2d Civil No. B212907

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 2

JENNIFER GAYE LEVITT, M.D.,

Plaintiff and Appellant,

v.

STEPHEN C. ROSS, M.D.,

Defendant and Respondent.

Appeal from the Superior Court of California, County of Los Angeles
Honorable Terry B. Friedman
Superior Court Case No. SC094422

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS OR ENTITIES

INTRODUCTION

Plaintiff and appellant Jennifer Gaye Levitt, M.D. is a psychiatrist at UCLA. She sued her primary care doctor, family medicine physician Stephen C. Ross, for medical malpractice in connection with her June 2006 diagnosis of breast cancer. Her theory against Dr. Ross was that his failure to palpate her breast (either before or after the tests he ordered, which were negative for cancer) caused a harmful delay in her diagnosis. The trial court granted summary judgment to Dr. Ross, finding that plaintiff's expert, a radiologist specializing in breast cancer, was not qualified to testify that Dr. Ross had breached the standard of care for family medicine physicians. Thus, there was no triable issue of fact on this key issue, and Dr. Ross was entitled to judgment as a matter of law.

On appeal, plaintiff attempts to preempt the argument that the trial court acted within its discretion when it struck the opinion of her expert witness by arguing that it was the opinion of Dr. Ross's expert that was inadmissible and that therefore the burden to come forward with controverting evidence never shifted to her. If the burden did shift, she contends, the trial count erred in striking her expert's opinion because his experience with breast cancer patients qualified him to opine about the standard of care required of a family doctor whose patient complains of a lump in her breast. Neither argument warrants reversal.

With respect to Dr. Ross's expert, plaintiff forfeited her challenge by failing to bring it in the trial court. Both the Evidence Code and the Code of Civil Procedure mandate that any objections to evidence appear in the

record. If they do not, they are waived, and plaintiff has waived them here. In any event, there were no deficiencies in the declaration of Dr. Ross's expert.

With respect to her own expert, plaintiff fails to demonstrate that the trial court abused its discretion by rejecting plaintiff's argument that a family medicine physician is, in effect, bound by the same standard of care applicable to radiologists specializing in breast cancer. When the cases she relies upon for the proposition that a physician in one field may testify about the standard of care in another are examined, it is plain that they have no application here.

There is an additional reason to affirm summary judgment: The declaration of plaintiff's expert fails to raise a triable issue of fact on causation. It is simply too conclusory and speculative to support an inference that Dr. Ross in any way caused plaintiff's injury.

Accordingly, summary judgment in Dr. Ross's favor is proper on both standard-of-care and causation grounds. This court should affirm.

STATEMENT OF FACTS

Dr. Ross had been plaintiff's primary care physician through her UCLA Healthcare HMO since 1999. (1 AA 209, ¶ 3.)[1/] Dr. Ross examined plaintiff three times: On February 2, 1999 for an initial visit; on November 30, 2001 for a comprehensive examination; and on August 1, 2003 for an abnormal Pap smear and earache. (1 AA 83-87; 1 AA 175, ¶¶ 3, 5; 1 AA 177, ¶ 12.) During the 1999 examination, Dr. Ross referred plaintiff to an infertility specialist. (1 AA 83; 1 AA 175, ¶ 4.) During the 2001 examination, plaintiff told Dr. Ross that her great grandmother had a history of breast cancer. (1 AA 84; 1 AA 176, ¶ 8.) Dr. Ross referred plaintiff (then about 45 years old) for a mammogram if she was not pregnant. (1 AA 84-85; 1 AA 176, ¶ 9.) Plaintiff had a normal mammogram on February 15, 2002. (1 AA 70; 1 AA 176, ¶ 10.)

From the late 1990s through at least 2005, plaintiff pursued infertility treatment. (1 AA 83-87, 90-99; 1 AA 175-178, ¶¶ 4, 7, 13-15.) Between September 2004 and July 2005, she had numerous appointments with an obstetrician/gynecologist ("ob/gyn") specializing in infertility, Dr. Snunit Ben-Ozer. (1 AA 90-99; 1 AA 178, ¶ 15.) Dr. Ben-Ozer also served as plaintiff's regular ob/gyn through February 2007. (1 AA 108-109; 1 AA 185, ¶ 36.) Dr. Ben-Ozer conducted plaintiff's "yearly Paps and breast exams," and examined plaintiff's breasts in September or October 2004. (1 AA 109, 110; 1 AA 185, ¶¶ 36-37; 1 AA 188, ¶ 46.)

[1/] In this brief, the Appellant's Appendix is referred to as "AA," the Reporter's Transcript as "RT," and the appellant's opening brief as "AOB."

On December 13, 2004, plaintiff contacted Dr. Ross's office and said that she had found a lump in her left breast. (1 AA 88; 1 AA 178, ¶ 16; 1 AA 209, ¶ 4.) Dr. Ross ordered a mammogram and ultrasound. (1 AA 88; 1 AA 179, ¶ 17.) Dr. Ross also presented evidence that his office had asked plaintiff to make a follow-up appointment with him; plaintiff disputed that evidence. (1 AA 88, 103; 1 AA 179, ¶ 17; 1 AA 210, ¶ 4.)

On January 4, 2005, plaintiff had the mammogram and ultrasound ordered by Dr. Ross. (1 AA 71; 1 AA 179, ¶ 18; 1 AA 210, ¶ 5.) Plaintiff complained of a lump in the area of her left breast from 2 to 3 o'clock. (1 AA 179, ¶ 18 [plaintiff's separate statement of undisputed facts]; 1 AA 71; 1 AA 189, ¶ 50; 1 AA 210, ¶ 5.) The mammogram showed that there was "an area of asymmetric breast tissue" in the left breast, but that it had been stable since a 1997 mammogram. (1 AA 71; 1 AA 180, ¶ 20.) The right breast was normal. (1 AA 71; 1 AA 181, ¶ 25.) The overall assessment was benign. (1 AA 71; 1 AA 181, ¶ 24.)

