed at a health center operated by the sole distributor of paraquat in the United States, having consulted and advised physicians in many cases of paraquat poisoning, having participated in many research projects and in biannual conferences on the subject of paraquat toxicology, and having provided laboratory services to analyze human tissue samples connected with incidents of paraquat poisoning." (*Id*. at p. 132.) Here, in contrast, Dr. Zukerman's academic training, clinical social work and teaching experience were not of the type that would qualify her to render

medical opinions. (See *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1442 ["The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so his testimony would be likely to assist the jury in the search for the truth"].)

III. The Trial Court Properly Granted Summary Judgment.

The trial court ruled that Fountain Gardens and Dr. Tsai met their threshold burden on summary judgment, demonstrating as a matter of law that appellants could not establish the elements of their claims.[3] Again, we find no error.

A. Wrongful Death Against Fountain Gardens.

"'The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs. [Citations.]' [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263, italics omitted.) Appellants alleged that the underlying torts were professional negligence and elder abuse. Turning first to appellants' claim of negligence, or medical malpractice, "'[t]he elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the

---

[3] Although appellants alleged a cause of action for professional negligence as a survivor's action, on appeal their arguments concerning their entitlement to pre-death damages are confined to the statutory cause of action for elder abuse. "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief. [Citations.]" (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [declining to address the merits of certain causes of action that had been summarily adjudicated].) "'"[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citation.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.) We therefore address only appellants' wrongful death and elder abuse claims.

duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage.' [Citation.]" (*Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1571.)

In a medical malpractice case, the general rule is that expert testimony is required to establish the standard of care, whether the standard was breached and whether any negligence caused injury. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542; accord, *Jennings v. Palomar Pomerado Health Systems, Inc., supra*, 114 Cal.App.4th at p. 1118 ["'The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony'"].) As explained in *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984–985, "'California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When 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.' [Citations.]" (See also *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402, 403 ["A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury"].)

To satisfy its burden on summary judgment, Fountain Gardens submitted the declarations of Dr. Josephson and registered nurse Spencer. Dr. Josephson's opinion was confined to causation; she did not express an opinion on the standard of care except as it related to elder abuse. She opined to a reasonable degree of medical certainty that the progression of the two primary causes of Pinkney's death—pneumonia and sepsis—would have been the same regardless of the care she received at Fountain Gardens. She opined that "no act or omission by the nursing staff at Fountain Gardens caused or contributed to Ms. Pinkney's claimed injuries and ultimate demise." She added that the only measure which could have been taken to prevent Pinkney from aspirating her own

secretions was to keep her head elevated, which had been done and documented. Spencer's declaration was directed to the standard of care, and she opined that the Fountain Gardens staff complied with the applicable standard of care by providing appropriate notice to Pinkney's family about changes in her condition, and following Dr. Tsai's orders regarding treatment, nutrition and wound care.

We agree with the trial court that Fountain Gardens satisfied its threshold burden to establish that one or more elements of appellants' wrongful death claim could not be established. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.) Both declarations addressed the focus of appellants' claims as alleged in the complaint, which related to skin integrity and G-tube feeding and infection. On the basis of Pinkney's medical records, as well as each declarant's training and experience, Dr. Josephson explained why neither Pinkney's skin ulcers nor her G-tube nutritional intake or infection contributed to her ultimate demise, and Spencer explained how the staff's treatment and monitoring of Pinkney's condition complied with the standard of care. Moreover, Dr. Josephson explained how the interaction of Pinkney's preexisting conditions led to her inevitable decline, opining "to a reasonable degree of medical certainty, Decedent's condition and progression of her wounds and illnesses, would have been the same under the best of care." This evidence was sufficient to shift the burden to appellants to produce evidence demonstrating the existence of a triable issue of material fact. (See § 437c, subd. (p)(2).)

The only admissible evidence offered by appellants was Dr. Zukerman's declaration relating to Fountain Gardens's inadequate documentation and reporting during January and February 2008.[4] In that regard, Dr. Zukerman opined Fountain Gardens's staff breached the standard of care by "fail[ing] to alert attending physician that one of Decedent Pinkney's decubitus ulcers had regressed to stage 4" and by "fail[ing] to report the deteriorating condition of Decedent Pinkney's G-tube site." But

---

[4] On October 6, 2010, appellants received permission from the trial court to supplement their expert designation to add a registered nurse. They did not, however, supplement their expert declarations in opposition to summary judgment.

