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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOHN P. FRISCH, as Personal Representative, etc., v. STEPHEN G. ROBERTS et al., Defendants and Respondents.	H034388 (Santa Cruz County Super. Ct. No. CV156812)

Appellant John P. Frisch, the personal representative of plaintiff Bruce J. Frisch's estate, appeals from a judgment entered after the trial court granted defendants' motion for nonsuit after plaintiff had presented his medical malpractice and fraud case at a jury trial.[1] Appellant contends that the trial court (1) erroneously granted nonsuit based on its finding that plaintiff had failed to present sufficient evidence of causation, (2) abused its discretion in refusing to allow plaintiff to augment his expert witness list on the eve of trial, (3) prejudicially erred in granting an in limine motion excluding evidence regarding acts of malpractice outside the limitations period, and (4) abused its discretion in denying plaintiff's belated request to amend the complaint to include a prayer for punitive damages. We reject his contentions and affirm the judgment.

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[1] Bruce Frisch died after the judgment was entered. John Frisch was substituted into the action as the personal representative of Bruce Frisch's estate.

I. Factual Background

Plaintiff was "concerned" about prostate cancer because his brother had been diagnosed with prostate cancer at age 66 or 67. Plaintiff's blood was tested in April 2000 to determine his total prostate specific antigen (total PSA). The result of this test was that plaintiff's total PSA was 2.9, which was normal. A May 2001 total PSA test yielded a result of 2.7, which was also normal. A November 2001 total PSA test had the same result.

Plaintiff became a patient of Dr. Michael Johnson, a family practice physician, in 2002. Johnson practiced at Santa Cruz Medical Clinic (SCMC). SCMC was operated by Palo Alto Medical Foundation (PAMF), which was associated with Sutter Health (Sutter). In September 2002, Johnson ordered a total PSA test on plaintiff's blood, and the result was 6.5, which was abnormal. Plaintiff asked that the total PSA test be repeated and that a "free PSA" test also be performed. Johnson ordered these tests in October 2002.[2] The retest showed that plaintiff's total PSA was 3.5 and his free PSA was 26 percent, which were both normal. In July 2003, Johnson ordered a total PSA test on plaintiff's blood, and the result was 2.9, which was normal.[3] No free PSA test was performed.[4]

In April 2004, at plaintiff's request, Johnson ordered total and free PSA tests. Because SCMC policy was that free PSA tests should not be ordered except in

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[2] Johnson testified that he recommended that plaintiff see a urologist, but plaintiff wanted only a retest.

[3] Johnson testified that he again encouraged plaintiff to consult a urologist, but plaintiff did not see a urologist. Plaintiff testified that Johnson mentioned that he should perhaps be seen by a urologist but never actually referred him to one.

[4] Plaintiff testified that he told Johnson in 2002 that, from that point forward, he wanted to always have both a total PSA test and a free PSA test each time he was tested and "that if my free PSA dropped below 25 percent, no matter what my total PSA was, I wanted to have a biopsy." Johnson denied that plaintiff had made such a request.

association with a urologist, Johnson also referred plaintiff to Dr. Stephen Roberts, an SCMC urologist. When Johnson referred plaintiff to Roberts, Johnson understood that he had "turned over the care of [plaintiff's] prostate health to the urologist." Plaintiff's blood was drawn on April 22. Plaintiff made an appointment with Roberts for April 30. From that point forward, plaintiff did not discuss prostate cancer issues with Johnson and considered Roberts his doctor for prostate cancer issues.

Plaintiff's blood was sent to two different labs, a local lab and an outside lab. The local lab performed only a total PSA test on the blood. The result from the local lab's test was a total PSA of 3.3. Because the local lab used the same computer system as plaintiff's SCMC doctors, this result was immediately entered into SCMC's electronic medical information system and immediately available to SCMC doctors. The outside lab performed both total PSA and free PSA tests. The results from the outside lab's testing were a total PSA of 2.7 and free PSA of 21 percent. The outside lab's results were immediately faxed to Johnson, but the faxed results were not placed in plaintiff's paper chart and were not noted in SCMC's electronic medical information system.

When Johnson received the lab results from both labs, he viewed the results as "normal" and "within limits of what the lab says" so he considered the results "good news" for plaintiff. Johnson's understanding was that "the free PSA [result] is not utilized" as a screening tool unless the total PSA result was over 4. Johnson expected that Roberts would discuss these results with plaintiff when plaintiff saw Roberts.[5]

Plaintiff saw Roberts on April 30, 2004. At that time, plaintiff believed that Roberts had received the results of his April 2004 total PSA and free PSA tests because plaintiff had already received a bill for those tests from the outside lab. Roberts

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[5] Plaintiff's medical records expert testified that Johnson should have notified Roberts of these lab results. Plaintiff's family practice expert testified that Johnson had breached the standard of care by failing to inform plaintiff of the outside lab's total PSA and free PSA test results.

performed a digital rectal exam on plaintiff, which showed that plaintiff's prostate was "mildly enlarged." Roberts discussed the total PSA result with plaintiff,[6] but he did not discuss the results from the outside lab because he was unaware of those results.[7] Roberts found the total PSA result of 3.3 in SCMC's electronic medical information system.[8] Roberts's interpretation of this total PSA result and plaintiff's prior PSA results

