Filed 3/27/09

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANFRED MULLER et al., Plaintiffs and Appellants, v. FRESNO COMMUNITY HOSPITAL & MEDICAL CENTER et al., Defendants and Appellants.	B196684 (Los Angeles County Super. Ct. No. SC 065146)
MANFRED MULLER et al., Plaintiffs and Appellants, v. SANAGRAM SHANTHARAM, Defendant and Appellant.	B199316 (Los Angeles County Super. Ct. No. SC 065146)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cesar C. Sarmiento, Judge. Affirmed.

---

[*] Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the Discussion entitled "The Appeals from the Order Granting a New Trial" on pages 10-19.

Keesal, Young & Logan, Samuel A. Keesal, Jr., Albert E. Peacock III and Evelyn A. Christensen for Plaintiffs and Appellants.

Weiss, Martin, Salinas & Hearst, Andrew R. Weiss; Greines, Martin, Stein & Richland, Martin Stein, Barbara W. Ravitz and Kent J. Bullard for Defendant and Appellant Sanagram Shantharam.

Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson; Stammer, McKnight, Barnum & Bailey and Carey H. Jonnson for Defendant and Appellant Fresno Community Hospital and Medical Center.

* * * * * *

In a previous opinion (*Muller v. Daniel Freeman Hospitals, Inc*. (Mar. 3, 2005, B169141) [nonpub. opn.]), we reversed a jury verdict in favor of University Medical Center in Fresno, which is now known as the Fresno Community Hospital and Medical Center (FCH), Dr. James Davis and Dr. Sanagaram Shantharam, who were defendants in that case. The case was tried again to a jury and again resulted in a jury verdict for FCH and Dr. Shantharam, Dr. Davis having been dismissed prior to the second trial. The trial court granted the motion for new trial made by plaintiffs Manfred Muller and Rose Shoshana. The trial court concluded that it had erred in not allowing plaintiffs to call Dr. James London as a rebuttal witness. FCH and Dr. Shantharam appeal from this order.

After the trial court granted the motion for a new trial, the plaintiffs filed a motion for sanctions based on alleged discovery abuses on the part of the defendants that were connected with plaintiffs' failed attempt to call Dr. London as a rebuttal witness. The trial court denied the motion and plaintiffs appeal from that order.

We ordered the two appeals to be consolidated for purposes of record, oral argument and decision.

We affirm the orders granting the new trial and denying the motion for sanctions.

FACTS

1. Background

Mr. Muller, a German-born sculptor living in Santa Monica, was severely injured on October 28, 1999, when the car he was driving to San Francisco went off Interstate Route 5 and rolled over twice. He was first taken to FCH, where he was under the care of Drs. Davis and Shantharam. After 13 days, Mr. Muller was transferred to Daniel Freeman Hospital in Los Angeles for rehabilitation. At Daniel Freeman Hospital, Mr. Muller came under the care of the Neurology and Rehabilitation Medical Group (NRMG), Dr. Howard Chew and Dr. Jeffrey Bogosian. After a few days, Mr. Muller was transferred to the UCLA Medical Center, where his left arm between the elbow and wrist was amputated. As we relate below, the fact that the amputation was below the elbow became pivotally important to the second trial.

Mr. Muller and his wife, Rose Shoshana, filed an action wherein they sued FCH, Daniel Freeman Hospital, NRMG, and Drs. Davis, Shantharam, Bogosian and Chew. The core of the complaint was that the defendants' alleged medical negligence resulted in the amputation of Mr. Muller's arm. Rose Shoshana sued for loss of consortium.

The case was tried to a jury. Evidence was presented from March 21, 2003, to April 14, 2003. The trial court granted directed verdicts to NRMG and Dr. Chew. The jury returned its special verdict on April 16, 2003, and found that FCH and Drs. Davis, Shantharam and Bogosian had not been negligent in their diagnosis, care and treatment of Mr. Muller. The case against Daniel Freeman Hospital was predicated on the theory that Dr. Bogosian was Daniel Freeman Hospital's agent; the verdict for Dr. Bogosian exonerated the hospital.

Our previous opinion affirmed the judgment as to Daniel Freeman Hospital and Dr. Bogosian but reversed as to the remaining defendants, i.e., FCH and Drs. Davis and Shantharam. In substantial part, our previous opinion was based on our conclusion that the trial court erred in precluding the plaintiffs from calling more than one expert per issue. We found that, under the facts of the case, plaintiffs should have been allowed to call experts retained by defendants Daniel Freeman Hospital, NRMG, and Drs. Chew and Bogosian who

would have testified, *in agreement with plaintiffs' theory of the case*, that Mr. Muller had sustained irreversible injury while hospitalized at FCH. According to plaintiffs' theory of their case, the injury was caused by a "compartment syndrome," a condition that we explained in our previous opinion.[1]

Plaintiffs' claim against FCH and Dr. Shantharam was based on the theory that Mr. Muller acquired the compartment syndrome while hospitalized at FCH and while he was under Dr. Shantharam's care at that facility. Specifically, when he arrived at FCH from the accident scene, all four bones in Mr. Muller's left hand were broken. Among other treatment, splint dressing was applied to the left hand. According to Dr. Moulton Johnson, plaintiffs' expert, danger signals indicating compartment syndrome began appearing on October 31, 1999 (Mr. Muller was admitted on October 28) and intensified through November 1, 1999.[2]

Dr. London, who played a pivotal role in the second trial, was also the subject of our previous opinion. The aspect of Dr. London's role in our previous opinion that is germane

---

[1] "There are compartments in the forearm, hand, lower leg and feet through which the nerves and muscles run. These compartments are encased in a tough tissue which has very little elasticity. A compartment syndrome occurs when trauma to an area of the body contained the compartment in question causes blood to flow to that area. The injured tissue in the compartment begins to swell and soon fills the inelastic compartment. The inability of the tissue to swell further and the increased blood flow causes the pressure in the compartment to escalate. The pressure squeezes the capillaries and blood vessels shut, with the result that muscle and nerve tissue within the compartment are starved of the necessary blood flow. Unless treated promptly, the muscle and nerve tissue die within eight to 24 hours. Once this happens, there is no treatment and no recovery and, as in Mr. Muller's case, amputation is the only remedy. [¶] A compartment syndrome is sometimes called the 'tight cast syndrome' because it can also be caused by a cast or dressing that becomes too tight due to swelling. The cast or dressing has to be loosened, in order to prevent pressure from building up in the affected compartment." (*Muller v. Daniel Freeman Hospitals, Inc.*, *supra*, B169141 [at p. 3].)

[2] Another reason we reversed the judgment in our previous opinion was that the trial court erroneously precluded Dr. Johnson from testifying that Dr. Shantharam's treatment of Mr. Muller fell below the standard of care. (*Muller v. Daniel Freeman Hospitals, Inc.*, *supra*, B169141 [at p. 6].)

to this appeal is that it is clear that Dr. London was an expert who had been designated as such by Dr. Chew.[3]

2. The Second Trial[4]

All experts from both sides agreed that the failure to timely diagnose a compartment syndrome in a hospital setting with a conscious patient is below the standard of care. It was also generally agreed that a tight cast can cause or aggravate an existing compartment syndrome. The question therefore was whether Mr. Muller sustained such an undiagnosed injury while at FCH. According to the plaintiffs' experts, the answer was yes. The defense experts, on the other hand, opined that the injury to Mr. Muller's left hand and arm occurred during the crash when he sustained a crush injury.

