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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

GAIL WADE et al.,

Plaintiffs and Appellants,

v.

TOMASZ PAWLOWSKI,

Defendant and Respondent.

E051333

(Super.Ct.No. CIVVS703994)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Reversed with directions.

Law Offices of Bruce G. Fagel and Associates, Bruce G. Fagel and Richard Akemon for Plaintiffs and Appellants.

Beach | Whitman | Cowdrey, Thomas E. Beach, Andrew K. Whitman, and Sueanne D. Chadbourne for Defendant and Respondent.

We seldom see as clear a case of medical malpractice as this. Timothy Wade had a growth removed from his neck. Dr. Tomasz Pawlowski, a pathologist, examined the

growth and pronounced it an invasive squamous cell carcinoma. Given that diagnosis, the appropriate treatment was to have a doctor look at the site again within a year, which Wade did.

Actually, however, the growth was a malignant melanoma — “probably the most aggressive cancer that exists,” according to one expert witness. The appropriate treatment would have been to yank Wade back into the operating room and to remove a two-centimeter area around the site; this, along with appropriate follow-up, would have prevented a recurrence. However, because of Dr. Pawlowski’s misdiagnosis, this never happened; the melanoma recurred, metastasized, and killed Wade.

Wade’s widow and adult children (the Wades) then filed this action against Dr. Pawlowski. Their experts testified that his misdiagnosis fell below the standard of care and caused Wade’s death. Dr. Pawlowski either did not or could not find a single expert witness (including himself) who was willing to testify otherwise. Thus, the testimony of the Wades’s experts stood uncontradicted.

The trial court nevertheless denied the Wades’s motion for a partial directed verdict on the issues of negligence and causation, saying “Let the jury decide.” The jury, however, after deliberating for just three hours, announced that it was deadlocked. After the trial court instructed it to deliberate further, it requested a readback; and just 20 minutes after the readback, it checked “No” next to the first question on the special verdict form, thus finding that Dr. Pawlowski was not negligent. (Capitalization omitted.)

We will hold that the trial court should have granted the motion for a partial directed verdict. Hence, we will reverse.

## I

### FACTUAL BACKGROUND

Sometime in 2006, Wade noticed a “mole” or growth on his neck. On April 5, 2006, the growth was surgically removed.

Dr. Pawlowski was a pathologist at Victor Valley Hospital. As he admitted at trial, it was his “duty . . . to render a correct pathological diagnosis . . . .”

Dr. Pawlowski had the lab prepare slides from the growth, which he then examined under a microscope. He reported that it was an “invasive moderately differentiated squamous cell carcinoma . . . .”

Wade’s primary care physician, Dr. Victor Sabo, received a copy of Dr. Pawlowski’s report. Dr. Sabo asked Wade to schedule an appointment. Wade declined, saying that he wanted to see a specialist instead.

In February 2007, Wade saw Dr. Monika Curlin, a specialist in dermatology at Kaiser Permanente. She reviewed Dr. Pawlowski’s pathology report. She also examined Wade. She found no evidence of recurrence.

In August 2007, Wade found a bump on his head “very, very close” to the location of the previous growth. The new bump was biopsied and found to be a malignant melanoma. Further examination revealed that it had metastasized, including to Wade’s liver.

In September 2007, a Kaiser pathologist requested Dr. Pawlowski's slides and reexamined them. He concluded that they showed a malignant melanoma. His conclusion was reviewed by the Kaiser pathology department — probably because he was “disagreeing with the diagnosis of an outside pathologist” — but it was found to be correct.

In December 2007, Wade died.

The Wades called Dr. Lawrence Weiss as their expert on pathology. According to Dr. Weiss, the slides showed a malignant melanoma. One diagnostic indicator was that it was pigmented. Although “[m]alignant melanomas can vary in their amount of pigment,” he testified, “[t]his lesion had a lot of pigment.” The pigmentation was visible without a microscope. He added, “[T]he patient, himself, described it as a pigmented lesion, so I think the pathologist should have been able to see the pigment.” Dr. Weiss concluded that Dr. Pawlowski's failure to diagnose a malignant melanoma was below the applicable standard of care.

Dr. Weiss also testified that “melanoma is a much more lethal . . . tumor than squamous cell carcinoma,” even if both tumors are invasive and both are malignant. Nevertheless, if Wade had been diagnosed as having a malignant melanoma, and if he had received appropriate treatment, he would have had a 90 percent chance of surviving for five or even 10 years. Dr. Weiss concluded that “Dr. Pawlowski's failure to comply with the standard of care . . . [was] a significant factor in causing [Wade's] death[.]”

The Wades also called Dr. Joshua Ellenhorn as their expert on surgical oncology. He testified that an invasive squamous cell carcinoma is treated simply by cutting out the entire tumor. After that, the patient should follow up with a primary care physician once a year.

