CASENOTE: PLAINTIFF'S EXPERT MAY NOT OFFER OPINIONS AT TRIAL AS TO INJURY CAUSATION WHERE SUCH AN OPINION WAS NOT INDICATED IN THE EXPERT DESIGNATION. MERELY STATING EXPERT WILL TESTIFY AS TO "NATURE AND EXTENT" OF INJURIES DOES NOT INCLUDE "CAUSATION"

(CORRECTED)

LAWATYOURFINGERTIPS ®
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Filed 8/16/17 Wolffe v. Guzman CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

PAMELA WOLFFE et al., Plaintiffs and Appellants, v. MARTHA WILCOX GUZMAN et al., Defendants and Respondents.	B268093 (Los Angeles County Super. Ct. No. BC516289)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed.

Law Office of Lee Arter, Lee C. Arter, Steven M. Karp, and Theodore A. Cohen, for Plaintiffs and Appellants.

Ford, Walker, Haggerty & Behar, Jennifer L. Russell and Adam C. Hackett, for Defendant and Respondent Martha Wilcox Guzman.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous; Clasen, Raffalow & Rhoads, Ezra D. Siegel, for Defendants and Respondents Timothy Benedict and Thomas Travis Benedict.

Plaintiff Pamela Wolffe (Wolffe) and her daughter, plaintiff Jzenica Pierson (Pierson), were in two automobile accidents. Defendant Martha Guzman (Guzman) rear-ended Wolffe and Pierson (collectively, plaintiffs) in the first. In the second, defendant Timothy Benedict (Benedict) broadsided plaintiffs while they were driving together two months later. Plaintiffs sued both defendants, and by the time of trial, both defendants had admitted the accidents were their fault; defendants, however, disputed the accidents caused the full range of injuries plaintiffs claimed to have suffered. The trial court barred plaintiffs' neuropsychologist expert witness from opining traumatic brain injury allegedly suffered by Wolffe was caused by the accidents because plaintiffs did not give adequate notice the expert would offer such an opinion and because the expert was in any event incompetent to offer such an opinion. Concluding there was no other substantial evidence that either accident was the cause of Wolffe's asserted traumatic brain injury and lower back injury, the court later granted defendants' motions seeking nonsuit as to those injuries. We are asked to decide whether the trial court abused its discretion in excluding plaintiffs' expert testimony, and whether the trial court properly granted defendants' nonsuit motions.

I. BACKGROUND

A. The First Accident

In the afternoon on March 29, 2013, Wolffe was driving Pierson's Ford F250 pickup truck on her way to the beach. Pierson was in the passenger seat. As Wolffe came to a stop at a traffic light, the truck was rear-ended by a Toyota Prius driven by Martha Guzman (Guzman). Both plaintiffs were taken to the hospital for treatment.

At the hospital, Wolffe was treated in the emergency room by Dr. Oliver Sahagun. Wolffe complained she had a headache, mild nausea, back and neck pain, and pain on the left side of her chest. Dr. Sahagun ordered CT scans of Wolffe's head and neck. The CT scan revealed she had a stroke earlier in her life, but Dr. Sahagun did not observe "any evidence of significant head trauma." Dr. Sahagun diagnosed Wolffe as having a head injury, contusions on her face and scalp, and a sprained neck, but he did not believe her symptoms rose to the level of a concussion and he considered her "neurologically intact." Wolffe received a prescription for motrin and vicodin, along with instructions to follow up with her regular doctor.

B. The Second Accident

The second accident occurred two months later on May 29, 2013. Wolffe and Pierson were on their way to the veterinarian in the same pickup truck, but Pierson was driving this time. As Pierson pulled over to the curb of the street they were travelling on, a vehicle driven by Benedict came out from a side street and struck the truck on the passenger side, right behind the door where Wolffe was seated.

An ambulance transported Wolffe to the hospital after the accident, but there is no evidence in the record of what treatment she received (if any) when she arrived. Pierson did not go to the

hospital that day, but she and her mother (Wolffe) went the following day to see Dr. Phillip Lichtenfeld, a general and family practice doctor to whom they were referred by their attorney.