Dr. London, who had been Dr. Chew's expert in the first trial, appeared as one of Mr. Muller's experts in the second trial.[5] Dr. London, a board-certified orthopedic surgeon, testified that Mr. Muller sustained a compartment syndrome at FCH and that if this condition is not treated within six to 12 hours, it results in the death of the muscles in the affected compartment. According to Dr. London, Dr. Shantharam's performance was below the standard of care because he failed to diagnose and treat Mr. Muller's compartment syndrome. Dr. London did not think that Mr. Muller had sustained a crush injury.

Drs. Stuart Kushner and Clark Davis, who had been experts for Daniel Freeman Hospital and NRMG in the first trial, both testified in the second trial that Mr. Muller sustained a compartment syndrome while at FCH. They were joined in this opinion by Drs. Luther Cobb, a board-certified general surgeon, Dr. Clark Davis, an orthopedic surgeon

---

[3] Erroneous limitations on Dr. London's testimony were yet another reason for our previous reversal. (*Muller v. Daniel Freeman Hospitals, Inc.*, *supra*, B169141 [at pp. 15-16].)

[4] Opening statements commenced on August 18, 2006, and the jury returned its verdict on September 14, 2006.

[5] Mr. Muller's expert at the first trial, Dr. Johnson, did not testify at the second trial.

specializing in hand surgery, and Dr. Bogosian.[6] Not all of these experts found that Dr. Shantharam fell below the standard of care; as an example, Dr. Clark Davis had no opinion on this subject.

Four physicians at UCLA Medical Center, including Dr. Roy Meals, the treating orthopedist at UCLA Medical Center, were of the opinion that Mr. Muller sustained a compartment syndrome.

The first witness called by the plaintiffs testified on August 18, 2006. Thereafter, plaintiffs' witnesses testified on three successive trial days, i.e., on August 24, August 25 and August 28, 2006. On the fifth trial day, August 29, the defense called its first witness out of order. On the next day, August 30, the plaintiffs called one witness and the defense called two witnesses, including Dr. Michael Botte, whose testimony we summarize below.

The testimony that is central to both appeals took place on the next to the last day of testimony, i.e., on September 1, 2006. After that day, only Mr. Muller's spouse testified on September 5, 2006. All parties rested after she concluded her short testimony on September 5, 2006.

According to Dr. Botte's testimony given on August 30, Mr. Muller never sustained a compartment syndrome but rather a crush injury due to severe trauma to the left arm and wrist. Dr. Botte also thought that Mr. Muller had developed a secondary infection at Daniel Freeman Hospital. Dr. Botte concluded that both Dr. Shantharam and Dr. James Davis (Dr. Davis),[7] the chief of surgical critical care at FCH, complied with the standard of care and that they could have done nothing to alter the sad course of events for Mr. Muller.

The testimony on September 1, 2006, began with the defense calling Dr. Davis. Dr. Davis testified on direct examination that Mr. Muller never had a compartment syndrome but that he had a dead hand and arm from the crush injury. On cross-examination, he was asked to explain how it was that Mr. Muller was allowed to leave FCH

---

[6] Dr. Bogosian was a treating physician at Daniel Freeman Hospital.

[7] Dr. *Clark* Davis was a plaintiffs' expert. (Text, p. 5, *ante*.)

in Fresno without any notation in his medical record that he had a dead hand and arm. Dr. Davis's attempts to answer were not satisfactory[8] and he was asked yet again how it was that Mr. Muller ended up with a dead hand and arm. This question he answered by stating that "[i]t's the natural physiology of the injury."

Counsel didn't really allow him to explain what he meant by this. So, on redirect, counsel for FCH asked Dr. Davis to "expand on why you think the natural physiology of the injury Mr. Muller sustained in the car accident evolved the way it did." After a lengthy preface, Dr. Davis came to the point: "[O]ne of the features of compartment syndrome is it kills what's in the compartment from the origin of the muscle all the way down to where the muscle inserts on -- on the other bony structure. . . . [T]he muscle in that whole compartment is in the same sheath so it's exposed to all the same pressure. [¶] So, when you get a compartment syndrome, the muscle in the whole compartment dies. So you don't save the leg below the knee,[9] you have to take it off at the knee or do an above knee amputation, and the kid's don't [*sic*] pitch high school ball. If you get it in the upper extremity, then you lose the arm at the elbow or even above the elbow. You don't have viable muscle below the elbow to close over the bony stump. That's what I meant by the natural history of the disease. And it can take several weeks to slowly progress."

Neither counsel nor Dr. Davis was finished with this topic. After Dr. Davis noted that Mr. Muller had a below the elbow amputation, which meant that there was viable muscle below the elbow joint, counsel asked: "Explain that. Why does the fact that he has a below elbow amputation rule out a compartment syndrome?" Dr. Davis answered at some length that in a compartment syndrome, all the muscle in the compartment dies but that if Mr. Muller "had living muscle to close over the bone, that wasn't dead from a compartment syndrome." Counsel asked: "Mr. Muller had quite a bit of muscle below the elbow joint

---

[8] Dr. Davis's answers tended to be discursive and round-about.

[9] Dr. Davis was referring to the case of another patient that he had discussed in his testimony.

that survived, didn't he? [¶] A [Dr. Davis:] I don't know. I haven't seen his operative note. I've noticed that he does, in fact, have an elbow joint. He does seem to have some below the elbow. So I would say he had enough muscle to close over the bone. [¶] Q And have you ruled out a compartment syndrome in his case? [¶] A Yes, sir, I believe so. [¶] Q And how strongly do you believe that? [¶] A That's what I believe."

Still on Friday, September 1, 2006, the next to testify was FCH's expert, Dr. Michael Kulick. Dr. Kulick testified that Mr. Muller did not have a compartment syndrome but that he had a crush injury. He reiterated the point that in a compartment syndrome, all the muscle in the compartment dies. Dr. Kulick noted that the operative report from UCLA Medical Center, where the amputation was done, stated that there was muscle on the forearm to cover up the stump. This was consistent with a crush injury and not consistent with a compartment syndrome.

The last to testify on September 1 was Dr. Shantharam. He had been previously called by the plaintiffs under Evidence Code section 776 but the subject that we have covered above did not come up in his prior testimony. At the end of his direct examination by his counsel, the following transpired: "Q [Dr. Shantharam's counsel:] Now, we've heard testimony earlier today that, if there had been a compartment syndrome, you would expect the entire muscle throughout the compartment to have died? [¶] A [Dr. Shantharam:] Correct. [¶] Q And you understand now that the entire muscle in Mr. Muller's compartment did not die? [¶] A It did not die. And one would be going through an amputation above the elbow if it is a compartment syndrome. [¶] MR. WEISS [Dr. Shantharam's counsel]: That's all I have, Your Honor. Thank you."