By letter dated January 6, 2005, the radiologist interpreting the mammogram informed plaintiff that it was normal, but instructed her to contact her physician regarding possible follow up: "Your physician or other health care provider should further evaluate the area of concern in your breast and determine the necessary follow-up at that time. Although mammography is the most accurate method for early detection, not all cancers are found through imaging." (1 AA 101; 1 AA 182, ¶ 26.) In the same letter, the radiologist also advised plaintiff—as a woman over 40

years old—to have annual mammograms (plaintiff was then about 49 years old). (1 AA 101.)

Plaintiff did not contact Dr. Ross's office for follow-up nor did she discuss her concerns with her treating ob/gyn, or with anyone else. (1 AA 98; 1 AA 186-188, ¶ 39, 43, 46; 1 AA 210, ¶ 4; 1 AA 211, ¶ 6.) In February 2007, when plaintiff finally told Dr. Ben-Ozer about the January 2005 mammogram, she explained that the lump had "disappeared" and that she therefore had decided not to tell anyone about it—including Dr. Ben-Ozer. (1 AA 98; 1 AA 186, ¶ 39.) Plaintiff also admitted to Dr. Ben-Ozer that she had been told to come back for a mammogram in one year and she had not done so. (1 AA 98; 1 AA 188, ¶ 47.)

Unfortunately, in March or April 2006, plaintiff had felt another lump in her left breast. This one was the "size of a bullet right at [the] 6:00 o'clock" portion of her lower breast. (1 AA 105; 1 AA 182, ¶ 27; 1 AA 211, ¶ 7.) Dr. Ross again ordered a mammogram and ultrasound, which plaintiff had on June 1, 2006. (1 AA 72-77; 1 AA 182-183, ¶¶ 28-29; 1 AA 211-212, ¶ 7.)

The radiologist compared the 2005 and 2006 films. (1 AA 72.) The radiology report indicated that the current abnormality was at a "different location" than that noted in 2005, "located more inferiorly than [the area of concern] seen in 2005." (1 AA 72.) It was a "new left breast palpable mass in the lower outer quadrant between 3 to 6 o'clock involving the entire lower outer quadrant." (1 AA 72, 75.) The focal point of the mass was between 5 to 6 o'clock. (*Ibid*.) The radiology report concluded

that the results were "highly suggestive of malignancy" and recommended that "appropriate action" be taken. (1 AA 73, 76.) The right breast was normal. (1 AA 73, 76; 1 AA 184, ¶ 31.) An ultrasound and biopsy results confirmed that there was a carcinoma. (1 AA 72-81; 1 AA 184, ¶ 33.)

Plaintiff underwent chemotherapy and had a lumpectomy in January 2007. (1 AA 112-114; 1 AA 184, ¶ 34; 1 AA 185, ¶ 35.) In May 2007, she had a double mastectomy; although there was no carcinoma on the right side, she wished "to diminish her future risk and to achieve symmetry of reconstruction." (1 AA 115; 1 AA 186, ¶ 40.)

STATEMENT OF THE CASE

In June 2007, plaintiff sued Dr. Ross—along with the Regents of the University of California and the radiologist who interpreted her January 2005 mammogram, Dr. Yaghmai; she alleged that Dr. Ross had committed malpractice by not seeing her to palpate her breast after she reported a possible breast lump in December 2004. (1 AA 1-8.)[1/] Dr. Ross moved for summary judgment, submitting a declaration from Eduardo Añorga, M.D. regarding the standard of care of family practice physicians and causation, and a declaration from Michael B. Van Scoy-Mosher, M.D. regarding causation. (1 AA 35-38, 40-42.)

Plaintiff opposed the motion. (1 AA 159-195.) She submitted a declaration from Michael T. Nelson, M.D. regarding the standard of care

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[2/] The trial court denied the summary judgment motions brought by the Regents and Dr. Yaghmai. (1 AA 285-286.) They are not parties to this appeal.

and causation. (1 AA 202-207.) She submitted no written objections to Dr. Ross's evidence, nor did she object orally at the hearing. (2 AA 343; RT 1-9.) Dr. Ross filed a reply and written objections to Dr. Nelson's opinion on the ground, among others, that he was not qualified to opine on the standard of care for family medicine practitioners and that his opinions were speculative. (1 AA 260-281.)

At the motion hearing, the trial court agreed that Dr. Nelson was not qualified to opine on the standard of care applicable to family physicians in 2005. (RT 8-9.) Because plaintiff had no other evidence regarding the standard of care, the trial court granted summary judgment to Dr. Ross. (RT 9; 1 AA 282-288.) Notice of entry of judgment was served on October 30, 2008. (2 AA 289-292, 296-301.)

Plaintiff timely moved for a new trial, arguing that Dr. Nelson was qualified to give an opinion on the standard of care applicable to family doctors. (2 AA 293-295, 306-325.) After a hearing, the trial court denied the motion. (RT 13-14.) Notice of Ruling was served on December 5, 2008. (2 AA 334-337.)

Plaintiff filed a notice of appeal on December 15, 2008. (2 AA 338-340.) It was timely pursuant to California Rules of Court, rules 8.104 and 8.108, subdivision (b)(1). The judgment is appealable under Code of Civil Procedure section 901.4, subdivision (a)(1).

STANDARD OF REVIEW

This court independently reviews an order granting summary judgment and reviews the ruling underlying the order—here, the trial

court's exclusion of plaintiff's expert opinion evidence—for a "manifest abuse of discretion." (*People v. Kelly* (1976) 17 Cal.3d 24, 39 ("*People v. Kelly*") [expert evidence]; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563 ("*Lockheed*") [summary judgment].) This court must affirm the summary judgment on any ground supported by the record—even if the trial court relied on a different rationale. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140 ("*Jimenez*").)