C. Plaintiffs Sue, and the Case Proceeds to Trial

Two months after the second accident, Wolffe and Pierson sued Guzman and Benedict in a negligence action seeking damages arising from the two accidents. Both defendants subsequently admitted fault for causing their respective accidents, so the only issues that remained for resolution at trial were the nature and extent of plaintiffs' injuries, the question of whether the accidents caused those injuries, and the reasonableness of the damages plaintiffs sought.

The jury heard testimony over the course of eleven days. Both plaintiffs testified about the accidents, their medical histories, their injuries, and the treatment they received. Plaintiffs called as witnesses nine different medical doctors, including a neurosurgeon, a neurologist, a radiologist with expertise in neuroradiology, and an orthopedic surgeon, among others. Also called to testify by plaintiffs was Claude Ruffalo (Ruffalo), Ph.D., a licensed forensic clinical psychologist and neuropsychologist[1] plaintiffs retained to provide expert testimony. Defendants likewise presented expert testimony, including two doctors and a neuropsychologist who had evaluated Wolffe to determine if she

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[1] Neuropsychology, according to Ruffalo, is a "specialty that involves understanding how to evaluate cognitive functioning and relate that to actual brain structure so that one can determine if a person has impairments in their functioning due to actual brain injury or damage of some kind. And to address the kind of diagnostic categories that would be involved in identifying—after having identified certain patterns of impairments on tests and clinical examination and history of the patient."

was psychologically suited to receive a spinal cord stimulator to alleviate her reported back pain.

1. Exclusion of Ruffalo's opinion on causation

During the second day of his testimony, plaintiffs' neuropsychologist Ruffalo opined Wolffe had suffered an injury that "probably involves the orbital frontal lobe areas, and the frontal system [of the brain] more generally." When plaintiffs' counsel asked Ruffalo to opine on the cause of the injury, defendants objected.

Defendants argued (outside the presence of the jury) that permitting Ruffalo to testify concerning the cause of Wolffe's asserted "traumatic brain injury with neurocognitive deficits" would exceed the scope of testimony described in plaintiffs' expert designation and that Ruffalo—who was not a medical doctor or an expert in biomechanics—was not qualified to offer an opinion on causation. Defendants emphasized plaintiffs' notice designating Ruffalo as an expert witness included no reference to causation and instead stated as follows: "[Ruffalo will] testify regarding his care and treatment of Plaintiff, PAMELA WOLFFE[,] his review of [the] medical records, and will express opinions concerning the nature and extent of plaintiff's injuries sustained in the subject accidents, the reasonableness and necessity of his care and treatment, likelihood of need for future care and treatment, cost of same and the limitations to the plaintiff as a result of the related injuries. It is anticipated that Dr. Ruffalo will testify with respect to Plaintiff's medical and psychological condition, including the nature and extent of injuries received in the accidents which are the subject of this lawsuit, including Plaintiff's current condition and prospects for the future."

Plaintiffs countered that testimony about "causation" was necessarily included in "opinions concerning the nature and extent of plaintiff's injuries sustained in the subject accidents." And plaintiffs maintained Ruffalo was qualified to testify con-

cerning the cause of Wolffe's alleged traumatic brain injury because that sort of testimony was based on "what he does as a neuropsychologist."

The trial court ruled Ruffalo would not be permitted to offer an opinion on the cause of Wolffe's alleged traumatic brain injury because the expert designation's use of the phrase "nature and extent" could not be construed to provide adequate notice that Ruffalo would opine on causation. The court further found that even if plaintiffs' expert designation had provided sufficient notice that Ruffalo would testify regarding causation, such testimony still would not be admissible because Ruffalo lacked the medical or biomechanical expertise necessary to be able to testify about whether the automobile accidents caused plaintiffs' injuries. Although the trial court concluded Ruffalo could not opine on whether the accidents caused Wolffe's claimed traumatic brain injury, it did not preclude Ruffalo from testifying about the testing he performed when examining Wolffe, the results of his testing, and "the functional correlation of what he observed through his testing as it relates to [Wolffe]."

