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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.

FILED

Mar 11, 2022

DANIEL P. POTTER, Clerk

kdominguez Deputy Clerk

JOSE FLORES,

Plaintiff and Appellant,

v.

MARIO A. MEALLET, et al.,

Defendants and Respondents.

B304139

(Los Angeles County
Super. Ct. No. BC673898)

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

Miller & James, David D. Miller and Patricia I. James for Plaintiff and Appellant.

Lewis, Brisbois, Bisgaard & Smith, Jeffry A. Miller, Brittany B. Sutton, Matthew S. Pascale, and Judith M. Tishkoff for Defendant and Respondent.

Plaintiff and appellant Jose Flores appeals from a judgment of dismissal in favor of defendants and respondents Mario A. Meallet, M.D., and A Center For Vision Care (the Center) in this medical malpractice action. The trial court granted a motion in limine to preclude Flores from introducing any expert opinion testimony at trial, because Flores failed to designate an expert in compliance with the discovery procedures. Without expert testimony, Flores could not prove his claims, and his case was dismissed.

On appeal, Flores contends that the trial court erred by not permitting Flores to elicit expert witness testimony from defendant Meallet at trial, citing Code of Civil Procedure section 2034.310, subdivision (a).¹ We conclude Flores failed to show that the trial court abused its discretion in granting defendants' motion in limine, because there is no evidence in the appellate record that Meallet was deposed after his expert designation and in his capacity as an expert pursuant to section 2034.310, subdivision (a). Therefore, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In the summer of 2015, Meallet performed laser eye surgery on both of Flores's eyes at the Center. After the surgeries, Flores complained about problems with his vision, but Meallet said those issues would go away with time.

On August 28, 2017, Flores filed a complaint against Meallet and the Center for medical malpractice. On November

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

17, 2017, Flores filed an amended complaint for medical malpractice, breach of the medical standard of care, medical negligence, and intentional tort.

On December 20, 2018, the defendants served Flores with a demand for exchange of expert witness information. Flores responded that no experts were being designated at that time. On January 14, 2019, the defendants served Flores with an expert designation identifying a retained expert and several non-retained experts, including Meallet himself. The trial date was continued twice. On August 14, 2019, the defendants served Flores with a new demand for exchange of expert witness information. Flores did not respond. On September 3, 2019, the defendants again served Flores with their expert designation, which identified Meallet as one of the non-retained experts.

On October 11, 2019, the defendants filed a motion in limine to preclude Flores from presenting expert opinion testimony at trial because he unreasonably failed to designate any expert witnesses. The defendants also filed a motion to dismiss the case, premised on the trial court granting the motion in limine, because Flores would be unable to prove his claims without expert opinion testimony. On November 4, 2019, Flores filed his opposition to the defendants' motion in limine, arguing he could present the testimony of George Rajacich, M.D., one of the physicians who treated Flores, because Rajacich was designated as a non-retained expert by defendants, had been subpoenaed for trial by Flores, and could opine as to whether Meallet's procedures were within the protocols of the American Ophthalmologist Association.

At a November 20, 2019 motion in limine hearing, Flores acknowledged he did not designate an expert because he was

unable to retain one. His principal argument was that treating physicians and percipient witnesses, Rajacich and Meallet, were presumably experts, had been designated by defendants, and therefore could be used to substantiate Flores's case. Although it had not been raised by Flores in his opposition, the trial court considered whether Flores could present expert testimony from Rajacich and Meallet under section 2034.310, subdivision (a), which allows a party to call an expert witness designated by another party and thereafter depose pursuant to the provisions for expert witness depositions. Flores conceded he could not call Rajacich pursuant to that section, because Rajacich had not been deposed. Picking up on the court's suggestion, however, Flores argued he could call Meallet as plaintiff's expert because Meallet had been deposed. The defendants countered that, although Meallet had been deposed, he was questioned only as a percipient witness, not an expert; defendant's counsel emphasized that "there were no questions asked whatsoever about the standard of care or [] Meallet's opinion as to whether he had followed it or departed from it." Neither party stated when Meallet's deposition was taken.² Flores's counsel did not dispute this representation, and stated that if the motion was denied, Flores "hope[d] that he would be able to . . . use [Meallet] to hang himself by his own petard."

The trial court granted the motion in limine, finding Flores unreasonably failed to designate an expert and the exception for

² Our record contains no copy of Meallet's deposition, and indeed no indication of when Meallet's deposition was noticed or taken. We note that over sixteen months elapsed between the filing of the complaint and defendants first notice identifying Meallet as a non-retained expert.

presenting an expert witness designated by another party under section 2034.310 was not met. After granting the motion in limine, the trial court also granted the defendants' motion to dismiss, because Flores's claims required expert testimony that Flores could not provide. On December 11, 2019, the trial court entered judgment of dismissal in favor of the defendants.

Flores timely appealed.