ARGUMENT

I. DR. AÑORGA'S EXPERT OPINION ON THE STANDARD OF CARE WAS SUFFICIENT TO SHIFT THE BURDEN TO PLAINTIFF TO RAISE A TRIABLE ISSUE OF FACT.

"A defendant . . . [moving for summary judgment] has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established. . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) Dr. Ross moved for summary judgment on the ground that he had complied with the standard of care and that plaintiff could not establish causation. (1 AA 21-33, 49-67.) His evidence included the declaration of Dr. Añorga on the standard of care and causation. (1 AA 40-42.)

Plaintiff attempts to preempt the argument that her expert was not qualified to testify on the standard of care by contending that the declaration of Dr. Añorga was insufficient to shift the burden to her to come forward with any controverting evidence. Among other things, *he* was not qualified to opine on the standard of care. (AOB 17-23.) Thus, "even if plaintiff

[made] a weak response or no response at all," Dr. Ross was not entitled to summary judgment. (AOB 17.)

Plaintiff's argument must be rejected. She has waived any objections to Dr. Añorga's declaration by failing to assert them in the trial court, and there is no merit to her objections in any event.

A. Plaintiff Waived Her Challenges To Dr. Añorga's Expert Opinion By Failing To Raise Them In The Trial Court

. Plaintiff contends that Dr. Añorga's declaration did not satisfy Dr. Ross's burden for three reasons: (1) Dr. Añorga did not establish he was qualified to opine on the standard of care for family medicine practitioners—despite being one himself—because he did not testify that he had personally cared for a woman self-reporting a breast lump (AOB 18-19); (2) his declaration did not specify the standard of care for a family doctor when a woman complains to him of a breast lump, and hence, presumably, was irrelevant (AOB 19); and (3) his declaration did not explain the reasons for Dr. Añorga's opinion that Dr. Ross's conduct complied with the standard of care, and hence, presumably, was too conclusory to be relevant (AOB 20-22). Plaintiff never objected to Dr. Añorga's declaration in the trial court on these grounds—or on any grounds at all—and it is too late to do so now. (1 AA 159-194; 2 AA 293-294, 306-314; RT 2-13.)

Evidence Code section 353 provides that no judgment shall be reversed "by reason of the erroneous admission of evidence unless: . . . there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made. . . ." (*Id*., subd. (a); see also Code Civ. Proc., § 437c, subd. (b)(5) ["Evidentiary objections not made at the hearing [of a summary judgment motion] shall be deemed waived"].) Plaintiff's failure to object constitutes a waiver, and this court should not consider her belated evidentiary objections. (See, e.g.,

People v. Farnam (2002) 28 Cal.4th 107, 161-162 [refusing to consider objection to expert's qualifications raised for the first time on appeal]; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 321.) Moreover, plaintiff's objections fail on the merits.

B. Plaintiff's Challenges To Dr. Añorga's Expert Opinion Lack Merit

. **1. Dr. Añorga was qualified to render an expert opinion**

. In finding that Dr. Ross sustained his burden on the summary judgment motion with the declaration of Dr. Añorga, the trial court implicitly found that Dr. Añorga was qualified to opine on the standard of care for practitioners in the field of family medicine. (1 AA 286.) Plaintiff disagrees, challenging Dr. Añorga's qualifications on the ground that his declaration did not say that he had personally cared for a woman self-reporting a possible breast lump. (AOB 18-19.) However, plaintiff cites no authority holding that an expert witness otherwise qualified on the standard of care cannot opine on the topic unless that witness has *personally* confronted the *exact* same scenario at issue in the lawsuit. In fact, the law is otherwise. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 133 [experienced pathologist qualified to opine on cause of death even though he had not previously performed an autopsy where death was caused by paraquat poisoning].)

"A medical practitioner is held to the standard of practice generally accepted by his branch of the profession." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 278, fn.13, internal quotations and citations omitted.) Dr. Añorga's credentials in the area of family medicine are indisputable. He has been Board-certified in family practice since 1987, and was re-certified in 1994 and 2001. (1 AA 40, ¶ 2.) He has practiced family medicine since 1988, and now practices in Redondo Beach, California. (*Ibid*.) He has been a clinical instructor in family medicine at UCLA since 1997. (*Ibid*.) Dr. Añorga's extensive training and experience in family medicine amply show that he was "familiar with the standards required of physicians under similar circumstances." (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476.) Clearly,

Dr. Añorga has the "special knowledge, skill, experience, training or education sufficient to qualify him as an expert" to testify as to what a reasonably prudent family doctor in Dr. Ross's position would do when confronted by a patient reporting a lump in her breast. (Evid. Code, § 720, subd. (a); see *Landeros v. Flood* (1976) 17 Cal.3d 399, 410 [characterizing standard of care in terms of what reasonably prudent physician would have done].) There was no abuse of discretion in implicitly so finding.

2. Dr. Añorga clearly set out the relevant standard of care

. Plaintiff argues in passing that Dr. Añorga's declaration fails "to specify what the standard of care was for a physician in the position of [Dr. Ross] who has been advised that a woman has discovered a lump in her breast." (AOB 19.) Not true. Dr. Añorga opined that Dr. Ross acted appropriately by ordering a mammogram and ultrasound and requesting that she make an appointment. (1 AA 42, ¶ 15.) Dr. Añorga amplified his opinion by explaining what the standard of care did *not* require: it did not require that Dr. Ross contact plaintiff to make a follow-up appointment within three or four months based on the results of the mammogram and ultrasound, nor that Dr. Ross refer plaintiff to a surgeon based on those same results. (1 AA 42, ¶ 16.)[1/] Plaintiff cites no authority for the proposition that a standard-of-care opinion in this context need be any more elaborate, and Dr. Ross does not know of any such authority. Thus, this challenge is meritless as well.