2. Benedict's motion for nonsuit

After plaintiffs finished presenting their case, defendant Benedict filed a motion for nonsuit. The motion contended nonsuit was warranted as to certain of plaintiffs' claimed injuries because neither plaintiff provided sufficient evidence to demonstrate the accident for which Benedict had accepted liability was the cause of the injuries. Specifically, Benedict sought nonsuit on plaintiffs' claims for damages related to (1) Wolffe's traumatic brain injury, headaches, and cognitive deficits; (2) Wolffe's lower back injury; (3) Wolffe's injuries to her neck and her middle and upper back; (4) Pierson's back and neck injuries; and (5) Pierson's request for future economic and noneconomic damages.

Plaintiffs argued there was no basis for granting nonsuit against them because the testimony of two of their expert witnesses, Dr. Ian Armstrong, a neurosurgeon, and Dr. Issac Regev, a neurologist, would permit a jury to conclude the accidents caused plaintiffs' asserted injuries. Specifically, plaintiffs emphasized Drs. Armstrong and Regev testified Wolffe sustained concussions in both car accidents, and Dr. Armstrong also testified Wolffe's lower back issues were related to both accidents.

Defendant Benedict, in response, identified other portions of Dr. Armstrong and Dr. Regev's trial testimony that tended to undercut any suggestion that their testimony could support a finding of causation as to the injuries raised in Benedict's nonsuit motion. Dr. Armstrong, for instance, at one point testified: "I don't know if all of [Wolffe's] symptoms today are related to that concussion. It's two or three years out. So there's no way for me to specifically know whether [her] symptoms today have any relation. I think there must be some correlation to having two concussions in someone over 60 in such a short period of time, but I don't know which symptoms are due to concussion and perhaps other issues, which I think the psychologist [i.e., Ruffalo] may speak to."

The trial court granted the nonsuit motion in part and denied it in part. With respect to Wolffe's claims of traumatic brain injury and *lower* back pain, the trial court agreed with Benedict that "there was no expert testimony to establish causation" between those claims and the May 29, 2013, automobile accident involving Benedict. Plaintiffs' counsel conceded Pierson had waived any claim for future economic damages, and so the trial court granted nonsuit on that issue as well.[2] The trial court denied the motion as to both Wolffe and Pierson's claims for neck

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[2] The court did not grant the nonsuit motion as to Pierson's request for future *non*economic damages.

injury and injury to the middle or upper back—those issues the jury would decide.

3. Guzman's motion for nonsuit

The day after the trial court partially granted defendant Benedict's nonsuit motion, defendant Guzman made her own motion for nonsuit. Like Benedict's motion, Guzman's motion asserted neither plaintiff provided sufficient evidence to demonstrate Guzman's negligence caused certain of their injuries. Specifically, Guzman sought nonsuit on damages plaintiffs sought for (1) Wolffe's traumatic brain injury, headaches, and cognitive deficits; (2) Wolffe's lower back injury and corresponding need for surgery; (3) Wolffe's spinal cord stimulator (used to treat her back pain); and (4) Pierson's future economic damages. Guzman's nonsuit motion differed from Benedict's in that Guzman sought nonsuit regarding Wolffe's claim for damages regarding the spinal cord stimulator but did not seek nonsuit regarding Wolffe's injuries to her neck and middle and upper back (the trial court had already denied Benedict's nonsuit motion regarding those injuries).

a. Wolffe's traumatic brain injury

Plaintiffs argued nonsuit should not be granted on the issue of whether the accident involving Guzman caused traumatic brain injury or cognitive deficits (even without testimony on causation from Ruffalo) by again pointing to testimony from Dr. Regev, their neurology expert. Plaintiffs emphasized Dr. Regev testified that Wolffe sustained a concussion in the Guzman car accident: "[Wolffe] has sustained symptoms that fall within the category of concussion-like syndrome. And the main problems she developed after the accident, why I kept seeing her . . . were her headache and anxiety and the . . . cognitive complaints; so it was based on the history I received that at least these three spe-

cific complaints were a direct result of the trauma that occurred March 29, 2013 [i.e., the Guzman accident]."