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[6] Roberts testified that the total PSA result he discussed with plaintiff was the local lab's 3.3 result. Plaintiff at one point testified that Roberts discussed a total PSA test result of 2.7 with him and told him that his free PSA test result was 26 percent. However, plaintiff's testimony was internally inconsistent about whether Roberts referred to the 2.7 result or the 3.3 result. Plaintiff also testified that he told Roberts that he wanted a biopsy if his free PSA level "dropped below 21 percent." Plaintiff testified that Roberts told him that he did not need to return for two years because his total PSA results were "coming down" and his free PSA results were "stable." The standard in 2004 was that men over 50 should have an annual prostate exam including a digital rectal exam and a total PSA test.

[7] In 2004, when an SCMC doctor ordered a test from an outside lab, the results would be faxed to the "ordering provider," in this case Johnson. However, the faxed results would not become part of the patient's paper chart or be entered into SCMC's electronic medical information system. That process did not begin until SCMC received the "hard copy" of the results. The outside lab "batch[ed]" the hard copy results and only sent them on a monthly basis. When the hard copy was received by SCMC, it would be placed in the patient's paper chart. This process meant that there could be a 30- to 60-day delay between the outside lab producing results and the placement of the results in the patient's paper chart. After SCMC received the hard copy from the outside lab, a copy of the outside lab's results would be "batch[ed]" by SCMC and, each month, SCMC's electronic medical information system would be updated to include notations acknowledging the existence of test results from outside labs. The actual results were not entered into SCMC's electronic medical information system; the electronic information system would merely contain a notation that the results were available in the paper chart.

Plaintiff's medical records expert testified that SCMC's procedures for handling outside lab results were below the standard of care. However, he conceded that it would have been within the standard of care if it had taken a week for such results to be placed in a patient's medical records.

[8] SCMC considered the paper chart to be the patient's medical record, while the electronic medical information was not.

was that plaintiff was not at "significant risk of cancer." Roberts did not become aware of the outside lab's results until plaintiff notified Roberts in 2007 of plaintiff's intent to sue Roberts.[9] Had Roberts been aware of the outside lab's test results, "it wouldn't have changed [his] recommendation at that time."

Johnson subsequently reviewed Roberts's report of his April 30, 2004 visit with plaintiff, and he believed that Roberts had performed an "excellent examination" of plaintiff for his prostate problem.[10]

Plaintiff saw Roberts again in May 2006, and Roberts, noting that plaintiff was "overdue for testing," ordered a total PSA test. The total PSA test result was 5.34, which was abnormal, so Roberts ordered another total PSA test and a free PSA test. He also told plaintiff that he probably had prostate cancer. The results of the additional tests were that plaintiff's total PSA was 5.2 and his free PSA was 21 percent. Roberts told plaintiff that he should have an ultrasound and a biopsy

Plaintiff subsequently went to Stanford Hospital, had a biopsy, and learned that he had prostate cancer with a "Gleason" score of "8." Surgery was not a recommended treatment option due to his Gleason score. Plaintiff underwent radiation and hormone suppression therapy.

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[9] A patient's paper chart was usually pulled about three days in advance of a scheduled appointment so that the chart could be in the doctor's hands when the patient was seen. Roberts's custom was to check SCMC's electronic medical information system "immediately before, during or after" he saw the patient to ensure that he was aware of the most recent information.

The local lab's total PSA result was entered into SCMC's electronic medical information system on April 22, 2004. The outside lab's results were not entered into SCMC's electronic medical information system until late June 2004. It was unknown when the outside lab's results were placed in plaintiff's paper chart.

[10] Plaintiff testified that he believed Roberts's report of his April 30, 2004 visit had been falsified or altered and that the local lab's total PSA test result of 3.3 was false and no such test had ever been performed.

II. Procedural Background

Plaintiff initiated this action in April 2007 by filing a complaint against Roberts, Johnson, Bell (Roberts's medical assistant), SCMC, PAMF, and Sutter. In July 2007, plaintiff filed a second amended complaint, which is the operative pleading. This pleading alleged causes of action for medical negligence and fraud.

The factual allegations in the second amended complaint related solely to events occurring from April 2004 to May 2006. The crux of plaintiff's case was his claim that neither Roberts nor Johnson had informed him of the outside lab's result from the April 2004 "free PSA" test, which showed a free PSA result of 21 percent. He also alleged that Roberts had falsely told him that his 2004 free PSA result was 26 percent and that he did not need to be tested again for two years. Plaintiff claimed that, had he been accurately informed of the result of his April 2004 free PSA test, he "would have immediately required a prostate biopsy." He alleged that defendants' failure to diagnose him with prostate cancer in April 2004 "allowed the PLAINTIFF'S prostate cancer to grow to an aggressive form of prostate cancer, i.e., Gleason Score of 8, and, thereby, limited PLAINTIFF'S treatment options to a combination of hormone testosterone suppression and radiation treatments versus having a nerve-sparing radical prostatectomy." "The delayed diagnosis of PLAINTIFF'S prostate cancer provided the prostate cancer cells with a longer time period to develop metastasis capabilities and, thereby, metastasize to other parts of PLAINTIFF'S body and breed additional prostate cancer sites." The second amended complaint did not pray for punitive damages.