Plaintiffs' counsel did not cross-examine these three witnesses on the topic of the below-the-elbow amputation nor did counsel object to any of this testimony. After testimony was concluded on September 1, plaintiffs' counsel stated that plaintiffs' counsel had been in touch over the lunch hour with Dr. London "who's going to be here first thing in the morning to rebut some of the new evidence that we heard today." Dr. Shantharam's lawyer immediately objected "to the extent he's [Dr. London] going to be expressing opinions, because that's improper rebuttal." When the trial court asked for an offer of proof,

plaintiff's counsel stated: "Your Honor, today for the first time, despite all of the experts who have testified in three weeks, today was the first day that the defendants put on experts who said that, whether or not the amputation was below elbow or above, was somehow indicative of whether this was a compartment syndrome. This was new. They didn't ask Dr. [Botte]. They didn't ask any of the other experts about this. We intend to call Dr. [London] back to simply say that, whether or not it's a below elbow or an above elbow amputation, is not indicative of whether or not this was a compartment syndrome. Plain and simple." The court requested authorities on the subject by next Tuesday morning, when the trial would reconvene.

On Tuesday, September 5, Dr. Shantharam's counsel filed a written memorandum, which stated that defense expert Dr. Kulick had testified that in a compartment syndrome all of the muscle in the compartment dies and that plaintiffs wanted to present the contrary testimony of Dr. London. The memorandum stated that Dr. London had read Dr. Kulick's deposition and that he was therefore aware of his opinions but that plaintiffs had not covered this subject when they had examined Dr. London during their case in chief. The memorandum also contended that Code of Civil Procedure section 2034.310, subdivision (b)[10] foreclosed plaintiffs from calling Dr. London in rebuttal.

During the hearing on this matter held on Tuesday morning,[11] FCH's counsel stated that Dr. Kulick had testified in his deposition that in a compartment syndrome all of the muscle in the compartment dies. Counsel read the following question and answer from Dr. Kulick's deposition: "'Question: And what was inconsistent with a compartment

---

10 "A party may call as a witness at trial an expert not previously designated by that party if either of the following conditions is satisfied: [¶] . . . [¶] (b) That expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." (Code Civ. Proc., § 2034.310, subd. (b).)

11 It is not disputed that Dr. London was outside the courtroom and ready to testify on Tuesday, September 5.

syndrome at the time of amputation? [¶] Answer: Most of the compartment syndromes I have been involved with, the entire compartment is involved. Reading the reports from, I believe, Dr. Meals [from UCLA Medical Center], he had the proximal[[12]] portion of his forearm completely spared which for me is more consistent with what I think happened with a crushed component.'"

After listening to argument by both sides, the trial court concluded, clearly referring to Code of Civil Procedure section 2034.310, subdivision (b) (see fn. 10, *ante*), that "What I think you're [plaintiffs] offering here is rebuttal evidence. Under the law what you're allowed to do is add foundational fact, not contrary evidence. I'm not going to allow you to call Dr. London at this time."

In its verdict, the jury specifically found that Mr. Muller did not have a compartment syndrome while at FCH.

3. The Order Granting a New Trial

The trial court granted the motion for new trial on the ground that an error of law had been committed. (Code Civ. Proc., § 657.) We set forth the court's minute order:

> "Dr. London's rebuttal testimony was improperly excluded. He should have been permitted to testify on the issue of whether the below the elbow amputation ruled out the existence of the compartment syndrome. The court's ruling was based upon CCP section 2043.10(b) [*sic*]. This section applied only to non-designated expert witnesses. Dr. London was a properly designated expert; therefore, this section did not apply to his proposed rebuttal testimony. [¶] The defendants presented no evidence to this court to show that they had at any time before this trial informed the plaintiff that they would be presenting expert testimony showing that the location of the amputation was a factor in determining the existence of a compartment syndrome. The plaintiff then, did not present evidence on this issue during their case in chief and they were unable to cross examine Dr. Botte, a key defense expert, on this issue. [¶] The exclusion of Dr. London's proposed rebuttal testimony was prejudicial. The defense argued to the jury that the location of the amputation was significant in showing the non-existence of a compartment syndrome. Since the plaintiff was precluded from introducing contrary expert opinion

---

12 In this context, "proximal" refers to above the elbow and "distal" to below the elbow.

they were placed in an unfair position. This evidence was likely to have affected the outcome of the trial."

DISCUSSION

THE APPEALS FROM THE ORDER GRANTING A NEW TRIAL*

Dr. Shantharam's Contentions

1. There Is Support in the Record for the Trial Court's Finding That the Location of the Amputation Was a New Theory First Advanced on September 1, 2006

Dr. Shantharam contends that Dr. Kulick's deposition testimony adequately apprised plaintiffs of the theory that the location of the amputation ruled out a compartment syndrome. In propounding this contention, Dr. Shantharam relies on a single answer from Dr. Kulick's deposition, which we set forth in the margin.[13] While in his opening brief Dr. Shantharam breaks up this single answer into three parts, it is nonetheless only one answer. When considered as a whole, the answer is far too guarded to amount to a clear statement that the below the elbow amputation *rules out* a compartment syndrome. It is also true that, after Dr. Kulick gave his answer, he was given an opportunity to state the theory that the location of the amputation ruled out a compartment syndrome but he did not do so.

One answer from a deposition does not amount to a clearly articulated theory, especially when, on its face, the answer makes no mention of the theory but requires interpretation and elucidation before the answer adds up to the theory. As an example,

---

* See footnote, page 1, *ante*.

13 "*Most* of the compartment syndromes *I've been involved with*, the entire compartment's involved. Reading the reports from, I believe, Dr. Meals [UCLA Medical Center], he had the proximal portion of his forearm completely spared, which for me is *more consistent* with what I think happened with a crush component. And the patient has a vertical aspect to this problem versus a compartment syndrome where you have an increased pressure in a compartment that's unrelenting and that pressure is distributed throughout the entire length of the compartment so that when you open up that skin you go from one end to the other and all of the muscle is dead. [¶] Q Anything else about the UCLA records that you think are inconsistent with a compartment syndrome? [¶] A No." We have italicized the portions of the statement that, in our opinion, make it a guarded statement.

under Dr. Davis's below the elbow amputation theory it must be also true that the *affected* compartment extended to *above* the elbow for Dr. Davis's theory to be correct, a point on which we discern no testimony. In any event, a trial is not a game of "gotcha" in which one guarded answer in a deposition can be transformed into a compelling theory of defense propounded for the first time on what was effectively the last day of trial.

Another way of understanding the reality of the situation is to assume, *favorably* to Dr. Shantharam and FCH, that Dr. Davis simply stumbled into his below the elbow theory during his trial testimony and that he surprised the defendants' counsel just as much as he surprised plaintiffs' counsel. Given that a trial is a quest for truth and not an ordeal by battle, the jury should in all likelihood have been allowed to hear about this new theory -- as long as the element of surprise was counterbalanced by giving the plaintiffs an opportunity to study this new theory and to respond to it. But, instead of recognizing this aspect of the case, the defendants' adamantly opposed Dr. London as a rebuttal witness. To make matters worse, the defendants' opposition was based on the spurious argument that Dr. London's testimony was barred by Code of Civil Procedure section 2034.310, subdivision (b), a matter we take up separately below, in the unpublished part of this opinion. Thus, the defendants did all they could to benefit from the surprising turn in Dr. Davis's testimony, if it in fact surprised them, and to deny the plaintiffs a fair opportunity to react to that surprise.

On the other hand, if one takes the defendants literally at their word and assumes that Dr. Kulick's deposition answer was *in fact* a statement of the below the elbow amputation theory, one is presented with a cleverly disguised deposition answer, planted like a mine well before trial, and then exploded deliberately by the defendants at the end of the trial. Needless to say, such a course of conduct, the proverbial trial by ambush, is entirely unacceptable.