Counsel for Guzman responded that this concussion-related testimony from Dr. Regev was not equivalent to testimony that the accident caused the specific brain injury plaintiffs alleged. Defense counsel argued: "[C]oncussion does not equal traumatic brain injury that results in neurocognitive deficit. . . . [T]here is no testimony . . . to that effect. And that is the damages that the defendant Guzman is seeking to exclude. . . . [¶] Saying a concussion from both accidents does not meet his burden, saying that there was a concussion and identifying a specific event does not meet his burden." Guzman's attorney did acknowledge Ruffalo had discussed traumatic brain injury with cognitive deficit during his testimony (as opposed to simply a concussion), but counsel reminded the court it had already decided Ruffalo was not qualified to testify as to the cause of the asserted injuries.

The trial court agreed with Guzman, stating the jury could appropriately consider evidence regarding a concussion, but "[t]hat's not the issue. [W]hether or not there was a medical expert who connected the concussion with traumatic brain injury is the issue." The court found nonsuit was warranted as to Wolffe's traumatic brain injury claim because "[n]o expert witness testified to a medical probability a connection between the March 29, 2013 accident and a traumatic brain injury causing cognitive defects."

The parties and trial court were not always consistent in their use of terminology, but as Guzman's attorney discussed, they had established a distinction between concussion and brain injury on the one hand, and *traumatic* brain injury with neurocognitive deficit (or simply "traumatic brain injury") on the other hand. The thrust of defendants' motions for nonsuit sought judgment in their favor as to traumatic brain injury.

b. Wolffe's lower back injuries

Plaintiffs argued nonsuit should not be granted for lack of evidence the Guzman accident caused Wolffe's lower back pain and the need for lumbar surgery by pointing to the testimony of Dr. Kreitenberg, the orthopedic surgeon they retained to testify as an expert. He testified "[b]oth accidents were substantial contributing factors to [Wolffe's] back pain, need for diagnostic testing, and treatment including surgery."

Guzman argued this testimony was insufficient to establish causation because Dr. Kreitenberg, in referring to *both* accidents causing Wolffe's lower back pain and the need for lumbar surgery, had not specifically addressed how the accident for which Guzman was at fault caused the injuries. Plaintiffs argued they were under no obligation to apportion as between the two accidents the share of Wolffe's injuries each caused. The trial court granted nonsuit on this issue, finding "[n]o expert witness testified to a medical probability regarding the connection between the March 29, 2013 accident [involving Guzman] and claims of low back pain and a causal need for surgery."

With respect to the issue of the spinal cord stimulator, Guzman noted plaintiffs' own expert, Dr. Armstrong, testified he would not have recommended use of the device. Plaintiffs asked for additional time to review the trial transcripts to find relevant evidence that could be cited to defeat the nonsuit motion. The trial court denied plaintiffs' request for additional time and granted nonsuit on the issue.

As with Benedict's nonsuit motion, plaintiffs stipulated Pierson made no claim for future economic damages and the trial court granted nonsuit on that issue as well.

4. The impact of the nonsuit motions and the jury's verdict

The trial court's rulings on the two nonsuit motions were implemented via a jury instruction that provided: "Pamela Wolffe's claim for epidural injections, trigger point injections, facet block injections, facet joint injections, spinal cord stimulator, back surgery and brain injury with neurocognitive deficit caused by either accident are no longer an issue in this case. [¶] Plaintiffs Wolffe and Pierson's claim for future economic damages are also no longer issues in this case. [¶] Do not speculate as to why these claims are no longer involved in this case. You should not consider this during your deliberations."

In addition, earlier in the trial, plaintiffs had read to the jury a list of medical bills incurred by Wolffe and Pierson that the parties stipulated were "reasonable medical expenses." The jury was told defendants reserved the right "to offer evidence and argument that said bills and medical treatment for which the bills were generated were not necessary, and that the injuries or alleged injuries for which said treatment was provided were not caused in whole or in part by the accidents alleged in this case." Following the nonsuit motions, the parties revised the medical bills list to remove those items no longer at issue, and plaintiffs read the revised list to the jury.

The jury determined by a vote of nine to three that Guzman's negligence was not a substantial factor in causing injury to Wolffe, and by a vote of ten to two, not a substantial factor in causing injury to Pierson. By similar margins, the jury found Benedict's negligence was not a substantial factor in causing injuries to either Wolffe or Pierson. The trial court entered judgment in favor of defendants, and plaintiffs timely noticed an appeal.