3. Dr. Añorga clearly explained his reasons for concluding there was no malpractice

[3/] The 2005 test results were negative for a malignancy. (1 AA 71, 101; 1 AA 180-181, ¶¶ 20-25.)

. Plaintiff lastly challenges Dr. Añorga's declaration because it "fails to explain the reasons or rationale" for his opinion that Dr. Ross complied with the standard of care. (AOB 20.) For this purpose, she relies on two cases: *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 ("*Kelley*"), and *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297 ("*Johnson*"). (AOB 20-22.) Both cases are inapposite.

In *Kelley*, *supra*, the sum total of the expert witness's standard-of-care opinion was that the defendant physician "acted appropriately and within the standard of care under the circumstances presented." (66 Cal.App.4th at p. 522.) The court found this "conclusory expert declaration" inadmissible because "it did not disclose the matter relied on in forming the opinion expressed." (*Id.* at pp. 521, 524.) In contrast, Dr. Añorga clearly stated what facts supported his opinion that Dr. Ross had complied with the standard of care, and specified what the standard of care did not require him to do. (1 AA 42, ¶¶ 15, 16.)

In *Johnson*, *supra*, the court also found an expert's declaration insufficient to establish that the defendant acted within the standard of care. That case involved a complex medical procedure for implanting radiation seeds to treat the plaintiff's prostate cancer. (143 Cal.App.4th at pp. 306-308.) The actual number of radioactive seeds implanted exceeded the number originally planned with serious consequences to the patient. (*Ibid*.) The expert opined that the plan was within the standard of care and the implantation procedure was within the standard of care, but neglected to address the "crucial issue" of whether too many seeds had been implanted. (*Id*. at p. 308.) There was nothing, for example,

about how the number of seeds is usually determined or what the "recognized standard" is for making that decision. (*Ibid*.)

Here, the crucial issue was whether Dr. Ross acted appropriately when plaintiff complained of a lump in her breast. Dr. Añorga described the conduct of Dr. Ross that was appropriate and explained what Dr. Ross was not required to do under the standard of care; that was the factual basis—the reason and rationale—for his conclusion that Dr. Ross had complied with the standard of care and that no malpractice occurred. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509 ("*Bushling*") [the "reason for the opinion is the absence of evidence of medical malpractice"].) Dr. Añorga's opinion is thus significantly different from an opinion that is a bare statement, without reference to specific facts, that someone met the standard of care (as in *Kelley*, *supra*) or an opinion that fails to address the crucial issue altogether (as in *Johnson*, *supra*). In sum, Dr. Ross met his burden of showing that plaintiff's cause of action against him had no merit because she could not establish he had breached the standard of care. The burden then shifted to her to raise an issue of fact, and she did not.

C. Plaintiff's Passing Reference To A Disputed Fact In Dr. Añorga's Declaration Does Not Save Her Case Against Dr. Ross

. Plaintiff contends, without analysis, that a factual dispute turning on whether or not she was asked or advised to make an appointment with Dr. Ross should have precluded summary judgment based on the standard of care. (AOB 21.) Dr. Añorga mentions that the records indicate Dr. Ross asked plaintiff to schedule an appointment with him when he ordered a diagnostic mammogram and ultrasound in December 2004 (1 AA 41, ¶ 11); plaintiff asserted

that no one asked or advised her to come in or make an appointment (1 AA 210, ¶ 4).

Only an issue of *material* fact enables a plaintiff to avoid summary judgment. (Code Civ. Proc., § 437c, subd. (c).) Materiality depends on the issues in the case and is determined by the pleadings. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 65.) Per the complaint, the issue here is whether Dr. Ross breached the standard of care when he failed to recommend further diagnostic studies or follow-up treatment after the January 4, 2005 mammogram and ultrasound. (1 AA 8.) Whether or not he told her to make an appointment is not sufficiently related to that core issue to be material.

But even if this court disagrees about the materiality of this factual dispute, Dr. Añorga's declaration was more than sufficient on the other facts he addressed (*e.g.*, ordering a mammogram and an ultrasound) to shift the burden to plaintiff to come forward with an admissible expert opinion that Dr. Ross had breached the standard of care. As next discussed, the trial court correctly determined that she did not meet that burden.

II. SUMMARY JUDGMENT WAS WARRANTED BECAUSE DR. NELSON WAS NOT QUALIFIED TO OPINE ON THE STANDARD OF CARE FOR FAMILY DOCTORS.

Because Dr. Ross's expert evidence showed that he had complied with the standard of care for family doctors, plaintiff was required to come forward with admissible, conflicting expert evidence. (See *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.) The trial court determined that Dr. Nelson was not qualified to offer an opinion on the standard of care for family doctors. (1 AA 286; RT 9.) "The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Kelly*, *supra*, 17 Cal.3d at p. 39.) To show this "manifest abuse of discretion," plaintiff must establish that the trial court's ruling resulted from an "arbitrary determination, capricious disposition or whimsical thinking." (*In re Cortez* (1971) 6 Cal.3d 78, 85.) She has not done so.