The case proceeded to a jury trial in February 2009. Prior to opening statements, the court granted Bell's motion for judgment on the pleadings. After the completion of opening statements, the court granted a motion for nonsuit on the fraud cause of action as to PAMF and Sutter. Plaintiff then presented his case to the jury. After plaintiff rested, the remaining defendants moved for nonsuit on both causes of action. The court found that plaintiff had "failed to produce sufficient evidence to establish the requisite causation

necessary to state either prima facie claim of medical negligence (first cause of action) or a prima facie claim of fraud (second cause of action)." The court entered judgment for defendants. Appellant timely filed a notice of appeal.

III. Discussion

A. Nonsuit After Presentation of Plaintiff's Case

1. Background

Plaintiff represented himself at trial. He called Roberts to testify as part of his case. Roberts testified that a patient's Gleason score does not necessarily increase over time if prostate cancer is left untreated. The Gleason score "can actually go down, it can stay the same, or it can go up." Roberts referred to a study which found that, in two-thirds of the subjects, the Gleason score stayed the same or went down "a couple of years after the initial diagnosis."

After plaintiff had presented many witnesses, the court addressed plaintiff: "I just want to give you this warning. So far we have had no testimony whatsoever that any of the breaches of the standard of care that you established have been a cause of any injury or damage to you. So the causation element of the case is entirely lacking right now." Plaintiff replied: "And that would be filled by Dr. Sullivan."

Plaintiff's final witness was Dr. Terrence Raymond Sullivan, a urologist.[11] Plaintiff asked Sullivan: "In your opinion, what did the two year delay in diagnosis of

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[11] Sullivan testified that Roberts had violated the standard of care. However, Sullivan's testimony was based on his mistaken belief that, when Roberts saw plaintiff in April 2004, plaintiff's most recent total PSA test result was 5.3. Based on this misapprehension, Sullivan asserted that an ultrasound in April 2004 "would have probably shown a prostate cancer." Sullivan was also under the mistaken impression that plaintiff's 2006 total PSA result was 3.2. Plaintiff subsequently prompted Sullivan to correct himself with regard to the 2006 total PSA test result, and Sullivan conceded that the 2006 result was 5.3.

my prostate cancer cause in the way of damages in any degree to myself?"[12] Sullivan responded: "It is my opinion that the two or possibly four year delay in the diagnosis of the prostate cancer allowed the Gleason score to increase." Sullivan asserted that, "with time the average prostate cancer tends to increase in its grade or its Gleason score." "[W]ith time the Gleason score does indeed increase." "I'm of the opinion that the two-year delay significantly changed the alternatives that Mr. Frisch had in terms of his treatment program after the diagnosis had been made. If, for example, the Gleason score had been a 6 or 7 at the highest, one of his options would have included a radical nerve sparing prostatectomy . . . ." "Because the Gleason score was 8, he was not reasonably offered that option." Sullivan also testified that a Gleason score of 8 meant that it was "more likely than not that a recurrence will develop" after treatment. However, he also testified that "I can't state with a medical certainty that, in fact, his life expectancy has changed in opposition to the point and the opinion with regard to a recurrence developing."

On cross-examination, Sullivan retracted some of his testimony on direct.[13] Sullivan conceded that the results of radiation therapy and hormone suppression therapy, such as plaintiff had undergone, "match[ed] the cure rates of radical prostatectomy [surgery] without the adverse effects and complications" and "has the same benefits of radical prostatectomy without as much risk." Sullivan reasserted his belief that, if

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[12] Plaintiff initially ended his direct examination of Sullivan without presenting any causation testimony. The court pointed this out to him at sidebar, and plaintiff then proceeded to ask this question of Sullivan.

[13] Sullivan never corrected his misapprehension regarding plaintiff's 2004 total PSA result. Indeed, when defense counsel pointed out the mistake, Sullivan insisted that plaintiff's April 2004 total PSA result was 5.2. He did concede that a total PSA level of 3.3 would be considered normal and that all of plaintiff's total PSA test results up to April 2004 had been normal but for the September 2002 result which had resulted in a normal result on retesting.

prostate cancer was left untreated, "the Gleason score if measured would be higher over time" "[i]n general." Defense counsel asked Sullivan: "Nobody can say to a degree of probability that his Gleason score in June of '05 would have been any lower tha[n] it was in June of '06, correct?" Sullivan responded: "I think there's no scientific answer to that question. It's an assumption that's probably reasonable." Defense counsel asked: "But there's no evidence to support it?" and Sullivan responded: "There's no evidence, that's correct."