By contrast, a malignant melanoma is treated by cutting out not only the tumor, but also an area at least one or two centimeters around the tumor. “Most of the time,” this will prevent a recurrence. But if this was not done, there would be “a high recurrence rate . . . .” This is because a malignant melanoma is likely to be accompanied by adjacent “satellites” or “islands” of cancer.

In Dr. Ellenhorn’s opinion, the second growth was a recurrence of the original growth, not a “de novo lesion.” Thus, Dr. Ellenhorn — like Dr. Weiss — concluded that Dr. Pawlowski’s failure to diagnose the malignant melanoma caused Wade’s death.

## II

### PROCEDURAL BACKGROUND

The plaintiffs in this action are Wade’s widow, Gail Wade, and his three adult children, Timberlie Warner, Randie Dill, and Shane Wade. They asserted causes of action for wrongful death, survival, and loss of consortium. By the time the case went to trial, the only defendant was Dr. Pawlowski.

Before the jury was instructed, the Wades filed a motion for a partial directed verdict on the issues of negligence and causation. They argued that both negligence and

causation had been established by the testimony of their expert witnesses and that Dr. Pawlowski had not called any expert witnesses to contradict them.

In opposition to the motion, Dr. Pawlowski argued that the expert witnesses had not specified *how* he failed to meet the standard of care. He also argued that evidence of a mistaken diagnosis was not sufficient to prove negligence.

After hearing argument, the trial court denied the motion for a directed verdict.

The jurors were given a special verdict form with seven questions. The first question asked whether Dr. Pawlowski had been negligent. After the jurors had been deliberating for a little over three hours, they sent out a note stating: “We are at an impass[e], we cannot get pas[t] question #1.”

In response, the Wades renewed their motion for a directed verdict. The trial court once again denied the motion.

The trial court then instructed the jurors to continue to deliberate. About 20 minutes later, the jurors requested a readback of Dr. Weiss’s cross-examination testimony. About 20 minutes after receiving the readback, the jury reached a verdict, answering the first question “No.” (Capitalization omitted.) Accordingly, the trial court entered judgment in favor of Dr. Pawlowski and against the Wades.

The Wades filed a motion for judgment notwithstanding the verdict (JNOV). In it, they argued, among other things, that the trial court should have granted their motion for a directed verdict.

The Wades also filed a motion for new trial, arguing, yet again, that they had conclusively proved that Dr. Pawlowski was negligent.

The trial court denied both motions.

### III

#### UNCONTRADICTED EVIDENCE PROVED BOTH NEGLIGENCE AND CAUSATION

The Wades contend that there was uncontradicted evidence that Dr. Pawlowski was negligent and that his negligence caused Wade's death.

This issue arises in no fewer than four procedural contexts:

1. Should the trial court have granted the Wades's motion for a directed verdict?
2. Should the trial court have granted the Wades's motion for JNOV?
3. Should the trial court have granted the Wades's motion for a new trial?
4. Was there sufficient evidence to support the jury's finding that Dr. Pawlowski was not negligent?

In three out of these four contexts, our review is complicated by the fact that the jury was instructed: "You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose it as a basis for your decision. You may believe all, part or none of an expert's testimony." (CACI No. 219.) This instruction was erroneous.<sup>1</sup> As the Use Notes say, "This

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<sup>1</sup> The Wades contend that there were additional instructional errors. In light of our holding and disposition, we need not reach these contentions.

instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if the testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. [Citations.]” (Directions for Use to CACI No. 219 (2011), p. 71.) The Wades, however, did not object to the instruction until after it had already been given. Thus, at least arguably, we would have to view the sufficiency of the evidence through the lens of the erroneous instruction. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674-675; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535.) At a minimum, we would have to carry out additional analysis to explain why we are not so constrained.

The motion for a directed verdict, however, was made *before* the jury was instructed. Indeed, it had to be. (Code Civ. Proc., § 630, subd. (a).) The trial court was required to decide it in light of the law as it actually stood, not the law as it might be stated (or misstated) later in the jury instructions. We therefore review the issue in this context.

“[T]he function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict.’ [Citations.] Accordingly, we examine the record to determine whether the verdict . . . was, as a matter of law, unsupported by substantial evidence. In our examination we apply the well established rule of appellate review by considering the evidence in the light most

favorable to the prevailing party . . . . [Citations.]” (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906-907.)

A. *Dr. Pawlowski’s Breach of the Standard of Care.*

“ . . . “The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.” [Citations.]’ [Citations.] The ‘common knowledge’ exception is principally limited to situations in which the plaintiff can invoke the doctrine of *res ipsa loquitur* . . . . Otherwise, ““expert evidence is conclusive and cannot be disregarded. [Citations.]” [Citation.]” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, fn. omitted.)