A. The Trial Court Acted Within Its Discretion By Excluding Dr. Nelson's Standard-Of-Care Opinion

. **1. The evidence at best establishes that Dr. Nelson was qualified to testify about the standard of care for radiologists, not that he was qualified to testify about the standard of care for family doctors**

. Plaintiff contends that Dr. Nelson's knowledge and experience with respect to breast cancer qualified him to testify about the standard of care for family doctors. (AOB 24-26.) In his declaration, Dr. Nelson stated that "[a]fter years on the radiology staffs of private hospitals, for the last 14 years [he had] been on the faculty of the University of Minnesota Medical School, where [he] now serve[s] as a Professor of Medicine in the Department of Radiology." (1 AA 202, ¶ 1.) He went on to state that he examines 70 to 80 women per week for complaints about breast lumps. (*Ibid*.) He has conducted breast imaging and breast cancer research, and chaired the "Institute for Clinical System Integration working group" that developed imaging and practice guidelines for breast cancer patients. (*Ibid*.)

As plaintiff argues on appeal, one gauge of a proposed expert's qualifications is the "'practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice.'" (AOB 19, quoting *Sinz v. Owens* (1949) 33 Cal.2d 749, 753.) But Dr. Nelson did not testify that he had any practical hands-on knowledge of what is customarily done by family medicine practitioners under the circumstances presented here. Significantly, Dr. Nelson did *not* state

he had ever practiced as a family doctor, although he had been Board-certified in the field in 1975. He did *not* state he had maintained his Board certification in the field or had kept abreast of family practice developments. He did *not* state that he had ever consulted with family doctors. Indeed, he did not even state that he was familiar with the standard of care for family doctors. (1 AA 202-207.)

When the entire substance of Dr. Nelson's declaration is scrutinized, it becomes apparent that he is *not* talking about the standard of care for family doctors, but rather about specialists such as radiologists to whom family doctors refer their patients. Dr. Nelson opined that Dr. Ross's conduct fell below the "appropriate" standard of care ". . . because he failed to schedule an appointment to see Plaintiff (either before or after the January 4, 2005 imaging studies) so that he could palpate the involved lump" and order "additional diagnostic tests." (1 AA 204-205, ¶¶ 4(1), 5.) Dr. Nelson stated that palpating the lump "can provide the physician with much useful information concerning the size, location, and consistency of the lump, all of which is useful in making sure the appropriate imaging studies are conducted." (1 AA 204-205, ¶ 5.) He described the "additional tests," which in his view were required given plaintiff's "very dense breasts," *but only in the context of addressing the care that should be provided by a radiologist* (1 AA 205-206, ¶¶ 7, 8); he did not state the standard of care requires a family physician to know that such finely tuned additional tests were required (or even to know what they were), or know to order them, having received the negative results from the tests the family physician did order. Thus, Dr. Nelson's opinion itself underscores that he was not qualified to testify about

the standard of care for a family physician; in effect, he imposed the standard of care for a specialist—a radiologist specializing in breast cancer—on a family doctor who did exactly what he should have done when he referred plaintiff to a specialist for a diagnostic mammogram and ultrasound.

A general practitioner is not held to the same standard of care as a specialist. (*Allen v. Leonard* (1969) 270 Cal.App.2d 209, 215-216.) The key is not that Dr. Nelson is a specialist and Dr. Ross a general or family physician; the key issue is whether Dr. Nelson demonstrated a knowledge of the standard of care in the field of family medicine despite not practicing that type of medicine. He did not. In finding Dr. Nelson unqualified to testify on whether Dr. Ross's conduct was within the standard of care for a family medicine practitioner, the trial court was well within its discretion: Dr. Nelson's specialized experience as a radiologist in a university breast cancer clinic is not sufficient in itself to qualify him to testify about family medicine practiced in a different setting.

2. The cases upon which plaintiff relies do not establish that Dr. Nelson's expertise in radiology qualifies him to testify about the standard of care in family medicine

Plaintiff contends that a specialist like Dr. Nelson can testify about a general practitioner's standard of care if the "witness discloses sufficient knowledge of the subject to entitle his opinion to go to the jury." (AOB 27.) She then cites several cases that she believes support her contention. (AOB 27-31.) Plaintiff reads the cases, and the rule they purportedly stand for, too broadly.

Two of plaintiff's cases held that the physician-expert need not have the same training or background as the defendant physician because the expert opined on areas of common knowledge to *all* physicians. In *Miller v. Silver* (1986) 181 Cal.App.3d 652, 661 (AOB 29-30), a psychiatrist was qualified to testify about the standard of care for a plastic surgeon, not with respect to surgery, but with respect to a very narrow subject area of shared interest: like "every physician and surgeon," the psychiatrist possessed the ability to research the role of prophylactic antibiotics. *Hutter v. Hommel* (1931) 213 Cal. 677, 682 (AOB 27-28), concerned the importance of cleanliness and sterilization in surgery, "a matter of almost common observation." Thus, a homeopathic eye specialist could testify against a physician also specializing in eye care. (213 Cal. at pp. 681-682.) Dr. Nelson, in contrast, was not testifying about a matter of common observation, but rather about additional, more sophisticated tests Dr. Ross would purportedly have seen the need for had he palpated plaintiff's breast.

The other cases upon which plaintiff relies are equally unavailing. In *Chadock v. Cohn* (1979) 96 Cal.App.3d 205, 208 (AOB 29), both the podiatrist expert and the defendant physician were specialists in the treatment of foot injuries; that is, they had similar practices but different medical degrees. The sole reason given by the trial court for disqualifying the podiatrist was that he was not a licensed medical doctor, and that was held to be error. (96 Cal.App.3d at pp. 214-215.) It goes without saying that the practice of Dr. Nelson, a specialist in radiology in a breast cancer clinic, is far different from that of a family medicine practitioner like Dr. Ross. They both might confront breast cancer

patients, but the type, level, and frequency of involvement cannot be deemed comparable, and as discussed (§ II.A.1, *supra*), the subject matter—the need for additional, more sophisticated diagnostic tests—is the purview of a specialist.