This colloquy followed: "Q. So nobody can state that if one is testifying in a court of law under oath, nobody can state to a degree of medical probability based on scientific fact that Mr. Frisch's Gleason score changed in the one year before his biopsy, correct? [¶] A. Yes. If you're emphasizing that you're using the time frame of one year. [¶] Q. I'm emphasizing all of the facts of my hypothetical [which were the undisputed facts regarding plaintiff]. Given all those facts, you'd agree it would be impossible, be speculation as to whether or not his Gleason score was lower a year earlier, right? [¶] A. Correct. [¶] Q. Okay. And likewise it would be speculative for the same reason to say his Gleason score was lower two years before his biopsy, in the spring of '04, would you agree with that, Doctor? [¶] A. Not as clearly. You might recall the articles that I brought to deposition that pointed out the group of men that go into watchful waiting. Within a two year time frame a significant number of those men did have an increase, proven on biopsy, of their Gleason score. [¶] Q. But that significant number was well under half, wasn't [it]? [¶] A. It was under half. [¶] Q. So you've read literature, and the only literature you've ever read on the subject has said that men with a Gleason score in the 6 or 7 range were followed over time without surgery, without radiation, without hormone suppression, that less than half of them will have their Gleason score go up over a period of two years, right? [¶] A. The best answer would be approximately 40 percent. [¶] Q. Is that less than half? [¶] A. Clearly. [¶] Q. Okay. So you'd agree with me, Doctor, that the only medical literature that you've

ever heard on this subject says if you follow men with a Gleason score of 6 or 7 over a course of two years, less than half of them will have that Gleason score go up, correct? [¶] A. Yes. But I emphasize that 40 percent is a significant number. It's not an insignificant number. [¶] Q. So, Doctor, would you agree with me -- I'm not asking whether it's significant or not. I'm asking if there's a way it rises to the level of medical probability based on scientific fact. ***Would you agree with me, Doctor, that you cannot say to a degree of medical probability, that is more likely than not, that based on scientific evidence that Mr. Frisch's Gleason score would have been any lower in the spring of '04 than it was when he underwent biopsy in June of '06? [¶] A. Less than a 50 percent likelihood. [¶] Q. You agree with that? [¶] A. Yes.***" (Boldface & italics added.)

After plaintiff rested, the remaining defendants moved for nonsuit based on the absence of evidence of causation. "He hasn't established the causal connection between the alleged breach and damages." The court noted that "Sullivan's testimony is crucial on the causation issue" because the question was whether there was "evidence that the Gleason score was any different in April of 2004 than it was when you actually discovered it in June of 2006." The court granted the nonsuit motions. It found that plaintiff "failed to establish the required element that any conduct of the Defendants was the . . . legal cause of any injury to him."

2. Analysis

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn

from the evidence in plaintiff['s] favor."' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.] [¶] In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment '"unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law."'" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

An essential element of plaintiff's medical negligence and fraud causes of action was causation. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305 [medical negligence]; *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818 [fraud].) "The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes *more likely than not* that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.] [¶] With cancer the question of causation is especially troublesome. . . . [¶] The fact that a determination of causation is difficult to establish cannot, however, provide a plaintiff with an excuse to dispense with the introduction of some reasonably reliable evidence proving this essential element of his case. Although juries are normally permitted to decide issues of causation without guidance from experts, 'the unknown and mysterious etiology of cancer' is beyond the experience of laymen and can only be

explained through expert testimony. [Citation.] Such testimony, however, can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403, italics added.) "A plaintiff cannot recover damages based upon speculation or even a mere possibility that the wrongful conduct of the defendant caused the harm. [Citations.] Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. . . . The defendant's conduct is not the cause in fact of harm '"where the evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,"' that the harm would have ensued." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132-133.)

Plaintiff claimed that defendants' wrongdoing led to a two-year delay in the diagnosis of his cancer which caused his "prostate cancer to grow to an aggressive form of prostate cancer, i.e., Gleason Score of 8," thereby limiting his "treatment options." In order to succeed on this theory, he was required to present *expert testimony* that it was *more probable than not* that, had his prostate cancer been diagnosed in April 2004, his Gleason score would have been less than 8. Plaintiff's sole causation expert was Sullivan.[14] Unless Sullivan's testimony provided substantial evidence of causation, plaintiff's causes of action could not survive the nonsuit motions.

Sullivan's testimony on direct examination failed to identify *how likely* it was that a Gleason score would increase, and was fatally vague with respect to the time period during which any increase might take place. Initially, Sullivan testified that a "*two **or even possibly four** year* delay . . . ***allowed***" a Gleason score to increase. (Boldface &

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[14] Appellant's briefs on appeal devote substantial space to arguments which are not based on Sullivan's testimony but on appellant's attorney's reasoning that cancer always grows over any period of time. Such reasoning cannot substitute for the requirement that, in a case such as this, causation be supported by substantial evidence provided *by an expert*. Therefore, we do not discuss appellant's appellate attorney's lay reasoning.

italics added.) This testimony was inadequate in two respects. It was not limited to the two-year period in question, and it did not reflect that a Gleason score increase was *more likely than not* but only that such a delay "allowed" for an increase. Sullivan's subsequent testimony that "with time the Gleason score does indeed increase" was also insufficient as it was not restricted to any particular time period.