II. DISCUSSION

The trial court did not abuse its discretion in precluding plaintiffs' neuropsychologist Ruffalo from testifying on the cause of Wolffe's alleged traumatic brain injury. Contrary to well-established statutory requirements, plaintiffs' expert witness designation failed to state that Ruffalo would testify on the topic, and that failure was all the more pronounced in light of plaintiffs' other expert disclosures, which did include clear language providing notice those experts might testify regarding injury causation issues. Because we are of the view that the trial court properly precluded the jury from considering testimony from Ruffalo on causation, we review the other expert testimony plaintiffs identify to determine if there was any substantial evidence of causation regarding the brain and lower back injuries Wolffe allegedly suffered, such that it was error to grant defendants' motions for nonsuit as to those injuries. We agree with the trial court that there was not. The few instances where the other experts arguably referenced the issue of causation during their testimony were at best conclusory and do not constitute substantial evidence on which the jury could have made a finding that either accident caused the injuries in question.

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[3] Plaintiffs argue that "[s]ince the nonsuits should not have been granted by the Court . . . [,] the instruction to the jury which eliminated Appellant's claims was also erroneous." We hold the nonsuit motions were properly granted, and this holding likewise disposes of their instructional error argument. For the same reason, we need not separately address Pierson's claim that "[b]y granting the nonsuits as to [Wolffe], and severely limiting the injuries the jury was allowed to consider, [Pierson] was . . . unable to argue and prove her claim of negligent infliction of emotional distress as her remaining injuries were not severe enough."

A. Precluding Ruffalo from Offering Causation Testimony Was Not an Abuse of Discretion

1. Standard of review

We review a trial court's "ruling excluding or admitting expert testimony for abuse of discretion. [Citations.] A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] But the court's discretion is not unlimited, especially when, as here, its exercise implicates a party's ability to present its case. Rather, it must be exercised within the confines of the applicable legal principles." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 [finding trial court properly excluded expert testimony]; *People v. Jones* (2012) 54 Cal.4th 1, 57 [trial court's determination of whether a witness qualifies as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse].)

Plaintiffs state the relevant standard of review is found in *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, which holds that "when a trial court erroneously denies . . . *essential* expert testimony without which a claim cannot be proven, the error is reversible per se because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice." (*Id.* at p. 1114.) That is not the standard of review for determining whether there was error, but rather a rule dictating when an error found to exist should be considered prejudicial, requiring reversal. As explained *post*, we hold the trial court did not err when ruling Ruffalo could not testify concerning causation, and we therefore do not reach the question of whether any error was prejudicial.

2. Plaintiffs' failure to designate Ruffalo to testify on causation was sufficient grounds to exclude his testimony on that topic

When a party designates an expert who has been retained "for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under Section 2034.260." (Code Civ. Proc., § 2034.210, subd. (b).) This declaration must contain among other items a "brief narrative statement of the general substance of the testimony that the expert is expected to give." (§ 2034.260, subd. (c)(2); see also § 2034.300 [authorizing trial courts to exclude expert testimony for failure to comply with section 2034.260].)

"It is well settled that an expert may be precluded from testifying at trial on a subject that was not described in his expert witness declaration." (*DePalma v. Rodriguez* (2007) 151 Cal.App. 4th 159, 164.) As our Supreme Court explained in *Bonds v. Roy* (1999) 20 Cal.4th 140 (*Bonds*), the purpose of expert witness discovery "is to give fair notice of what an expert will say at trial." (*Id.* at p. 146.) Thus, where an expert witness declaration "fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial," a trial court may properly limit the scope of the expert's testimony to the general substance of what was previously described in the expert witness declaration. (*Id.* at p. 149.)