In *Cline v. Lund* (1973) 31 Cal.App.3d 755, 766-767 (AOB 27-29), a pathologist was found to be qualified to testify about the standard of care for a gynecological surgeon. The evidence was that he had frequently "scrubbed in" for surgery and advised gynecological surgeons on what to do. (31 Cal.App.3d at p. 766.) In addition, he had extensive experience making rounds with gynecologists and had examined uteruses both after death and during surgery. (*Ibid*.) He was competent to testify because through this experience he had gained knowledge of the standard of care applicable to a specialty he was not directly engaged in. (*Id*. at pp. 766-767.) The same cannot be said for Dr. Nelson. His declaration does not demonstrate that he had gained knowledge of the standard of care applicable to family doctors; for example, he does not state he ever practiced family medicine, that he ever worked side by side with family doctors, or that he has stayed abreast of developments and training in family medicine. (1 AA 202-207.)

Finally, in *Valdez v. Percy* (1950) 35 Cal.2d 338 ("*Valdez*") (AOB 28), a resident had performed an unnecessary mastectomy, and the physician expert was challenged on the ground that he was without experience in the technique used. The court held that he need not be familiar with the particular surgical technique because his opinion concerned only the propriety of the operation in the first instance, not the technique. (35 Cal.2d at p. 342.) In *Valdez, supra*, the expert

testified on the basis of what he knew; what he did not know or lacked experience in—a particular technique—was irrelevant. Here, what Dr. Nelson gave no indication of knowing—the standard of care for a family doctor—is obviously central to this case.

In sum, none of the cited cases demonstrates that an abuse of discretion occurred here.

3. The trial court's ruling did not hinge on Dr. Nelson's 33 year-old Board certification

. Plaintiff argues that the trial court erroneously excluded Dr. Nelson's opinion simply because he was not Board-certified in family practice at the time he opined on Dr. Ross's care. (AOB 31-32.) That is not what happened.

During the summary judgment hearing, plaintiff pointed to Dr. Nelson's 33-year-old Board certification in family practice as the reason he was qualified to opine on the standard of care. (RT 8 [describing Dr. Nelson as "board certified in family practice"].) The trial court disagreed, saying, "Well, a long time ago. . . . And I don't think anyone could rely *solely*, as an expert, on their training 30 years ago in a particular field. And so what I'm left with is this long-ago certification, 33 years ago, and a very generic and general foundation . . ." (RT 8-9.) Thus, the trial court simply ruled a 33-year-old Board certification was not enough to qualify Dr. Nelson to opine on the standard of care for family doctors in 2005, in light of the absence of any other specific facts demonstrating a knowledge of the subject. There was no abuse of discretion.

B. The Court—Not The Trier Of Fact—Decides As A Threshold Matter Whether Dr. Nelson Is A Qualified Expert

. Plaintiff contends that Dr. Nelson's lack of qualification is relevant to the weight, not the admissibility, of his opinion. (AOB 26-27.) Not true. Under Evidence Code sections 405 and 720,[1/] the court determines the preliminary fact of whether a proposed expert has sufficiently established his or her qualifications to testify on a subject. (See Ass. Com. on Judiciary com., 29B pt. 1 West's Ann. Evid. Code, § 405 (1995 ed.) p. 375; Cal. Law Revision Com. com., 29B pt. 2 West's Ann. Evid. Code, § 720 (1995 ed.) p. 316.) Once that threshold is crossed, then a jury may determine what weight to give those qualifications. (See *People v. Bolin* (1998) 18 Cal.4th 297, 322 ["Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility"], internal quotations and citations omitted.)

Here, the trial court reviewed Dr. Nelson's qualifications as outlined in his declaration, considered counsel's arguments, and rightly found that Dr. Nelson had *not* crossed the threshold and was not qualified to opine to a jury on the standard of care for family doctors in 2005. (RT 4-9.) The absence of an

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[4/] Evidence Code section 405, subdivision (a), provides in part: "The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises." Section 720, subdivision (a), provides in part: "Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

admissible, expert opinion on this issue was fatal to plaintiff's claim against Dr. Ross. (See *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844.)

Plaintiff's arguments add up to a request for this court to do the one thing it cannot do: substitute its judgment regarding Dr. Nelson's qualifications for that of the trial court. (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) She has not demonstrated the "manifest abuse of discretion" necessary for reversal. Accordingly, the trial court properly granted summary judgment to Dr. Ross because plaintiff presented no admissible, conflicting expert standard-of-care evidence. (See, e.g., *Barragan v. Lopez* (2007) 156 Cal.App.4th 997, 1007-1008.)

III. SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE DR. NELSON'S DECLARATION FALLS SHORT OF ESTABLISHING THAT ANY ALLEGED OMISSION BY DR. ROSS CAUSED PLAINTIFF HARM.

A plaintiff suing for medical malpractice must prove the defendant's negligence was a cause-in-fact of her injuries. (*Jennings v. Palomar Pomerado Health Systems*, Inc. (2003) 114 Cal.App.4th 1108, 1118 ("*Jennings*").) "'[C]ausation must be proven within a reasonable medical probability based [on] competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case.'" (*Ibid.*, citation omitted; see also *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776 [directed verdict for defense required where expert testimony posits mere possibility of causation].)

While the trial court granted summary judgment based on the ground that plaintiff lacked admissible evidence on the standard of care issue, her lack of

controverting evidence on causation is an additional ground upon which to affirm. (See *Jimenez, supra*, 130 Cal.App.4th at p. 140 [court must affirm on any ground supported by the record].)