Even if Sullivan's vague testimony on direct examination could have supported an inference that a Gleason score was *likely* to increase over *some* period of time, Sullivan's unequivocal testimony on cross-examination precluded any inference based on his direct testimony that a Gleason score was likely to increase over a two-year period. Sullivan readily conceded on cross-examination that it was "speculation" whether plaintiff's Gleason score was lower in June 2005 than it was in May 2006. He also conceded that the only study of which he was aware showed that fewer than half of the men in the study had increases in their Gleason scores over a two-year period. Finally, Sullivan explicitly agreed that he "cannot say to a degree of medical probability, that is more likely than not, that based on scientific evidence that Mr. Frisch's Gleason score would have been any lower in the spring of '04 than it was when he underwent biopsy in June of '06." In view of Sullivan's explicit testimony on cross-examination rebutting plaintiff's theory of causation, Sullivan's testimony failed to provide substantial evidence of causation.

As the trial court correctly concluded that plaintiff had failed to present substantial evidence of causation, it did not err in granting the nonsuit motions.

B. Denial of Motion To Amend Expert Witness Disclosure

Appellant contends that the trial court abused its discretion in denying plaintiff's motion to amend his expert witness disclosure to name a new expert witness on the eve of trial.

1. Background

In April 2008, plaintiff, who had been acting in pro per, substituted Dana Scruggs as his attorney. In May 2008, at plaintiff's request, the court set the trial for February 17, 2009. On December 29, 2008, Scruggs filed an expert witness disclosure on plaintiff's behalf. The disclosure identified 14 individuals as potential expert witnesses for defendant, including five retained experts. The retained experts were identified as James Kozlowski, Terrence Sullivan, Marcus Contardo, Helen Nunberg, and Enrique Terrazas. Kozlowski and Sullivan were both identified as urologists. Scruggs declared that all of the retained experts would testify about liability, causation, and damages. Scruggs simultaneously substituted out of the case, and plaintiff represented himself for the remainder of the trial court proceedings.

On December 30, 2008, defense counsel noticed depositions of plaintiff's retained expert witnesses to take place on January 14 and 15, 2009. Defense counsel repeatedly attempted to contact plaintiff about these scheduled depositions, but he heard nothing from plaintiff until January 12. On January 12, plaintiff wrote to defense counsel and said he was "in the process of getting dates from my expert witnesses and I expect to have all of them in by the end of the week." He did inform defense counsel that Nunberg was available for deposition on January 26. On January 14, plaintiff informed defense counsel that Terrazas and Sullivan were available for deposition on January 27 and 30. Defense counsel quickly scheduled depositions for those expert witnesses on those dates.

Plaintiff "knew in January [2009] that Dr. Kozlowski and Dr. Contardo could not be expert witnesses for [his] case." He had also known since at least November 2007 that Sullivan "had some previous experiences that would hamper [his] effectiveness as an expert witness." On January 16, 2009, plaintiff filed an ex parte request for a court order requiring defendants to depose Kozlowski in Chicago because Kozlowski was "too busy" to come to California. The court denied this request. On January 19, plaintiff informed

defense counsel that he intended to seek an order requiring the defense to depose Kozlowski by video teleconference, and he filed such a request on January 21.

On January 26, 2009, one of the defense attorneys spoke to plaintiff about scheduling the deposition of Contardo for February 10. Plaintiff said he would consider the matter and get back to defense counsel. Plaintiff did not disclose that Contardo had withdrawn from the case on January 7. On February 2, the court heard and denied plaintiff's request that the defense be required to depose Kozlowski by video teleconference. "I have no legal basis to order the taking of his deposition by teleconference in Chicago. If he's your expert, you're obliged to produce him within 75 miles of the courthouse unless you seek a protective order . . . unless you make a showing of good cause as to why . . . the mileage limitation should not apply." The court concluded that plaintiff had not shown good cause.

On February 4, 2009, plaintiff informed defense counsel that he planned to seek to substitute two new expert witnesses, whom he did not identify, for Kozlowski and Contardo. He stated that he would be able to make the new experts available for deposition in a week or two. Trial was scheduled to commence on February 17.

On February 9, 2009, plaintiff wrote to defense counsel and asked that they agree to allow him to substitute new experts for Kozlowski and Contardo. Defendants declined. On February 10, 2009, plaintiff asked defendants to agree to the substitution of "Dr. Joseph Spaulding, An [*sic*] Urologist" in place of Kozlowski. Plaintiff offered to pay for Spaulding's deposition fees if defendant did not oppose his request, and plaintiff stated that Spaulding "can be available for deposition at 7:00 a.m. on February 12, 2009" in San Francisco. Defendants did not accept this offer.

On Wednesday, February 11, 2009, with trial scheduled to commence in less than a week, plaintiff filed an ex parte motion for leave to amend his expert witness disclosure and a motion to shorten time for hearing on that motion. He sought to replace Kozlowski with Joseph G.T. Spaulding because Kozlowski refused to travel to California to be

deposed.[15] Defendants opposed both motions. Because February 12 and 16 were court holidays, only one court day remained before the commencement of trial. On February 11, the court denied the motion to shorten time due to the lack of a showing of good cause. A hearing was scheduled for February 20 on the motion to amend. On February 13, 2009, plaintiff sent a letter to defense counsel "invit[ing]" them "to take the deposition of Dr. Spaulding in San Francisco on February 17, 18 or 19 at 4:30 p.m." Defense counsel dismissed his invitation as "premature" because his motion to amend the disclosure had not yet been heard.