Dr. Josephson addressed the absence of causation, averring that neither Pinkney's skin ulcers nor any issues relating to her G-tube site caused her death. Thus, appellants could not defeat summary judgment by showing there were triable issues of fact solely as to the element of breach of the standard care; that element was "rendered immaterial" because appellants failed to respond to Fountain Gardens's showing that they could not establish causation. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482; accord, *Romero v. American President Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 1203 ["the opposing party may not defeat summary judgment by attempting to generate a factual dispute as to immaterial issues"].)

B. Wrongful Death Against Dr. Tsai.

Dr. Tsai likewise offered an expert declaration in support of his motion for summary judgment designed to show there were no triable issues of fact as to whether he breached the applicable standard of care or caused Pinkney's death. Relying on Pinkney's medical records and his training and experience, Dr. Wachtel described Dr. Tsai's treatment of Pinkney in great detail, including his discovery of Pinkney's skin ulcers and treatment, changes in Pinkney's diet to assure her nutrition and G-tube placement and monitoring. He opined that the care and treatment Dr. Tsai provided to Pinkney from the time of her admission to Fountain Gardens until her death was within the standard of care. He specifically opined that Dr. Tsai visited Pinkney with sufficient frequency, that his evaluations were thorough and appropriate and that his documentation of his evaluations were adequate. He further opined: "The medication and treatment orders that Dr. Tsai placed for decedent were appropriate at all times and within the standard of care, as they were made based upon decedent's presentation at the time of examination, the results of laboratory and other diagnostic testing and sequelae of symptoms that arose from decedent's various disease processes and conditions." Finally, Dr. Wachtel concluded that, to a reasonable degree of medical certainty, "no act or failure to act on the part of Dr. Tsai caused or contributed to the death of decedent, Lillie Mae Pinkney."

Again, we agree with the trial court that Dr. Wachtel's declaration satisfied Dr. Tsai's initial burden on summary judgment to show that material elements of appellants' wrongful death claim could not be established. Appellants offered no admissible evidence in response. We therefore reach the same conclusion as the court in *Munro v. Regents of University of California, supra*, 215 Cal.App.3d at page 984. There, "plaintiffs failed to submit the declaration of an expert in opposition to the motion for summary judgment. Accordingly, no triable issue of fact was presented regarding defendants' compliance with the relevant medical standard of care and summary judgment on plaintiffs' cause of action for medical malpractice must be affirmed." (*Ibid*.)

C. Elder Abuse Against Fountain Gardens.

Appellants further alleged that Fountain Gardens's actions constituted neglect under the Elder Abuse Act and that Fountain Gardens acted recklessly and in conscious disregard for Pinkney's safety in its care and treatment of her. The Welfare and Institutions Code defines "neglect" in this context as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57, subd. (a)(1).) By statute, neglect includes, but is not limited to: (1) "[f]ailure to assist in personal hygiene, or in the provision of food, clothing, or shelter"; (2) "[f]ailure to provide medical care for physical and mental health needs"; (3) "[f]ailure to protect from health and safety hazards"; and (4) "[f]ailure to prevent malnutrition or dehydration." (Welf. & Inst. Code, § 15610.57, subd. (b)(1)-(4).) The plaintiff also must prove "that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407.)

A plaintiff may recover the heightened remedies provided by the Elder Abuse Act upon proof by clear and convincing evidence both that the defendant is liable for neglect and that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of" the neglect. (Welf. & Inst. Code, § 15657; accord, *Mack v. Soung*

(2000) 80 Cal.App.4th 966, 971–972.) "'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur [citations][.] Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' [Citation.]" (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32.)

Here, in addition to Spencer's opinion that Fountain Gardens acted within the standard of care, Fountain Gardens offered Dr. Josephson's opinion both that no act of neglect or negligence on the part of Fountain Gardens led to Pinkney's sepsis (identified as one cause of death) and that "the nursing staff at Fountain Gardens committed no act or omission as to Ms. Pinkney which was reckless, malicious, oppressive or fraudulent in nature." Spencer further opined that no act or failure to act on the part of Fountain Gardens constituted neglect or elder abuse. Because Fountain Gardens offered evidence to show that essential elements of appellants' elder abuse claim could not be established, the burden shifted to appellants. Again, however, the only admissible evidence offered by appellants showed inadequate reporting and documentation on the part of Fountain Gardens. Because failure to document or report is not a type of neglect specified by Welfare and Institutions Code section 15610.57, subdivision (b), appellants' evidence failed to create a triable issue of material fact.

Accordingly, summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Fountain Gardens and Dr. Tsai are entitled to their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