A. Dr. Ross Presented Evidence That Nothing He Did Or Did Not Do Caused Plaintiff Harm

. Dr. Ross offered the declarations of Dr. Añorga and Dr. Van Scoy-Mosher, an oncologist, on the issue of causation. (1 AA 35-42.) Dr. Añorga testified the records reflected that after the negative diagnostic mammogram and ultrasound on January 4, 2005, the radiologist told plaintiff to follow up with her primary care physician and to return for a mammogram in January 2006; she did neither, and although she was being followed by Dr. Ben-Ozer, her ob/gyn, she did not disclose her concerns about the breast lump she had discovered in December 2004. (1 AA 41-42, ¶¶ 12, 15-16.) On the basis of this, Dr. Añorga opined Dr. Ross did nothing to cause or contribute to any alleged delay in diagnosis. (1 AA 42, ¶ 17.)

Dr. Van Scoy-Mosher testified plaintiff's failure to return for the January 2006 mammogram, among other things, led him to conclude her action or inaction was a substantial factor in any alleged delay. (1 AA 38, ¶ 18.)[1/]

[5/] Plaintiff's cancer was diagnosed in early June 2006, some six months after she would have had another mammogram taken. (1 AA 72-81; 1 AA 184, ¶¶ 32-33.)

In light of Dr. Ross's evidence, it was incumbent on plaintiff to come forward with admissible evidence upon which a jury could reasonably find that Dr. Ross's alleged acts or omissions had caused her harm. She again offered Dr. Nelson's declaration; it does not do the job.[1/]

B. There Is No Reasonable Basis For Dr. Nelson's Opinion That The Alleged Omissions Of Dr. Ross Caused Plaintiff Harm

. Even if Dr. Nelson were qualified to opine on the standard of care for family doctors (he is not), summary judgment must nonetheless be affirmed because there is no genuine issue of material fact on the issue of causation with respect to Dr. Ross. "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed." (*Lockheed, supra*, 115 Cal.App.4th at p. 563, internal quotations and citations omitted.) When Dr. Nelson's declaration is scrutinized, it is readily apparent that it is divorced from the undisputed evidence in the record and is based on speculation. Thus, it is without evidentiary value. (*Ibid*.; see also *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 ("*Zuckerman*") [opinion based on factors that are "speculative, remote or conjectural" lacks evidentiary value].)

1. There is no evidence plaintiff would have made an appointment with Dr. Ross had he asked her to

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[6/] Dr. Ross objected to Dr. Nelson's opinion regarding causation (e.g., 1 AA 204-205, ¶¶ 4(3), 5) as speculative and lacking in foundation (1 AA 270-272). The trial court overruled the objections; a close reading of the declaration makes clear this ruling was erroneous, as discussed in the next section of this brief. (1 AA 282.)

. Plaintiff's theory of causation, presented through Dr. Nelson's declaration, is that if Dr. Ross had palpated plaintiff's lump in January 2005, the cancer that was not diagnosed until June 2006 would have been diagnosed in 2005 and could have been treated in a less invasive manner. (1 AA 204-207, ¶¶ 5, 10.) This theory is premised on the assumption that if Dr. Ross had asked plaintiff to schedule an appointment, she would have done so. (See 1 AA 204, ¶ 4.) But there is no evidence to support that assumption. When plaintiff testified that no one asked her to schedule an appointment after she reported her lump to Dr. Ross, it would have been easy enough to add that had someone done so, she would have made the appointment after submitted to a breast exam; but she did not so testify. (1 AA 103-104; 1 AA 210-211, ¶¶ 4, 6.)

And the only evidence that does exist supports an inference that indeed she would *not* have made the appointment. It is undisputed that she disregarded the instruction of the radiologist that she follow up with her "physician or other health care provider" after the 2005 mammogram and ultrasound. (1 AA 101.) Plaintiff did not follow up with Dr. Ross, nor did she share her concerns about the lump she had discovered in December 2004 with the ob/gyn who performed her annual breast exams, whom she saw numerous times in 2005, including a visit within two weeks of receiving the January 2005 instructions from the radiologist. (1 AA 94, 108-109; 1 AA 178-188, ¶¶ 14-15, 36-39, 43, 46.) The only reasonable inference from this evidence is that plaintiff had no interest in scheduling an appointment with Dr. Ross, particularly after receiving the results of the 2005 mammogram and ultrasound (see 1 AA 101 [results "normal"]), and

so would not have scheduled an appointment, even if Dr. Ross had asked her to when he referred her for the mammogram and ultrasound.

In sum, Dr. Nelson's theory of causation assumes a fact unsupported by the evidence—that plaintiff would have made an appointment with Dr. Ross, if asked, so that he could palpate her breast and order the tests that purportedly would have resulted in an earlier diagnosis. Thus, in that respect, his declaration is insufficient to raise a triable issue of fact. (See *Jennings*, *supra*, 114 Cal.App.4th at p. 1117 ["an expert's opinion based on assumptions of fact without evidentiary support" is inadmissible]; *Zuckerman*, *supra,* 189 Cal.App.3d at p. 1135 [expert cannot base opinions on assumptions that are not supported by the record].)

2. Dr. Nelson's opinion that if Dr. Ross had palpated plaintiff's breast in 2005, the cancer would have been diagnosed at that time ignores critical undisputed evidence

. Dr. Nelson testified that if Dr. Ross had palpated plaintiff's lump in January 2005 (either before or after the imaging studies), he would have discovered the lump to be from 2 o'clock to 6 o'clock and would have ordered additional tests that probably would have led to a cancer diagnosis. (1 AA 205, ¶ 5.) As a threshold matter, if Dr. Ross had palpated plaintiff's lump before the imaging studies, he presumably would have ordered the tests that in fact he did order without having palpated her breast—the mammogram and ultrasound. Moreover, when opining about Dr. Ross, Dr. Nelson did not identify the

"additional tests" he had in mind.[7/] The declaration is too conclusory on this point to be of any help to a jury and so cannot raise a triable issue of fact regarding causation. (See *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1371, 1373 [opinion unsupported by evidentiary fact in record is mere speculation; speculation is not substantial evidence that would support a verdict].)