There are two reasons why we are not persuaded by Dr. Shantharam's argument that the trial court was correct when it stated, during the hearing on September 5, 2006,[14] that

---

14 It will be remembered that this hearing was held prior to the end of the trial, as Dr. London was waiting to be called to testify in rebuttal.

Dr. Kulick's deposition gave notice of the below the elbow amputation theory. In the first place, the trial court was well situated to state the reason for its own decision. In its minute order granting the motion for new trial, the trial court stated that its ruling of September 5 excluding Dr. London's rebuttal testimony "was based upon" Code of Civil Procedure section 2034.310, subdivision (b). This means that even on September 5 the court did not base its decision on the theory that Dr. Kulick's deposition gave notice of the new theory. Second, for reasons we have explained, the trial court's quick reaction on September 5 to Dr. Kulick's deposition was simply wrong, as the trial court's minute order granting the motion for new trial recognized.

The trial court found that the "defendants presented no evidence to this court to show that they had at any time before this trial informed the plaintiff that they would be presenting expert testimony showing that the location of the amputation was a factor in determining the existence of a compartment syndrome."

Our review of the order granting a new trial is limited to determining whether there is any support for the trial court's ruling; we will reverse the order only if there is a strong affirmative showing of an abuse of discretion.[15] For reasons we have explained, Dr. Kulick's single deposition answer was not a statement of the theory that a below the elbow amputation rules out a compartment syndrome. There being no other warning or even intimation of this theory, the trial court's finding that there was nothing to show that

---

[15] "'The trial judge is familiar with the evidence, witnesses and proceedings, and is therefore in the best position to determine whether, in view of all the circumstances, justice demands a retrial. Where error or some other ground is established, his discretion in granting a new trial is seldom reversed. The presumptions on appeal are in favor of the order, and the appellate court does not independently redetermine the question whether an error was prejudicial, or some other ground was compelling. Review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on a strong affirmative showing of abuse of discretion.'" (*Bell v. State of California* (1998) 63 Cal.App.4th 919, 931, citing Witkin, now appearing in 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 133, pp. 723-724.) Witkin notes that the trial judge's order granting a new trial is seldom reversed. (8 Witkin, § 133, pp. 723-724.)

the defendants had informed the plaintiffs of this theory prior to trial was correct. It follows, of course, that there is no showing of an abuse of discretion.

While we do not need to independently redetermine the question whether the error of precluding Dr. London from testifying in rebuttal was prejudicial (see fn. 15, *ante*), we note that this was a close case, which increases the probability that the exclusion of evidence was prejudicial. (See generally 9 Witkin, Cal. Procedure, *supra*, §§ 443, 446, pp. 497-498, 500-501.) All in all, the evidence was closely balanced on whether it was a crush injury or a missed compartment syndrome. Thus, unequivocal testimony coming at the end of the trial that the location of the amputation ruled out a compartment syndrome was in all likelihood pivotal, as the trial court found.

2. The Question Is Whether Dr. London's Rebuttal Testimony Was Erroneously Excluded, Not Whether There Was an Obligation to Disclose the New Theory

Dr. Shantharam contends that the trial court erred in ruling that defendants had an obligation to inform plaintiffs and the trial court of the below the elbow amputation theory.

That was not the court's ruling. The court ruled that Dr. London should have been allowed to testify in rebuttal on the below the elbow amputation theory. It was in response to defendants' argument based on Dr. Kulick's deposition testimony that the trial court ruled that defendants had not given any indication of this theory before Dr. Davis's testimony. Because they had failed to disclose this defense, the trial court found that plaintiffs "did not present evidence on this issue during their case in chief and they were unable to cross[-] examine Dr. Botte, a key defense expert, on this issue." Thus, the failure to disclose this theory was not the breach of an obligation but rather had operative effects, one of which was that Dr. London should have been allowed to testify in rebuttal.

Subsumed in the foregoing argument is the further contention that there really was nothing new about the theory that a below the elbow amputation ruled out a compartment syndrome. As before, this contention is predicated on Dr. Kulick's deposition answer. For reasons that we have set forth, Dr. Kulick's deposition answer did not amount to a statement of the below the elbow amputation theory.

3. Plaintiffs Did Not Forfeit Their Right to Call Dr. London As a Rebuttal Witness by Failing to Object to Dr. Davis's Testimony

Dr. Shantharam contends that plaintiffs forfeited the right to call Dr. London as a rebuttal witness because they failed to object to Dr. Davis's testimony, as they were required to do under Code of Civil Procedure section 2034.300.

The premise of this contention is mistaken. Code of Civil Procedure section 2034.300 does not impose a requirement to object if the expert witness offers a theory in his or her trial testimony that is new to the case. Section 2034.300 requires the court to exclude expert opinion if the party offering that opinion has unreasonably failed to comply with rules governing discovery of expert opinions that we set forth in the margin.[16]

Dr. Shantharam contends that a "party may not let the testimony come in without objection and then move for rebuttal or for a new trial on grounds of surprise after an adverse jury verdict" and that the remedy for the failure to comply with "expert witness disclosure requirements" is exclusion of the testimony of the expert.

At least two cases have recognized that the trial court may exclude expert testimony if the expert is called at trial to give an opinion or opinions that he or she has not previously disclosed either in deposition or in the expert witness declaration. These decisions are *Bonds v. Roy* (1999) 20 Cal.4th 140 and *Jones v. Moore* (2000) 80 Cal.App.4th 557.

In *Bonds v. Roy*, a decision that has not been cited by any of the parties, the expert in this medical malpractice case testified at his deposition about the plaintiff's damages but at trial plaintiff attempted to have the same expert testify about the standard of care. (*Bonds v. Roy*, *supra*, 20 Cal.4th at p. 143.) The Supreme Court upheld the trial court's order barring the expert from testifying about the standard of care. The court based its decision in large

---

[16] Code of Civil Procedure section 2034.300 provides that the trial court "shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)."

part on the purpose of the expert witness declaration that must contain a statement of the "general substance of the testimony that the expert is expected to give." (Code Civ. Proc., § 2034.260, subd. (c)(2).) The court found that the statutory scheme "envisions timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial so long as a party has submitted any expert witness declaration whatsoever is inconsistent with this purpose." (*Bonds v. Roy*, *supra*, at p. 148.) The court found that there was no practical difference between a complete failure to submit an expert declaration and an "inaccurate" declaration. (*Id.* at p. 147.) Thus, it appears that the failure to submit an *accurate* expert witness declaration may lead to the exclusion of an expert opinion at trial under the authority of Code of Civil Procedure section 2034.300, subdivision (b). (See fn. 16, *ante*.)

In *Jones v. Moore*, *supra*, 80 Cal.App.4th 557, the expert gave very specific opinions in his deposition and went on to state that he intended to offer only those opinions at trial. The appellate court concluded that "it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (*Id.* at p. 565.) The court cited no authority that directly supported this conclusion but it found broad support for this principle in the statutory provisions that require expert declarations and provides for an amendment to those declarations. Quite correctly, in our opinion, the court concluded that these provisions indicate a policy precluding surprises in the expert's testimony for which the opposing party is not prepared. The court sustained the trial court's order excluding opinions not offered during the expert's deposition. (*Ibid.*)

Although there is no express statutory authority that covers this topic, the foregoing decisions show that the trial court may, in a proper case, exclude expert testimony if the opinion offered in that testimony is, for want of a better expression, new to the case. Thus, as long as the below the elbow amputation theory offered by Dr. Davis was actually a new theory, an objection would have been appropriate.

