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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL COURIS and MICHAEL FITZGIBBONS,

Plaintiffs,

v.

KRISTINA D. LAWSON, WILLIAM J. PRASIFKA, and ROBERT BONTA, in their official capacities,

Defendants.

Case No.:
PLAINTIFFS' OBJECTION TO DECLARATION OF DR. JAMES NUOVO 3:22-cv-01922-RSH-JLB
Date: February 2, 2023
Time: 1:30 p.m.
Courtroom: 3B Schwartz Courthouse

PLAINTIFFS' OBJECTION TO DECLARATION OF DR. JAMES NUOVO

Introduction

A core tenet of our legal system is that courts decide issues of law. Accordingly, "[o]pinions on legal issues are properly the subject of attorney argument, not expert testimony." *Stathakos v. Columbia Sportswear Co.*, 2018 WL 1710075, 2018 U.S. Dist. LEXIS 60143, at *15 n.6 (N.D. Cal. Apr. 9, 2018). Defendants ignored this foundational principle, backed up by the Federal Rules of Evidence and longstanding case law, by filing an expert declaration with their opposition to plaintiffs' motion for a preliminary injunction that seeks to usurp the Court's role. Dr. James Nuovo's declaration inappropriately claims to be an expert on law (Doc No. 12-1 ¶ 2) and to inform this Court of legal standards and also exceeds the page limitations for defendants' brief by adding legal argument to their filing in that separate document. Plaintiffs Dr. Couris and Dr. Fitzgibbons (collectively, "Couris") therefore file this objection to the admission of Dr. Nuovo's Declaration. *See* Doc No. 12-1.

In this lawsuit Couris challenges on First Amendment grounds AB 2098, which added a section to the California Business and Professions Code that subjects doctors to professional discipline if they "disseminate misinformation or disinformation related to Covid-19." The statute defines "misinformation" as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." What constitutes the "standard of care" and "scientific consensus" are thus key legal terms whose interpretation are of central importance.

Dr. Nuovo is a California-licensed physician specializing in Family Medicine. Doc. No. 12-1 ¶ 1. Dr. Nuovo discusses the issue of "standard of care" in depth, masking a discussion of a legal issue to be decided by the Court. *Id.* ¶ 2. Dr. Nuovo's declaration suffers an additional flaw: Even if he were permitted to tell the Court how to rule, his opinion as to the legal interpretation of "standard of care" is incorrect as a matter of California law and common sense and should be disregarded by the Court.

Couris respectfully asks the Court to strike Dr. Nuovo's putative expert declaration.

I. Testimony regarding legal conclusions and legal arguments is impermissible.

As an evidentiary matter, testimony regarding matters of law is inadmissible under either Rule 701 or 702 because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (internal quotation omitted). It is well established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Such legal opinions invade this Court's province as the "sole arbiter of the law." *GPF Waikiki Galleria v. DFS Group*, No. 07-00293 DAE-LEK, 2007 WL 3195089, at *5 (D. Haw. Oct. 30, 2007). "[T]he court is well equipped to instruct itself on the law." *Stobie Creek Invs. v. United States*, 81 Fed. Cl. 358, 361 (Ct. Fed. Cl. 2008), *aff'd* 608 F.3d 1366 (Fed. Cir. 2010). Accordingly, testimony on an issue of law "does not aid either the court or the jury" and thus "is improper and must be excluded." *Lukov v. Schindler Elevator Corp.*, 2012 WL 2428251, 2012 U.S. Dist. LEXIS 88415, at *5 (N.D. Cal. June 26, 2012) (excluding expert opinion regarding what "California law requires"); *see also Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1260 & n.23 (C.D. Cal. 2003) (striking "interpretations of case law"); *Stathakos v. Columbia Sportswear Co.*, 2018 WL 1710075, 2018 U.S. Dist. LEXIS 60143, at *15 n.6 (N.D. Cal. Apr. 9, 2018) (striking 20 paragraphs of expert declaration that "contain improper legal opinions which either interpret or merely quote case law, legal codes, and other authority).

II. Dr. Nuovo's declaration improperly opines on legal conclusions.

Dr. Nuovo's declaration sets forth his opinion as to the "standard of care," its meaning, and its application. But the standard of care is a legal term whose definition and application will affect the meaning, scope, application, and effect of AB 2098. AB 2098 defines "misinformation" as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." Because a physician who discusses possible treatments for patients "contradicted by contemporary scientific consensus contrary to the

standard of care" can be subject to discipline, the standard of care takes on key legal significance.

What constitutes the standard of care is a legal question that the Court is entirely capable of determining on its own. Yet Dr. Nuovo makes a number of statements regarding what the standard of care is, to whom it applies and how, and the consequences of violating it. Dr. Nuovo even offers definitions of terms such as "negligence" and "gross negligence"—terms that have been part of our common-law tradition for hundreds of years and that have been studied and written about by luminaries such as Oliver Wendell Holmes, Jr., and Learned Hand.