Dr. Nelson's opinion assumes the cancer discovered in 2006 was there to be discovered in 2005. This assumption is inconsistent with certain critical undisputed evidence:

- plaintiff's complaint in December 2004 and January 2005 located the lump between 2 o'clock and 3 o'clock (1 AA 71; 1 AA 179, ¶ 18; 1 AA 189, ¶ 50; 1 AA 210, ¶ 5);
- according to the 2005 radiologist's report, although there was an area of asymmetric breast tissue, it had not changed since a 1997 mammogram (1 AA 71; 1 AA 180, ¶ 20);
- the radiology report in 2006 when plaintiff's cancer was diagnosed drew a comparison with the 2005 studies, finding a "new" abnormality in a "different" location (1 AA 72, 75); and
- plaintiff admitted that the lump that had concerned her in December 2004 had subsequently "disappeared" (1 AA 98; 1 AA 186, ¶ 39).

[7/] As mentioned, (§ II.A.1, *supra*) in discussing the conduct of Dr. Yaghmai, the radiologist, Dr. Nelson described imaging studies he faulted Dr. Yaghmai for not performing. (1 AA 205-206, ¶¶ 7, 8.)

There is nothing in Dr. Nelson's declaration to reconcile his theory of causation with any of this evidence and so it is insufficient to raise a triable issue of fact. (See *Jennings, supra*, 114 Cal.App.4th at p. 1121 [expert testimony is inadmissible for failure to reconcile causation theory with certain facts, *i.e.*, for failing to give reasoned explanation for facts seemingly inconsistent with theory].)

3. Dr. Nelson's reliance on a June 2006 biopsy produced conjecture, not a valid admissible opinion on causation

. Dr. Nelson's opinion that plaintiff's cancer would have been diagnosed in January 2005 was "based upon the pathological features of Plaintiff's cancer as found by biopsies in June, 2006. These features are architectural distortion and abnormal calcification . . . And both the mammography and ultrasound [in 2005] showed abnormal areas including architectural distortion, calcifications, and multiple masses" in the left breast. (1 AA 206, ¶ 9.) But, Dr. Nelson's declaration does not specifically link the particular characteristics discovered in 2006 with those evident in 2005, much less reconcile the 2006 findings with the evidence that the "abnormal area" found in 2005 (asymmetric breast tissue) was unchanged from a 1997 mammogram, and that the 2005 radiology report said that the calcifications were "benign appearing" and there were "no radiographic signs of malignancy." (1 AA 71; 1 AA 180 ¶¶ 20-23.)

Most significantly, missing from his declaration is any explanation of how a family physician such as Dr. Ross would have been able to recognize through palpation these abnormalities, identified through biopsy, so that he would know to order more tests despite the negative results of the tests he did order. Indeed,

Dr. Nelson stated that plaintiff had very dense breast tissue, making clear that detection of abnormalities was difficult even by mammography. (1 AA 205, ¶ 7.) Dr. Nelson testified that palpation can provide a physician with "useful information concerning the size, location, and consistency of the lump." (1 AA 204-205, ¶ 5.) But that is too general a statement to explain the purported link between the failure to palpate in 2005 and the pathology of the cancer evident eighteen months later in 2006. Simply saying "as a probability" Dr. Ross would have determined the location of the lump and ordered additional tests (1 AA 205, ¶ 5) does not make it so, absent more facts establishing the necessary link. (See *Bushling, supra*, 117 Cal.App.4th at p. 511 [to declare "more probably than not" events occurred is "no more than speculation if there is no factual basis for those events"]; see also *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108 ["plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation or reasoning"].)

"[T]hat there is some theoretical possibility that the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation" and hence insufficient to raise an issue of fact for a jury. (*Jennings, supra*, 114 Cal.App.4th at p. 1118, emphasis in original.) Here, Dr. Nelson's declaration falls short of establishing even a theoretical possibility that an allegedly negligent act of Dr. Ross was a cause-in-fact of plaintiff's injury. Certainly nothing in it establishes that, more probably than not, if Dr. Ross had palpated plaintiff's left breast in 2005, he would have ordered additional,

presumably more sophisticated, tests that would have detected a malignancy. That opinion is pure speculation and hence without evidentiary value. There is simply no evidence to raise an issue of fact that Dr. Ross's conduct was a cause-in-fact of any harmful delay in plaintiff's diagnosis. Summary judgment should be affirmed on this additional ground.

CONCLUSION

This court should affirm summary judgment in Dr. Ross's favor. Dr. Ross clearly met his evidentiary burden; plaintiff did not. The trial court's order excluding her standard-of-care opinion evidence from an unqualified expert was well within its discretion, and her purported evidence on the issue of causation fell short of the mark. Accordingly,

there was no genuine issue of material fact, and Dr. Ross is entitled to judgment as a matter of law.

Dated: September 22, 2009

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204, subdivisions (c)(1) & (4), I certify that this **RESPONDENT'S BRIEF** contains about 7,728 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: September 22, 2009

_____

Lara M. Krieger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 10, 2009, I served the foregoing document described as **RESPONDENT'S BRIEF** on the parties in this action by serving:

Kathy B. Seuthe, Esq. Law Offices of Kathy B. Seuthe 14431 Ventura Blvd., #567 Sherman Oaks, CA 91423 **Attorneys for Jennifer Gaye Levitt, M.D.** **Plaintiff and appellant**	Clerk to the Honorable Terry Friedman Los Angeles Superior Court SC094422 Santa Monica Court 1725 Main Street Santa Monica, CA 90401-3299
Clerk of the Court California Supreme Court 350 McAllister Street San Francisco, California 94102 [Four (4) Copies]	

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Executed on September 10, 2009, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

Leanna Sun Borys

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