DISCUSSION

Standard of Review

"Evidentiary rulings are reviewed for abuse of discretion." (*Qaadir v. Figueroa* (2021) 67 Cal.App.5th 790, 803, as modified Aug. 16, 2021, review denied Nov. 10, 2021.) "As rulings on the admissibility of evidence, [in limine rulings] are subject to review on appeal for abuse of discretion." (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269.)

Under the abuse of discretion standard, we give "abundant deference to the trial court's rulings." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.) "A trial court abuses its discretion only where its action is clearly wrong and without reasonable basis." (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 236–237.)

"It is the appellant's burden on appeal to show the trial court abused its discretion." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) "It is the burden of appellant to provide an accurate record on appeal to demonstrate error. Failure to do so precludes an adequate review and results in affirmance of the trial court's determination." (*Estrada v.*

Ramirez (1999) 71 Cal.App.4th 618, 620, as modified May 4, 1999.)

Analysis

Flores contends the trial court erred in precluding him from proceeding to trial and calling defendant Meallet as the plaintiff's expert. Flores interprets section 2034.310, subdivision (a), as requiring him to show only that the defense designated Meallet as an expert and that Meallet was deposed. We disagree. For a non-designating party to call an opposing side's expert at trial pursuant to section 2034.310, subdivision (a), that expert must be deposed *after* his or her designation and deposed *as an expert*. There is no evidence in our record showing the date of Meallet's deposition or the capacity in which he was deposed. Moreover, there is no evidence that Flores provided this information to the trial court or made an offer of proof that satisfied the conditions of the statute. Therefore, he fails to meet his burden on appeal to show the ruling by the trial court was an abuse of discretion.

Section 2034.310, subdivision (a), states: "A party may call as a witness at trial an expert not previously designated by that party if . . . [t]hat expert has been designated by another party and has thereafter been deposed under Article 3 (commencing with Section 2034.410)." The plain language of the statute states that the exception applies if the witness was "thereafter deposed under Article 3." (§ 2034.310, subd. (a).) Article 3, entitled "Deposition of Expert Witnesses," sets forth the rules governing expert depositions. Thus, section 2034.310 requires that the individual be (1) designated as an expert by another party, (2) deposed *after* his or her expert designation, and (3) deposed

under the statutory provisions applicable to expert witnesses. (See *Powell v. Superior Court* (1989) 211 Cal.App.3d 441, 443–445 [subdivision broadly states the expert must be designated by another party and thereafter deposed under the procedures set forth for deposing expert witnesses]; see also *Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 219 [expert who was designated by the defendant, thereafter deposed by the plaintiff, and provided expert opinion during his deposition was properly allowed to testify pursuant to section 2034.310].) Deposing an individual as a percipient witness, and not in response to the notice designating the individual as an expert, cannot substitute for the statutory requirement of an expert deposition. (See *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1523 [affirming trial court’s order prohibiting plaintiff from eliciting at trial standard of care testimony from treating physician, because deposition of physician about his treatment of the patient preceded plaintiff’s decision to have the physician testify as an expert on standard of care].) Both the spirit and the letter of section 2034.310, subdivision (a), require that a party intending to call an opposing side’s expert at trial as their own give fair notice and an opportunity to question the expert on the expected opinions in a deposition before trial. (See *Id.* at pp. 1522–1523 [purpose of expert discovery provisions is to give fair notice of what an expert will say at trial].)


Although Flores contends the requirements of section 2034.310, subdivision (a) were met, there is no evidence in the record on appeal that Meallet was deposed after he was designated as an expert by respondents. “[W]e may disregard factual contentions that are not supported by citations to the record.” (*Tanguilig v. Valdez* (2010) 36 Cal.App.5th 514, 520.)

For the first time in his reply brief, Flores contends that the expert deposition requirement of section 2034.310, subdivision (a), does not apply when the designated expert is also a defendant in the action. But, Flores does not point to any language in the statute, nor does he provide any citation to authority, carving out an exception to the expert deposition requirements for an expert that happens to be a named defendant. We decline to read such an exception into the statute; doing so would undermine the need to designate experts in the majority of medical malpractice actions and circumvent the purpose of the discovery statutes to provide timely disclosure of an expert's expected testimony so the parties may properly prepare for trial. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 148.)

Flores has not met his burden on appeal to show evidence was presented to the trial court that satisfied the statutory conditions of section 2034.310 (i.e., evidence of when and in what capacity Meallet was deposed). In fact, the limited record on appeal suggests Meallet was not deposed after his designation. On this record we find no abuse of discretion in the trial court's ruling to exclude the introduction by Flores of expert witness testimony at trial. Flores does not challenge the trial court's dismissal of his action and entry of judgment against him on any other basis. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed. Respondents Mario A. Meallet, M.D., and A Center For Vision Care are awarded their costs on appeal.


MOOR, J.

We concur:


BAKER, Acting P. J.


KIM, J.