On Friday, February 13, 2009, plaintiff filed a motion in limine seeking exclusion of character evidence regarding Sullivan. He wanted to exclude any evidence that Sullivan had ever been sued for medical negligence, settled a lawsuit alleging medical negligence, or been placed on probation by the California Medical Board. There had been three medical negligence claims against Sullivan, and all of the claims had been settled. Sullivan had been on probation from 2001 to 2006. Plaintiff claimed that this evidence was irrelevant and more prejudicial than probative

On February 17, 2009, the day that trial had been scheduled to commence, plaintiff filed a motion for leave to amend his expert witness disclosure. He asserted that, "[d]ue to uncontrollable events," Kozlowski and Contardo "could not serve" as expert witnesses. Plaintiff asserted that Kozlowski's "role" was to have been that of "an experienced Urologist, from a prestigious university" to counter two of defendants' experts, who were urology professors at universities. Plaintiff stated that his remaining expert urologist, Sullivan, "is a community Urologist who was originally retained just to be a consultant and write a declaration, and not to testify." He claimed that Sullivan had "been placed in the position of having been deposed and possibly testifying because Dr. Kozlowski could not travel to California. It would be extremely unfair that due to

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[15] Plaintiff did not seek to replace Contardo, a pathologist.

circumstances beyond Plaintiff's control Plaintiff would have to go to trial with an inexperienced trial Urologist against the two 'prestigious' university Urologists that the Defendants have retained." Plaintiff sought to replace Kozlowski with Spaulding, and to replace Contardo with Mahul B. Amin, a professor of pathology at UCLA.

Defendants opposed the motion. They asserted that plaintiff's motion was untimely, that he had been "dilatory," that he had not justified the need for Spaulding's testimony, and that the defense would be prejudiced by the late disclosure.

The motion was heard on Friday, February 20, 2009. By that point, the court expected to dispose of motions in limine on Monday, February 23, have jury selection on Tuesday, February 24, and begin with opening statements on Wednesday, February 25. The court asked plaintiff how there would be time for defendants to depose Spaulding before they made their opening statements. He replied: "I guess the only way it could be done would be Monday after the court ends, if I can get Dr. Spaulding to commit to six hours that would be necessary to do that." The court noted the tight time schedule and asked plaintiff: "Do you even know if Dr. Spaulding is willing to do this?" Plaintiff responded: "Well, he was willing to do it last week up in San Francisco at 4:30. He had laid out three days. I called him after today's session and tried to get a handle on the schedule. He was in surgery, so I wasn't able to talk to him." The court asked plaintiff if he had "any indication he'd be willing to do this over the weekend?" Plaintiff said: "I do not. I'd have to talk to him."

The court inquired of defense counsel about the expenses they had incurred to depose Sullivan and in having their experts review his deposition testimony. After hearing from them about the very considerable and uncalculated expenses, the court told plaintiff: "Mr. Frisch, this is just going to be too unwieldy for me to get the necessary evidence from the Defendants as to their expenditures so I can make the appropriate conditional order. [¶] You can't represent to me that Dr. Spaulding would be available for the taking of his deposition on two sessions on a Monday and Tuesday so it could be

done at a time that -- unreasonably interfering with the opposing Counsel's ability to prepare for trial. So I'm going to deny the motion to augment, and you're going to be left with Dr. Sullivan as your treating [*sic*] urologist."

On February 23, plaintiff renewed his request to augment his expert witness list with Spaulding. He insisted that defendants "could take the deposition of him this week. Even if we had to start the trial one day late or two days late." The court refused to "revisit my ruling." "[M]y sense is that it was apparent, to both [plaintiff] and Mr. Scruggs, or should have been apparent that [D]r. Kozlowski was unwilling to come from Chicago to Santa Cruz to participate in the trial. . . . [T]he only basis on which I could allow augmentation is if it could be done without prejudice to the defendants, and without interruption of the Court's trial schedule. And given that six hours was spent with Dr. Sullivan, they would have to start from scratch on the first day of trial, take the deposition of the new expert prior to the time they make their opening statements in the case. That cannot happen given the complexity of the case and the issue that you have proffered for your theory of liability."[16]

The court proceeded to consider plaintiff's motion in limine to exclude character evidence concerning Sullivan. The court explained that it was inclined to grant the motion because "[a]ll the information is remote" and "its probative value is outweighed by the prejudicial effect it could have." The defense asked only that the court grant the motion conditioned "on Plaintiff not opening the door to that during his examination of Mr. Sullivan." The court granted the motion with the "proviso" that it was granted "unless you do something during your direct examination of Dr. Sullivan, unless Dr. Sullivan says something that would open the door to that permitting introduction of"

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[16] After the court granted the defense nonsuit motions at the conclusion of plaintiff's case, plaintiff again complained about the court's ruling on this motion. "I still object to the fact that I was not able to replace my medical expert from Chicago. I think that was -- I just think that was an error."

character evidence. On February 25, the parties made their opening statements and the presentation of evidence began.