It is another matter whether the failure to object forfeited the issue. The courts (e.g., *Bonds v. Roy*, *supra*, 20 Cal.4th 140, 147) and the writers (1 Hogan & Weber, Cal. Civil

Discovery (2nd ed. 2005) Expert Witness Disclosure, § 10.1, p. 10-1) recognize that experts pose a special problem for counsel because counsel must acquire specialized knowledge to examine or cross-examine an expert. Counsel who is not knowledgeable enough to question an expert simply cannot represent the client adequately; thus, the statutory scheme is designed to eliminate surprises in expert testimony. And there certainly cannot be a worse time for a surprise in expert testimony than at the end of a medical malpractice trial.

We think that a sound approach to the problem is to assess each situation on its own facts and circumstances, keeping in mind that the party opposing the new expert opinion should act diligently. That was done in this case. Instead of objecting, at the conclusion of the day's testimony on September 1, 2006, plaintiffs' counsel announced that plaintiffs intended to rebut the below the elbow amputation theory. Contrary to Dr. Shantharam's suggestion, plaintiffs did not wait until after the adverse jury verdict to raise the matter.

As a general matter, the purpose of an objection is to give the trial judge an opportunity to correct the matter and also to give the adverse party the opportunity to speak to the issue in the trial court. (See generally 9 Witkin, Cal. Procedure, *supra*, Appeal, § 400, pp. 458-459.) In this case, counsel could not have been faulted for not being able to conclude, immediately upon hearing Dr. Davis articulate the below the elbow amputation theory, that this was in fact a new theory. One would think that at least some reflection and review of his own materials, if not also a consultation with his own expert, would be required before counsel knew enough to make an objection that he could support. In fact, this is exactly what appears to have happened. As counsel stated on the afternoon of September 5, he had been in touch with Dr. London over the lunch hour. Thus, counsel notified the trial court at the end of the same day that Dr. Davis testified that counsel intended to address this issue through his own expert Dr. London. It could be said that it was more productive to produce an expert on this issue than to attempt to make inadequately researched objections. Be that as it may, counsel acted in time to allow the trial court to address the issue, and for the adverse party to comment, well before the case went to the jury.

We do not hold that as a general matter counsel is excused from making timely objections to an expert's testimony. We conclude that in this case, when an expert advanced what appeared to be a new theory at the end of a trial, counsel could raise the matter of a new theory by notifying the trial court and the adverse parties on the same day that a witness would be called to rebut the new theory. A timely objection is not the only way in which an issue can be preserved for review. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 404, pp. 462-463.) Under the rather unique circumstances of this case, timely notice of a rebuttal witness preserved for appellate review the matter of a new theory propounded by the expert.

FCH's Contentions

1. Introduction

FCH also contends that Dr. Kulick's deposition answer, which we have addressed at length above, gave notice of the below the elbow amputation theory advanced by Dr. Davis. It is unnecessary to repeat our discussion of Dr. Kulick's deposition answer and we incorporate that discussion here by reference. This is also true of our discussion of the argument that failure to object to Dr. Davis's testimony forfeited the issue of the new theory on appeal.

There are some specific points, however, that FCH makes regarding Dr. Kulick's deposition testimony that we chose to address.

First, we must correct a statement FCH makes in its opening brief with regard to the trial court's finding that defendants presented no evidence to the trial court to show that they had at any time before the trial informed the plaintiffs that they would be presenting expert testimony showing that the location of the amputation was a factor in determining the existence of a compartment syndrome. (See text, *ante*, p. 10.) FCH contends that this determination "is plain false" because Dr. Kulick "disclosed in his deposition testimony on [*sic*] this very point." The trial court's determination may be claimed to have been in error, but it is inappropriate to state that it is false.

Second, FCH contends in its brief that Dr. Kulick testified in his deposition that there were 5 1/2 inches of viable muscle below Mr. Muller's elbow. In violation of rule 8.204(a)(1)(C) of the California Rules of Court, FCH fails to provides any transcript

references for this alleged testimony. We are empowered to disregard such unsupported factual assertions. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.) In any event, this testimony, even if it was made, does not amount to a statement of the below the elbow amputation theory for reasons we have already explained. (Text, *ante*, pp. 11-12.)

FCH claims that plaintiffs' motion for new trial was based on the "false representation" (capitalization and boldface omitted) that Dr. Kulick testified that a below the elbow amputation ruled out a compartment syndrome. It was not Dr. Kulick but Dr. Davis that testified to this effect. Plaintiffs' motion may have been mistaken in identifying the source of this testimony, which is certainly an immaterial error at this point, but it is excessive to label it as a "false representation."

Finally, while it is true that Drs. Shantharam and Davis were not designated experts,[17] their testimony propounding the below the elbow amputation theory was nonetheless new to the case, when it was propounded on September 1, 2006. The point is that if a witness or witnesses testify about a theory that is new to the case on the next to the last day of trial or, for that matter, at any point in the trial, the adverse party ought to be given a chance to rebut that theory. This is so whether the witness is an expert or not.

2. Code of Civil Procedure Section 2034.310 Did Not Apply to Dr. London

Code of Civil Procedure section 2034.310 applies only to an expert witness called at trial *who has not been previously designated* as an expert. (See fn. 10, p. 9, *ante*.) It is not disputed that Dr. London was designated as an expert by plaintiffs; in fact, Dr. London was also a designated expert in the first trial, albeit then for Dr. Chew.

Without citing any authority, FCH contends that even if an expert has been designated as such, the expert is "still considered 'undisclosed' for purposes of the Code with respect to new opinions which they have not previously disclosed at deposition." Not only is there no authority cited for this proposition, FCH does not even give a reason or a rationale why this should be, or allegedly is, the rule.

---

[17] FCH's contention is that because these witnesses were not experts, they were not required to disclose their opinions prior to the trial.

“[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant’s . . . issue as waived.” (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; Cal. Rules of Court, rule 8.204(a)(1)(B); see generally 9 Witkin, Cal. Procedure, *supra*, Appeal, § 701, pp. 769-771.)

There is nothing in the text or history of Code of Civil Procedure section 2034.310 (1 Hogan & Weber, Cal. Civil Discovery, *supra*, Expert Witness Disclosure, § 10.14, pp. 10-40 to 10-41) that remotely supports FCH’s claim. In any event, because the argument violates the rule requiring argument and authority, we disregard this contention.

We do note, however, in the portion of our opinion that deals with the issue of sanctions, that the argument that Code of Civil Procedure section 2034.310 barred Dr. London from testifying in rebuttal, advanced successfully in the trial court, sailed dangerously close to being frivolous. It is particularly objectionable to have this patently unmeritorious contention raised again on appeal without a semblance of authority or reasoned argument.

FCH closes its opening brief with the unfounded statement that plaintiffs made false and misleading statements in their “declaration and argument, unsupported by any transcript of Dr. Kulick’s trial testimony or any other defense witness.” We do not agree; in fact, we strongly disapprove of FCH’s attacks on the probity of counsel and the trial court.