As examples of his legal conclusions, Dr. Nuovo states:

- "It is a violation of the standard of care to provide medical advice or treatment that is not yet proven or established based upon personal beliefs or opinions about what may become the standard of care in the future." Dkt. No. 12-1 ¶ 3 (without citation to authority);
- "a physician is responsible for applying the current standard of care in their community," *Id.* (without citation to authority);
- "A medical practitioner is negligent if they fail to meet the current standard of care in the care and treatment of patients." *Id.* (without citation to authority);
- "'Negligence' is defined as a 'simple departure' from the current standard of care. 'Gross negligence' is defined as an extreme departure from the standard of care." *Id.* ¶ 4 (without citation to authority);
- "A physician whose conduct falls below the standard of care can be subject to liability for civil malpractice and/or disciplinary proceedings before the Board under various statutes for unprofessional conduct, including, but not limited to, gross and repeated negligence, and incompetence." *Id.* ¶ 5 (without citation to authority);

While the last four are relatively trivial claims, the first is an extraordinary assertion of law that is both inappropriate expert testimony and simply wrong. To be blunt, Dr. Nuovo's declaration on these subjects is entirely improper, does not aid the Court, and should not be considered.

III. Dr. Nuovo's declaration is wrong regarding the standard of care.

Even if Dr. Nuovo's declaration were not almost entirely composed of inadmissible legal opinions, it should not be considered because it is not correct—and, indeed, it fails to provide any authority for its *ipse dixit*. Examining relevant legal authority shows that the opinions set out in the declaration are incorrect or, at a minimum, not a full picture of the law.

As to the standard of care, California law contemplates two types of disclosures to meet the informed consent standard of care: "(1) minimal disclosures that are *always* material, and (2) additional disclosures that *might be* material if skilled practitioners of good standing would provide these disclosures under similar circumstances." *Florio v. Liu*, 60 Cal.App.5th 278, 293 (2022) (cleaned up). If the treatment of procedure is experimental or investigatory, the informed consent standard of care must also satisfy certain statutory and regulatory requirements. *See Daum v. SpineCare Med. Group, Inc.*, 52 Cal.App.4th 1285, 1301-02 (1997).

According to the California Supreme Court, the informed consent standard is that of a "reasonable person." The decision about what information should be disclosed is left to the trier of fact, and not to medical experts, who play a "limited and . . . subsidiary role." *Arato v. Avedon*, 5 Cal.4th 1172, 1186, 1191 (1993). "This standard focuses on what an objective, reasonable 'prudent person' in the patient's shoes would want to know, and is therefore not dictated by whatever 'custom' physicians in the relevant medical community follow when making disclosures." *Flores*, 60 Cal. App.5th at 293. Courts recognize that "each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent." *Arato*, 5 Cal.4th at 1185.

It is wrong as a matter of law for Dr. Nuovo to state in his declaration that "[i]t is a violation of standard of care to provide medical advice or treatment that is not yet proven or established based on personal beliefs or opinion about what may become the standard of care in the future." While that statement might be true if a physician, conducting an experimental or investigational treatment, procedure or therapy, failed to fully disclose its experimental nature, it is not accurate if there has been adequately informed consent. *See, e.g.*, *Daum v. SpineCare Med. Grp.*, 52 Cal.App.4th at 1285 (expert testimony alone cannot establish duty of care with respect to experimental procedure; statues and regulations govern various disclosures for experimental or investigational medical procedure); *see also Flores*, 60 Cal.App.5th at 294 ("the decision as to what information should be disclosed is entrusted chiefly to the trier of fact, and *not* to medical experts").

Dr. Nuovo's *ipse dixit* assertion is also incorrect as a matter of common sense. In 1968, the first adult human heart transplant in the United States took place at Stanford Hospital in California. According to Dr. Nuovo, this negligently violated the standard of care and was malpractice. Until 1973, the *Diagnostic and Statistical Manual of Mental Disorders* classified homosexuality as a mental disorder. According to Dr. Nuovo, any doctor who told a patient they disagreed negligently violated the standard of care and committed malpractice. In 2020, many California doctors recommended to patients that they participate in clinical trials for Moderna's and Pfizer's COVID-19 mRNA vaccine. According to Dr. Nuovo, this negligently violated the standard of care and was malpractice. The opinion is thoughtless nonsense.

A second declaration filed by plaintiffs, that of William Prasifka, Executive Director of the Medical Board of California, confirms that in practice it is not solely a medical consultant working for the Board or the Board's outside expert investigating a patient's complaint that determines the standard of care. Doctors are entitled to due process and are entitled to have their own expert to challenge Board's expert on the standard of care and present alternative evidence on what the standard of care is. *See* Dkt. No. 12-2 ¶¶ 9-10.

As this discussion shows, contrary to Dr. Nuovo, it is not a "violation of the standard of care to provide medical advice or treatment that is not yet proven or established based on personal beliefs or opinions about what may become the standard of care in the future," and it is too simplistic to state that "Physicians have a duty to provide complete and accurate information to their patients." His further statements about departure from the standard of care and a physician's liability for such departure turn on legal issues, including the standard of care, and thus cannot be taken at face value without a more complete understanding of the term. In short, his declaration is unhelpful inadmissible expert testimony at best and incorrect and misleading at worst.

Conclusion

The Court should disregard Dr. Nuovo's declaration as inadmissible and improper testimony as to legal conclusions.

Dated: January 10, 2023

Respectfully submitted,

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