2. Analysis

"(a) On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to . . . : [¶] (1) Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained. [¶] . . . [¶] (b) A motion under subdivision (a) shall be made at a sufficient time in advance of the time limit for the completion of discovery under Chapter 8 (commencing with Section 2024.010) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time." (Code Civ. Proc., § 2034.610.)

"The court shall grant leave to augment or amend an expert witness list or declaration *only if all of the following conditions are satisfied*: [¶] (a) The court has taken into account the extent to which the opposing party has relied on the list of expert witnesses. [¶] (b) The court has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits. [¶] (c) The court has determined either of the following: [¶] (1) The moving party would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness. [¶] (2) The moving party failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, and the moving party has done both of the following: [¶] (A) Sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony. [¶] (B) Promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in Section 2034.260 on all other parties who have appeared in the action. [¶] (d) Leave

to augment or amend is conditioned on the moving party making the expert *available immediately* for a deposition under Article 3 (commencing with Section 2034.410), and on any other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion." (Code Civ. Proc, § 2034.620, italics added.)

Because plaintiff did not file his motion to amend until just before trial was scheduled to commence, he was obligated to support it by a showing of "exceptional circumstances." (Code Civ. Proc, § 2034.610.) He was also required to establish that the defense would not be prejudiced by the granting of the motion (Code Civ. Proc, § 2034.620, subd. (b)), that he had acted diligently or as a result of surprise or excusable neglect (Code Civ. Proc., § 2034.620, subd. (c)), and that the new expert was "available immediately" for deposition (Code Civ. Proc, § 2034.620, subd. (d)). He satisfied none of these requirements. The unavailability of one of his two urology experts was not an exceptional circumstance. Because the motion was brought on the eve of trial, the prejudice to the defense was readily apparent. The defense would have no time to formulate a response to the testimony of a new expert. Plaintiff knew of his expert's unavailability a month before he filed his motion, so the trial court could have reasonably concluded that plaintiff did not act diligently and that his neglect was inexcusable. And he did not offer to make his new expert "available immediately" for deposition.

Plaintiff cites only one case in which a denial of a motion to amend an expert witness disclosure was found to be an abuse of discretion. In *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242 (*Hernandez*), the plaintiff's attorney became terminally ill during the discovery phase and, due to his illness, failed to file necessary expert witness disclosures. The trial court granted a three-month continuance due to the attorney's illness, but the attorney died shortly after the granting of the continuance.

(*Hernandez*, at p. 1245.) The plaintiff then diligently obtained a new attorney and, two months before the scheduled trial, filed motions to reopen discovery, supplement his expert witness disclosures, and continue the trial. (*Ibid.*) The trial court granted a one-month continuance, which was insufficient to permit the new attorney to be prepared for trial, and denied the other motions. (*Ibid.*) The Court of Appeal found that the trial court had abused its discretion because the attorney's illness and death necessarily established good cause for a continuance and the reopening of discovery, including supplementation of the expert witness disclosures. (*Hernandez*, at pp. 1246-1248.) The court made no mention of the requirements of Code of Civil Procedure sections 2034.610 and 2034.620, as the focus of its discussion was the court's denial of a continuance.

Hernandez is of no assistance to appellant. The plaintiff in *Hernandez* was diligent, encountered truly exceptional circumstances, and made his motions months before the scheduled trial date, when prejudice to the defense was unlikely. Here, plaintiff had known for some time that Kozlowski would be unable to serve as an expert witness, but plaintiff did not bring his motion until the eve of trial. There was nothing exceptional about the circumstances leading to Kozlowski's unavailability.

Appellant contends that his motion should have been granted because, at the time of the filing of the expert witness disclosure, plaintiff did not know that Kozlowski would be unavailable and was not aware of Sullivan's "blemished record." We assume that plaintiff did not know of Kozlowski's unavailability *when he filed the disclosure*. However, the record reflects that plaintiff learned of Kozlowski's unavailability within a couple of weeks after filing the disclosure but did not file his motion to augment until an additional month later, on the eve of trial. His delay rebuts any claim that he was diligent or that his neglect was excusable. Nor is it true that plaintiff was unaware of Sullivan's "blemished record" until shortly before trial. Plaintiff knew that Sullivan had a "blemished record" more than a year before he designated Sullivan as an expert witness.

Appellant also argues that the trial court abused its discretion because the court based its order on the difficulty of determining the defense expenses that plaintiff would be required to reimburse if the court granted the motion. Although appellant emphasizes the court's reference at the hearing to the difficulty in swiftly ascertaining defense expenses, the trial court did not deny the motion simply due to this difficulty. Defendants' opposition to the motion was based primarily on prejudice and lack of diligence. At the hearing, immediately after the court referred to the difficulty of determining the defense expenses, the court pointed out that plaintiff had not made his new expert immediately available for deposition and that granting the motion would "unreasonably interfer[e] with the opposing Counsel's ability to prepare for trial." It was only after these references to the prejudice that the defense would suffer if the court granted the motion that the court said "*So* I'm going to deny the motion to augment . . . ." (Italics added.) The court clearly based its order on the prejudice to the defense of being required to respond at the very last minute to a new expert witness who was not even immediately available for deposition.