THE APPEAL FROM THE ORDER DENYING THE MOTION FOR SANCTIONS

The motion for a new trial was granted on December 13, 2006. On January 31, 2007, plaintiffs filed a motion for sanctions against Dr. Shantharam and FCH. The motion was predicated on the defendants’ failure to disclose in a timely fashion the theory that the location of the amputation below the elbow ruled out a compartment syndrome.

The trial court denied the motion for sanctions on March 3, 2007. The court found that there was no evidence that the defendants were “sandbagging” and no evidence that the defendants “knowingly and intentionally concealed Dr. Kulick’s opinion.” The court also found that the defendants’ conduct in this case did “not come close” to the misconduct in

Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152, the case on which plaintiffs' motion relied.

1. The Order Denying the Motion for Sanctions Is Appealable As a Collateral Order

Relying principally on *Wells Properties v. Popkin* (1992) 9 Cal.App.4th 1053, 1055, Dr. Shantharam filed a motion to dismiss the appeal from the order denying plaintiffs' motion for sanctions. We denied the motion before the briefs were filed but indicated that we were prepared to reconsider the issue when the briefing was completed.

The question whether the denial of a motion for sanctions is appealable is far from settled. *Wells Properties v. Popkin* is authority for the negative while *Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337 and *In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517 stand for the affirmative of the proposition.

In the context of this case, the only theory under which the order of denial would be appealable is the collateral order doctrine. Because there is no judgment in this case, the order granting a new trial having been entered, which we affirm, the denial order cannot be appealable under Code of Civil Procedure section 904.1, subdivision (a)(2) (appeal may be taken from an order made after a *judgment* appealable under subd. (a)(1) of § 904.1). This eliminates *Shelton v. Rancho Mortgage & Investment Corp.*, a case in which the denial of a motion for sanctions occurred after the entry of a judgment and when the appellate court, after close analysis of what constitutes an appealable postjudgment order, concluded that the denial of sanctions was appealable as such a postjudgment order. (*Shelton v. Rancho Mortgage & Investment Corp*., *supra*, 94 Cal.App.4th at pp. 1343-1345.)

"'A necessary exception to the one final judgment rule is recognized where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation. If, e.g., this determination requires the aggrieved party immediately to pay money or perform some other act, he is entitled to appeal even though litigation of the main issues continues. The determination is substantially the same as a final judgment in an independent proceeding.'" (*Yeboah v. Progeny Ventures*, *supra*, 128 Cal.App.4th 443, 449, fn. 2, citing what is now 9 Witkin, Cal. Procedure, *supra*, Appeal, § 99, pp. 162-163.) Witkin notes that the early cases on the collateral order doctrine applied the doctrine only

when the order in question directed the payment of money or the performance of some other act. (9 Witkin, *supra*, Appeal, § 106, p. 169.) "In later decisions, this limitation was not always observed, perhaps partly because more than one theory of appealability was loosely invoked and discussed." (*Ibid.*) (Among the cases digested by Witkin that have disregarded this limitation is *In re Marriage of Dupre*, *supra*, 127 Cal.App.4th at p. 1523.) Other texts have also noted that the Courts of Appeal have been divided on this question, some holding that these limitations apply and others ignoring them entirely. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:79, pp. 2-46 to 2-47; 4 Cal.Jur.3d (2007) Appellate Review, § 30, p. 65, fn. 9 & accompanying text.)

Relying on the cases that require the collateral order to direct the payment of money or the performance of an act, Dr. Shantharam contends that because the order denying the motion for sanctions required neither act, the order is not appealable. We agree that the order in question did not require the payment of money or the performance of an act. Thus, we must address the question whether these limitations actually apply to the collateral order doctrine.

One reason for the disagreement among the Courts of Appeal is that the Supreme Court has at different times endorsed these limitations and at other times has disregarded them. Thus, in the frequently cited opinion in *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119, the court, after noting the existence of the collateral order doctrine emphatically went on to state: "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him."

Seven years later, in *Meehan v. Hopps* (1955) 45 Cal.2d 213 (*Meehan*), the court disregarded the limitations on the collateral order doctrine that the order must require the payment of money or the performance of an act. Hopps, the defendant, moved to enjoin the plaintiffs' lawyers from participating in the case or disclosing confidential information that these lawyers had learned while, in a previous case, they had represented Hopps. The motion was denied and the sole issue was whether the order denying the motion was appealable. The Supreme Court gave two reasons why the order was appealable. First,

Hopps could have brought an independent action with the same objectives as the motion, in which event the denial of an injunction would have presented an appealable order. (*Id.* at pp. 215-216.) Second, the disqualification of counsel was "unquestionably collateral to the merits of the case" (*id.* at pp. 216-217) and "[b]ecause the trial court's order denying Hopps' motion left nothing further of a judicial nature for a final determination of his rights regarding opposing counsel, the order was final for purposes of appeal" (*id.* at p. 217). The Supreme Court made no mention of the limitations on the collateral order doctrine that the order must direct the payment of money or the performance of an act. The omission to refer to these limitations is understandable as an order disqualifying an attorney simply does not involve the payment of money or the performance of an act.

A review of some of the decisions of the Supreme Court handed down after *Meehan* suggests, at first blush, that the court has not been consistent in dealing with the limitations that the order must call for the payment of money or the performance of an act.

In *Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786, the court set forth the collateral order doctrine without reference to the foregoing limitations; the court held that orders regarding discovery are not collateral orders. In *Takehara v. H. C. Muddox Co.* (1972) 8 Cal.3d 168, 171, the court held, citing inter alia *McClearen v. Superior Court* (1955) 45 Cal.2d 852, 855, that an order granting or denying a lien under Code of Civil Procedure former section 688.1 was appealable as a collateral order. No mention was made of the limitation that a collateral order must also involve the payment of money or the performance of an act. Indeed, it is difficult to see how an order granting or denying a lien could involve either one of these limitations.

In *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368-369, where the appeal was from an order modifying spousal support, the court stated the collateral order doctrine in its pre-*Meehan* form[18] and held the order to be appealable. *Bauguess v. Paine* (1978) 22

---

18 "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken." (*In re Marriage of Skelley*, *supra*, 18 Cal.3d at p. 368.)

Cal.3d 626, 634, footnote 3, was a case when an order directing an attorney to personally pay $700 in sanctions was held appealable as a final order on a collateral matter directing the payment of money. And in *I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331, the trial court sustained a demurrer, the plaintiff sought and was denied reconsideration and the defendant moved for and was awarded $250 in sanctions. The Supreme Court held the order awarding sanctions to be appealable as a final order on a collateral matter directing the payment of money.

The apparent inconsistency in the Supreme Court's treatment of the limitations on the collateral order doctrine have caused some appellate courts to declare themselves firmly in the pre-*Meehan,* i.e., the *Sjoberg v. Hastorf*, camp. Thus, in *Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 156, the Court of Appeal stated that "[a] careful reading of the *Meehan* decision convinces us that as to the second ground upon which the court found appealability, it was concerned only with the question of collaterality and finality. . . . [T]here is nothing in the opinion in *Meehan* indicating an intent to delimit or overrule *Sjoberg* and its own decisions cited in *Sjoberg* to the effect that not only must the order of a collateral issue be final to be appealable, but that it must also direct the payment of money by appellant or the performance of an act by or against him."

We find that it is somewhat misleading to state that *Meehan* was "only" concerned with "collaterality and finality" -- the question in the case was whether the order denying disqualification was a final order on a collateral matter and therefore appealable, and the answer was yes. Thus, the fact remains that *Meehan* held the order to be a collateral, appealable order without reference to any limitations.