Here, Dr. Weiss specifically testified that Dr. Pawlowski’s failure to diagnose a malignant melanoma fell below the applicable standard of care. Dr. Pawlowski did not call any expert witnesses. Moreover, he had not designated any medical experts before trial; the trial court therefore granted the Wades’s motion in limine to preclude Dr. Pawlowski’s witnesses (including Dr. Pawlowski himself) from presenting any expert testimony. Dr. Weiss’s testimony stood uncontradicted.

Dr. Pawlowski argues that Dr. Weiss’s testimony was “conclusory” and that there was no evidence as to *how* he breached the standard of care. That is not so, for two reasons. First, when asked, “[W]hat is the basis of [your] opinion that [the] failure to

diagnose this as a malignant melanoma was below the standard of care?,” Dr. Weiss replied, “[A]n ordinary prudent pathologist would be able to establish a diagnosis of malignant melanoma on these slides.” In other words (to quote Justice Potter Stewart), “I know it when I see it.” And the ordinary prudent pathologist knows it when he or she sees it — at least when it presents as clearly as it did in this case. Dr. Pawlowski saw the same thing, but he failed to recognize it as a malignant melanoma. This was a sufficient explanation of the basis for Dr. Weiss’s opinion.

Second, however, Dr. Weiss actually did give a further basis for his opinion. He explained that a melanoma develops from melanocytes, whereas a squamous cell carcinoma develops from keratinizing cells.<sup>2</sup> “[M]elanocytes . . . are the cells of the skin that make pigment.” Thus, Dr. Weiss testified, the fact that the growth was pigmented should have been a dead giveaway.

Dr. Weiss admitted that sometimes, it can be “hard to tell the difference between malignant melanoma and squamous cell carcinoma.” In such a case, immunostaining — staining combined with antibodies to a particular type of tumor — can help in the diagnosis. In this case, however, the diagnosis was so clear that immunostaining was unnecessary. The Kaiser pathologist had likewise managed to diagnose the malignant melanoma without doing any immunostaining.

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<sup>2</sup> Misspelled by the court reporter as “carotenizing.”

Dr. Weiss did agree that there are “no universal standards for identifying the features of cells looked at under the microscope,” and that “it’s a matter [of] . . . considerable background, training, education, skill and experience . . . .” This, however, did not contradict his conclusion that Dr. Pawlowski fell below the standard of care.<sup>3</sup>

Dr. Pawlowski argues that a mere mistake, standing alone, is not negligence. This is beside the point. There was ample expert testimony that his misdiagnosis was not a mere mistake that any practitioner could have made. Quite the contrary, it was a mistake that fell below the standard of care.

Dr. Pawlowski also argues that, despite the trial court’s ruling barring him from giving expert testimony, the Wades “elicited expert testimony from [him], effectively

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<sup>3</sup> Dr. Weiss also likened one part of a pathologist’s job to “trying to distinguish shades of gray.” At that point, however, he was *not* talking about distinguishing a squamous cell carcinoma from a melanoma; rather, he was talking about distinguishing whether a cancer cell is slightly, moderately, or well differentiated from a normal cell.

In closing argument, counsel for Dr. Pawlowski deliberately obfuscated this point. He equated “differentiation” from normal tissue with the process of “differential diagnosis.” Thus, he suggested that his client’s finding that the supposed squamous cell carcinoma was “moderately differentiated” actually meant that the carcinoma was only moderately distinguishable from a melanoma: “[T]hat’s why I think the testimony you heard about differential diagnosis is so important, because Dr. Pawlowski didn’t try to tell anybody; oh, this is black and white. . . . It says it’s a moderate differentiation. If you want . . . 100 percent positive, you’re not going to get it from my report. My report says it’s only moderately differentiated.” “[A] guy who read the path report could only determine moderately how well differentiated those cells are *from more serious types of cancer.*” (Italics added.)

The Wades’s counsel, however, did not object.

waiving any claim that it was error to allow [him] to provide opinion testimony.” The only support that he cites for this, however, is his testimony that a squamous cell carcinoma is “different” from a malignant melanoma.<sup>4</sup> We may assume, without deciding, that this rather trivial observation rose to the level of expert opinion testimony. Even if so, it did not “open the door” to additional improper expert testimony. “Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.” [Citations.]” (*People v. Williams* (1989) 213 Cal.App.3d 1186, 1189, fn. 1.)

In any event, Dr. Pawlowski never actually gave any other expert opinion testimony. Rather, as he himself asserts, all of his testimony was “proper percipient physician testimony.” He did not testify that he met the standard of care. He also did not testify that his misdiagnosis did not cause Wade’s death.