The trial court did not abuse its discretion in denying plaintiff's motion to amend his expert witness disclosure.

C. Motions In Limine

Appellant contends that the trial court erred in granting motions in limine to preclude plaintiff from presenting evidence of acts of malpractice outside the three-year statute of limitations.

1. Background

Motion in limine No. 17 by Roberts, Johnson, and SCMC sought to preclude plaintiff from "alleging or attempting offering any evidence to show or suggest Defendant Michael Johnson, M.D., breached the applicable standard of care, or otherwise committed any tortious act prior to April 2004." When the court asked plaintiff if he was

opposing this motion, plaintiff said: "I understand that he did violate the standard of care prior to 2004. But I also understand the fact that it's -- I think it's time bound." The court clarified "Time barred." Plaintiff then said: "Unless it's fraud." The court ruled: "If it's limited to medical negligence claim, then any act or conduct prior to 2004 would, in fact, be time barred and precluded by Code of Civil Procedure Section 340.5. [¶] So I'm going to grant the motion in limine number 17 as it relates to Dr. Johnson, and any acts of medical negligence or tortious acts prior to April 2004."[17] PAMF and Sutter's motion in limine number 10 also sought to "[e]xcude claims [of] negligence barred by the statute of limitations." The court noted that this was same as motion in limine number 17, which it had already granted. Plaintiff said: "But we can talk about it, we just can't talk about it in the sense of standard of care" and "as long as we don't refer to standard of care."[18] The court confirmed that limitation.

Before plaintiff's family practice standard of care expert testified, the court reiterated that the expert could not testify about standard of care issues prior to April 2004, but could testify about events occurring prior to 2004 as they related to treatment given in April 2004 or thereafter. The court instructed the expert: "you can talk about what the medical records reflect as to what Dr. Johnson knew or should have known about prior to April 2004, but you cannot render any opinions of any conduct he engaged in prior to April 2004, or any care or treatment or recommendations he made prior to April of 2004 constituted a breach of the standard of care. So we'd be talking about care and treatment rendered after that date. You'll be limited to those periods of time."[19]

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[17] The court also granted motion in limine No. 19, which precluded Sullivan from testifying about breaches of the standard of care prior to April 2004.

[18] Plaintiff had identified these two motions in limine as ones he opposed.

[19] Similar admonitions were given before Sullivan, plaintiff's urology expert, testified. However, Sullivan did not testify about the standard of care provided by Johnson, and Roberts had no contact with plaintiff prior to April 2004.

2. Analysis

Appellant contends that the trial court's rulings on these two motions in limine erroneously limited plaintiff's evidence at trial.

In his opening brief, appellant contends that this ruling precluded plaintiff from showing that Johnson "intentionally withheld" from plaintiff *in 2002* the fact that Johnson "could not read free PSA results . . . ." The trial court's grant of the motions in limine had no impact on evidence to support this allegation. Plaintiff alleged two causes of action against defendants: medical negligence and fraud. The trial court's rulings on these two motions in limine related solely to evidence supporting the medical negligence cause of action. Even if Johnson failed to inform plaintiff in 2002 that Johnson could not analyze free PSA results, it was undisputed that the only free PSA result prior to 2004 was normal. Hence, Johnson's alleged inability to analyze that normal result in 2002 could not have established an actionable breach of the standard of care amounting to medical negligence. Nor was plaintiff precluded from presenting evidence of Johnson's understanding of free PSA results. He did so at trial.

In his reply brief, appellant contends for the first time that the trial court's rulings on the motions in limine precluded plaintiff from presenting evidence that Johnson "concealed" the fact that he did not order a free PSA test in July 2003. Appellate courts ordinarily do not consider new issues raised for the first time in an appellant's reply brief because such a tactic deprives the respondent of the opportunity to respond to the contention. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) That is precisely the case here. As respondents have had no opportunity to respond to this contention, we decline to consider it.

In any case, the point has no merit. The trial court's ruling on the motions in limine did not prevent plaintiff from presenting evidence of this 2003 event. Plaintiff testified at trial that Johnson ordered only a total PSA test in July 2003 but "told me that he had ordered both a free and a total and everything was fine." Plaintiff's family

practice expert testified that the standard of care was to order a free PSA test only if the total PSA was abnormal. Thus, a violation of the standard of care could not have occurred in 2003, as it was undisputed that plaintiff's July 2003 total PSA result was normal. Again, the trial court's rulings related only to the medical negligence cause of action and did not preclude plaintiff from presenting any evidence in support of his fraud cause of action. We also note that appellant's assertion regarding this 2003 event is completely outside the allegations in plaintiff's second amended complaint and bears no relation to any theory that plaintiff ever sought to pursue in the trial court.

Appellant has failed to establish that the trial court's rulings on the motions in limine were prejudicially erroneous.

D. Motion to Amend To Add Punitive Damages Prayer

We need not address appellant's claim that the trial court erred in denying plaintiff's belated motion to add a punitive damages prayer to his second amended complaint. The presence or absence of a punitive damages prayer had no impact on plaintiff's inability to overcome defendants' nonsuit motions.

IV. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.