Conservatorship of Rich (1996) 46 Cal.App.4th 1233, 1237, contains a particularly strong endorsement of *Sjoberg v. Hastorf* and the limitations on the collateral order doctrine, as well as a vote of confidence in *Efron v. Kalmanovitz.*[19] *Conservatorship of Rich* also

---

19 "It is true that the *Meehan* case, which postdates *Sjoberg* [*v. Hastorf*], contains language appearing to find an attorney disqualification order appealable as a final order on a collateral matter without considering whether it meets the payment-of-money/performance-of-an-act requirement. (45 Cal.2d at pp. 216-217.) However, as explained in *Efron v.*

states that the Supreme Court has "'consistently limited the collateral order doctrine to situations where a trial judge orders either payment of money or the performance of some act'" (see fn. 19), a conclusion that is refuted by *Meehan*, *Southern Pac. Co. v. Oppenheimer*, *Takehara v. H. C. Muddox Co.*, and *McClearen v. Superior Court*.

As we have noted, we do not think that *Meehan* can be dismissed, as the court did in *Efron v. Kalmanovitz*, because it was "only" concerned with "collaterality and finality." Whether the order was final and collateral *and therefore appealable* was in fact the issue that was decided in that case. But *Meehan* is not only authoritative, this decision also answers, albeit indirectly, the question what role the limitations of a payment of money or the performance of an act play in the collateral order doctrine.

An order disqualifying or denying the disqualification of counsel, the latter being the order on appeal in *Meehan*, stands alone; it does not require the payment of money or the performance of an act. There are other collateral orders that have been held to be appealable that do not involve a payment of money or the performance of an act. An order granting a creditor's lien upon a cause of action (*Bandy v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 230, 233), an order denying a request for pendente lite attorney fees (*Askew v. Askew* (1994) 22 Cal.App.4th 942, 964), and an order approving a receiver's accounting (*Schreiber v. Ditch Road Investors* (1980) 105 Cal.App.3d 675, 677, fn. 1) are examples of such orders.

Kalmanovitz[, *supra*,] 185 Cal.App.2d 149, 154-156, a close reading of the pertinent passage in *Meehan* warrants the conclusion that that [*sic*] the high court was concerned only with the issue of finality and did not intend to overrule its own holding in *Sjoberg* that there is a second indispensable requirement to the collateral order exception. History has borne out the wisdom of this analysis, for since then '[t]he California Supreme Court has consistently limited the collateral order doctrine to situations where a trial judge orders either payment of money or the performance of some act.' (*Samuel v. Stevedoring Services* (1994) 24 Cal.App.4th 414, 418, citing *Bauguess v. Paine*[, *supra*,] 22 Cal.3d 626, 634, fn. 3; *In re Marriage of Skelley*, *supra*, 18 Cal.3d 365, 368; *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 9.) [¶] We conclude that judicially compelled payment of money or performance of an act remains an essential prerequisite to the appealability of a final order regarding a collateral matter." (*Conservatorship of Rich*, *supra*, 46 Cal.App.4th at p. 1237.)

The apparent inconsistency in the Supreme Court's opinions evaporates when the focus is on the nature of the order, i.e., on whether the order itself does or does not require a payment of money or the performance of an act. When the order does not require a payment of money or the performance of an act, the Supreme Court will find the order appealable without reference to these limitations, *as long as the court is satisfied that the order is truly collateral*. (See *Meehan*, *supra*, 42 Cal.2d 213; *Takehara v. H. C. Muddox Co.*, *supra*, 8 Cal.3d 168 & *McClearen v. Superior Court*, *supra*, 45 Cal.2d 852.)

This suggests that the supposed limitations of a payment of money and the performance of an act are in actuality indications that the order in question is collateral to the main action. In other words, when the order directs the payment of money or the performance of an act, it is likely that the matter addressed in the order is collateral to the main action. Viewed from this perspective, it is logical that orders awarding pendente lite attorney fees (*In re Marriage of Skelley*, *supra*, 18 Cal.3d at pp. 368-369), orders directing the parties to share in the payment of discovery costs (*San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1402), and an order unsealing court records (the performance of an act) (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 297) are orders that are collateral to the main action.

A good illustration of the unnecessary strain that the payment of money or performance of an act limitations place on the collateral order doctrine is *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882-883. In that decision, the Court of Appeal expressed a doubt that an order denying a disqualification motion is a collateral order because such an order does not require the payment of money or the performance of an act.[20] On the other hand, according to the court in *Machado*, an order granting a

---

20 "An order granting or denying a disqualification motion is an appealable order. [Citing inter alia *Meehan*, *supra*, 45 Cal.2d at p. 215.] [¶] The California Supreme Court has given two reasons why such an order is appealable: First, it is an injunctive order (see Code Civ. Proc., § 904.1, subd. (a)(6)); second, it is a final order collateral to the main action. (*Meehan*, *supra*, 45 Cal.2d at pp. 215-217.) The second ground has been questioned because it seems to conflict with authority limiting those collateral orders that may be appealed. The general rule is that only those collateral orders which compel the payment of

disqualification motion compels the hiring of a new attorney, which satisfies the limitation of the performance of an act. (*Id*. at p. 882.) But an order disposing of a motion to disqualify an attorney either is, or is not, collateral to the main action; the better view, without a doubt, is that it is collateral. This conclusion results from an analysis of the relationship of the order of disqualification to the main action and it is not based on whether an order is granted or denied. All the same, if *Machado* is to be followed, an order denying a disqualification motion is not appealable while an order granting the motion is appealable. This does not make sense.

The artificiality of these supposed limitations is also made apparent by the holding that "[w]here, as here, the notice order[21] is neither final nor collateral, the fact that it directs payment of money or the performance of an act is immaterial." (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1229.) In other words, the real test is whether the order is collateral and final as to the collateral matter, not whether the order has the effect of requiring payment of money or the performance of an act.

It is surely of some significance that the rather considerable body of federal law on the collateral order doctrine that begins with *Cohen v. Beneficial Loan Corp.* (1949) 337 U.S. 541, makes absolutely no mention of the limitations on the collateral order doctrine that we have discussed. (15A Wright et al., Federal Practice & Procedure (1992) Jurisdiction, § 3911, pp. 329-371.) In other words, the collateral order doctrine has functioned in the federal courts without these limitations since its inception in 1949.

The fact is that these supposed limitations on the collateral order doctrine do not really speak to the fundamental concepts behind this doctrine. "The reason for the one judgment rule is that 'piecemeal disposition and multiple appeals in a single action would be

---

money or the doing of some act are appealable." (*Machado v. Superior Court*, *supra*, 148 Cal.App.4th at p. 882.)

21 The order was directing service of notice of a class action on the members of the class.

oppressive and costly, and . . . a review of intermediate rulings should await the final disposition of the case.'" (*Knodel v. Knodel* (1975) 14 Cal.3d 752, 760, citing what is now 9 Witkin, Cal. Procedure, *supra*, Appeal, § 96, pp. 158-159.) "In *Union Oil Co. v. Reconstruction Oil Co.* (1935) 4 Cal.2d 541, 545, the court stated that the test is whether an order is 'important and essential to the correct determination of the main issue.' If the order is 'a necessary step to that end,' it is not collateral." (*Steen v. Fremont Cemetery Corp.*, *supra*, 9 Cal.App.4th at p. 1227.) Thus, the essence of the collateral order doctrine is that the matter concluded by the order should be truly "distinct and severable from the general subject of the litigation," to use Witkin's phrase. (9 Witkin, *supra*, Appeal, § 99, p. 162.) It is only then that a piecemeal disposition and multiple appeals in a single action will be avoided.