Dr. Pawlowski, as a nonexpert, could have “contradicted” the experts’ testimony if, and only if, he called into question the factual basis of their opinions. But he did not.

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<sup>4</sup> The entire exchange cited is as follows:

“Q [By the Wade’s counsel:] Is a squamous cell carcinoma the same thing as a malignant melanoma?

“A It is not.

“Q They’re significantly different; correct?

“A They should be different.”

Indeed, he never really explained why he did *not* diagnose a melanoma. All he said on the subject was, “[It d]idn’t appear to me like melanoma . . . .” “[M]y initial gross examination impressions when I look[ed] under the microscope were pretty much consistent based on my past experience with the features of the invasive squamous cell carcinoma.”

He did testify that “[p]igments . . . were not part of my findings, otherwise, I would comment in the gross description.” However, it was essentially undisputed — particularly in light of the Kaiser pathologist’s report — that pigment was present. Indeed, Dr. Weiss testified that it was visible without a microscope.

Dr. Pawlowski also complained about the fact that Victor Valley Hospital did not have immunostaining facilities. He admitted, however, that he could have sent the sample out to another lab for immunostaining. He also admitted that he did *not* believe that “additional immunostaining testing was necessary . . . to make [his] diagnosis.”

We therefore conclude that there was uncontradicted evidence that Dr. Pawlowski breached the standard of care.

*B. Dr. Pawlowski’s Causation of Wade’s Death.*

Dr. Weiss also testified that “. . . Dr. Pawlowski’s failure to comply with the standard of care . . . [was] a significant factor in causing [Wade’s] death[.]”

Dr. Ellenhorn agreed that Dr. Pawlowski’s failure to diagnose the malignant melanoma caused Wade’s death. This expert testimony was both uncontradicted and amply supported.

According to the Wades's experts, an invasive squamous cell carcinoma rarely metastasizes elsewhere. Wade received the appropriate treatment for a squamous cell carcinoma. This required the removal of the entire tumor, which was done. It also required him to follow up with his primary care physician once a year; Wade's visit with Dr. Curlin, in February 2007, constituted "appropriate follow-up treatment . . . ."

By contrast, a malignant melanoma "is probably the most aggressive cancer that exists." Still, it is readily curable if it is diagnosed at an early state. The appropriate treatment is to remove not only the entire tumor, but also a one- to two-centimeter area around the tumor. This is because a malignant melanoma will typically establish "satellites" nearby. When this is done, the likelihood of recurrence is "extremely low."

If Dr. Pawlowski had diagnosed a malignant melanoma, the surgeon would have had him "brought back to the operating room" to remove a larger area. Both of the Wades's experts agreed that, if that had been done, ". . . Mr. Wade [would] be alive today[.]"

Instead, because it was not done, "[t]he tumor . . . recurred locally . . . and had metastasized by . . . August of 2007. The ultimate result. . . of that was that the patient died of malignant melanoma."

Even when an expert testifies to matters other than the standard of care, and hence the jury is not technically bound by the expert's opinion, "a jury may not arbitrarily or unreasonably disregard the testimony of an expert . . . ." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633.) Unless there was substantial evidence that

Dr. Pawlowski's negligence did *not* cause Wade's death, the trial court was required to grant the motion for a directed verdict on this issue. (See *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1282.)

Dr. Pawlowski basically argues that the misdiagnosis was no harm, no foul, because he did at least describe the squamous cell carcinoma as "invasive" — i.e., malignant. The expert testimony, however, was to the contrary.

Dr. Weiss agreed that an "invasive" tumor is one that has "the capacity to metastasize." He also stated that there is a "correlation" between the depth of a skin tumor and whether it is invasive or malignant. Dr. Pawlowski testified that he described the tumor as invasive because it "went below the epidermis and extended into the dermis."

According to the uncontradicted expert testimony, however, a malignant squamous cell carcinoma behaves very differently from a malignant melanoma. A malignant squamous cell carcinoma (at least of the type that Dr. Pawlowski reported) has "a very small chance of metastasis, well under 1 percent." A malignant melanoma, however, metastasizes aggressively. That is precisely *why* it is necessary to remove the area around a malignant melanoma but not around a malignant squamous cell carcinoma. As Dr. Weiss summed it up, "the word 'invasive' doesn't give the full indication of the risk."

We therefore further conclude that there was uncontradicted evidence that Dr. Pawlowski's breach of the standard of care caused Wade's death.

IV

DISPOSITION

The judgment is reversed. The trial court is directed to grant the Wades's motion for a partial directed verdict on the issues of negligence and causation. We leave it up to the trial court to determine, in the first instance and in a manner consistent with this opinion, the scope of any new trial. We award the Wades costs on appeal against Dr. Pawlowski.

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RICHLI  
Acting P.J.

We concur:

MILLER  
J.

CODRINGTON  
J.