But this is not all there is. An aspect of the collateral order doctrine that has received relatively little attention in California cases are the reasons for the doctrine. As the United States Supreme Court has put it, the collateral order doctrine in federal courts must involve a claim of right "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (*Cohen v. Beneficial Loan Corp.*, *supra*, 337 U.S. at p. 546.) The interest that is served by the collateral order doctrine is the expeditious completion of appellate review, when that can be accomplished without implicating the merits of the underlying controversy. The collateral order doctrine also preserves appellate review when, without the invocation of this doctrine, appellate review would be foreclosed.

This case illustrates both of the principal reasons for the invocation of the collateral order doctrine.

First. The matter of sanctions to be awarded for the defendants' alleged misconduct during and prior to the second trial of this case is of no relevance to the proceedings that will take place upon the remand of this case. If the order denying sanctions is to be reviewed on appeal, there is no reason to defer that review to the appeal from the eventual judgment, even assuming that review can in fact be deferred to that point in the future (see text, *post*). The sanctions are "too independent of the cause itself to require that appellate consideration

be deferred until the whole case is adjudicated." (*Cohen v. Beneficial Loan Corp., supra*, 337 U.S. at p. 546.) The principle that is served here is that it is preferable to resolve controversies whenever it is possible to do so rather than defer a matter that is in all respects ripe for resolution.

Second. There is also the very real question whether the order denying sanctions would be reviewable from a judgment following a third trial in this case, assuming that there is a third trial.[22] The order denying sanctions will not be a part of the trial proceedings of the third trial and there is therefore a question whether an eventual judgment following the third trial could properly incorporate the order denying the motion for sanction entered on March 5, 2007. And if there is no third trial and no judgment, even the possibility of incorporating the order denying sanctions into a judgment, assuming such incorporation would be proper, would disappear. We think that the denial of sanctions is a matter "too important to be denied review." (*Cohen v. Beneficial Loan Corp.*, *supra*, 337 U.S. at p. 546.)

We do not hold that generally all orders denying motions for sanctions are appealable as collateral orders. In this case, there is no judgment and there may never be a judgment. Under these circumstances, the order denying the motion for sanctions is appealable as a collateral order.

2. The Order Denying the Motion for Sanctions Is Affirmed

Plaintiffs' motion for sanctions relied on a mix of statutory and case law for authority that sanctions could be imposed on the defendants for their failure to disclose in a timely fashion their theory that the location of the amputation ruled out a compartment syndrome. The authorities that the motion cited were Code of Civil Procedure section 128.7 and former

---

22 An important aspect of the federal collateral order doctrine is that it preserves appellate review in situations when, absent an appeal from the order, the matter will evade appellate review entirely. (15A Wright et al., Federal Practice & Procedure, *supra*, Jurisdiction, § 3911.3, pp. 396-419.)

section 2023[23] and *Sherman v. Kinetic Concepts, Inc.*, *supra*, 67 Cal.App.4th 1152. On appeal, plaintiffs contend among other things that "[o]nly with an award of sanctions can the Court make the playing field level again from an economic stand point [*sic*] for a third trial and deter medical malpractice defendants and their counsel from using the damages and fee caps[24] as a means of defeating otherwise valid claims." The factual predicate of the motion for sanctions is the assumption that the defendants were at all times aware of the below the elbow amputation theory and deliberately delayed disclosing that theory until the end of the trial.

We begin with the observation that we have already made that, under the interpretation of Code of Civil Procedure former section 2034 set forth in *Bonds v. Roy*, *supra*, 20 Cal.4th at page 147 (see text, *ante*, pp. 14-15), the sanction for attempting to present an expert opinion at trial that was not contained in the expert witness declaration is the exclusion of that expert opinion. *Monetary* sanctions are authorized in the instance of motions addressing protective orders covering expert testimony, expert fees, the augmentation of expert lists and declarations and the filing of tardy expert witness information (respectively, Code Civ. Proc., §§ 2034.250, subd. (d), 2034.470, subd. (g), 2034.630 & 2034.730.) We find no authority in the statutes for the imposition of monetary sanctions for disclosing for the first time during the trial a theory that the expert did not disclose in the expert witness declaration.

In *Sherman v. Kinetic Concepts, Inc.*, *supra*, 67 Cal.App.4th 1152, a products liability case against the manufacturer of hospital beds, the defendant admitted that its product malfunctioned four or five times; the defendant concealed and failed to disclose 24 separate incident reports of malfunctioning beds. The Court of Appeal approved the

---

23 Code of Civil Procedure former section 2023 was repealed effective July 1, 2005, and reenacted without substantive changes as sections 2023.010, 2023.020, 2023.030, and 2023.040.

24 The reference is to the limitations in medical malpractice actions on noneconomic damages and attorney fees.

imposition of sanctions, including monetary sanctions, under Code of Civil Procedure section 2023.030.[25] (*Sherman v. Kinetic Concepts, Inc.*, *supra*, at pp. 1162-1163.)

The disclosure of expert witness information and testimony is specifically regulated in Code of Civil Procedure sections 2034.010 through and including section 2034.730, i.e., in part 4, title 4, chapter 18, of the Code of Civil Procedure. Specifically, Code of Civil Procedure section 2034.300, subdivision (b) provides for the exclusion of testimony as a sanction for the failure to submit a witness declaration, which *Bonds v. Roy* tells us includes an inaccurate declaration. "It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*Rose v. State* (1942) 19 Cal.2d 713, 723-724.) Thus, we must look to section 2034.300, subdivision (b) and not the general provisions providing for sanctions for "conduct that is a misuse of the discovery process" found in Code of Civil Procedure section 2023.030.

Finally, Code of Civil Procedure section 128.7 does not apply, when it comes to the memorandum filed by Dr. Shantharam on September 5, 2006, which contended that under Code of Civil Procedure section 2034.310 Dr. London could not be called as a rebuttal witness. Section 128.7 provides for the imposition of sanctions when a pleading, memorandum or motion advances a frivolous contention; a motion under section 128.7 must be served 21 days before it is filed. (§ 128.7, subd. (c)(1).) That was not done in this case. Nor, of course, can FCH be held liable under section 128.7 for Dr. Shantharam's memorandum.

---

[25] The opinion of the court in *Sherman v. Kinetic Concepts, Inc.*, *supra*, 67 Cal.App.4th at page 1163, referred to former section 2023. (See fn. 23.)

Although the reason that the trial court gave for denying the motion for sanctions is not the one that we have concluded applies to this motion, we affirm the ruling denying the motion. It is the ruling, and not the reason for the ruling, that is reviewed on appeal. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

DISPOSITION

The orders granting the new trial and denying the motion for sanctions are both affirmed. Manfred Muller and Rose Shoshana are to recover their costs in B196684. Dr. Sangaram Shantharam and Fresno Community Hospital and Medical Center are to recover their costs in B199316.

CERTIFIED FOR PARTIAL PUBLICATION

FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.