Plaintiffs contend the "plain language" of their expert witness declaration gave sufficient notice that Ruffalo would testify as to the cause of Wolffe's alleged traumatic brain injury. Specifically, plaintiffs quote language from their expert witness decla-

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Undesignated statutory references that follow are to the Code of Civil Procedure.

ration stating Ruffalo "will express opinions concerning the nature and extent of [Wolffe's] injuries sustained in the subject accidents." That language, however, does not suffice to comply with the requirements of the Code of Civil Procedure's expert disclosure statutes, as elucidated in *Bonds*. The terms "nature" and "extent" refer to the type of an injury or its characteristics, as well as perhaps its severity. (Webster's 3d New Internat. Dict. (2002) p. 1507 [defining "nature" as "1 *dial eng*: normal and characteristic quality, strength, vigor, or resiliency . . . 2a: the essential character or constitution of something . . . ; *esp*: the essence or ultimate form of something b: the distinguishing qualities or properties of something"]; Webster's 3d New Internat. Dict. (2002) p. 805 [defining "extent" as "5a(1): the range (as of inclusiveness or application) over which something extends: SCOPE, COMPASS, COMPREHENSIVENESS"].) That, of course, is quite distinct from the concept of causation.

The expert witness designations plaintiffs served for their other expert witnesses only serve to confirm the point, i.e., that "nature and extent" is not a phrase that should be read to include the concept of causation. For seven of their other retained experts, plaintiffs' expert witness designations expressly advised that the witnesses would provide opinions "concerning causation," among other topics. In addition, among the experts plaintiffs disclosed—but did not call to testify at trial—was a witness with expertise in biomechanics and "human factors in accident causation" who would be able to describe the "mechanism for injuries" to plaintiffs and "the potential and likelihood of injuries and symptoms claimed by plaintiffs[ ] as a result of the impacts and forces involved in the auto vs. auto accidents." These other expert witness designations reveal plaintiffs were unmistakably explicit when providing notice that a witness would potentially offer an opinion on the cause of their claimed injuries. No similar language was included in Ruffalo's expert designation,

which evinces an apparently knowing lack of compliance with the Code of Civil Procedure's expert designation rules and highlights the unfairness to defendants if the jury were nevertheless permitted to consider opinion testimony from Ruffalo on causation.[8]

Plaintiffs contend, however, that defendants were neither misled nor prejudiced by the absence of even an oblique reference to causation in Ruffalo's expert designation because he had testified about causation during his deposition. The scope of inquiry at a deposition is, however, broader than what is admissible at trial. In addition, giving testimony at a deposition neither assures its admissibility at trial (§ 2017.010) nor notifies the other side of an intent to offer that testimony at trial.[9] The trial court was thus well-within its discretion in ruling the jury would not be

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[8] Although plaintiffs did not offer two of the witnesses they designated to address causation at trial—and the five who did testify either did not opine on the topic or provided at most conclusory testimony—plaintiffs did not amend Ruffalo's expert declaration pursuant to section 2034.610, subdivision (a)(2) to provide notice he would testify on causation.

[9] Plaintiffs cite several cases in support of their argument, but all are inapposite; the facts of the cited cases reveal no instance in which the proffered expert was precluded from testifying on a topic not identified in the expert witness declaration. (See e.g., *De Palma v. Rodriguez*, *supra*, 151 Cal.App.4th 159 at p. 165 ["there is no issue concerning the scope of the *declaration* by an expert witness. Rather, the issue in the present case concerns the expert's deposition"]; *Brown v. Colm* (1974) 11 Cal.3d 639 [doctor could testify as to medical standard of care at time before doctor practiced medicine]; *Easterby v. Clark* (2009) 171 Cal.App.4th 772 [expert who stated at deposition he had no opinion on causation not precluded from offering trial testimony on causation where party gave written notice three months prior to trial expert intended to expand testimony to causation].)

allowed to consider opinion testimony by Ruffalo as to what caused Wolffe's asserted traumatic brain injury.

B. Nonsuit Was Proper Because There Was No Substantial Evidence Either Accident Caused the Pertinent Damages

Plaintiffs argue defendants' motions for nonsuit should not have been granted because they presented substantial evidence the accidents in question caused the damages that were the subject of the trial court's ruling. Defendants protest that plaintiffs waived their ability to seek review of the trial court's nonsuit rulings because they failed to ask the trial court to allow them to reopen their case to present further evidence on causation. The cases cited by defendants do not support their position on waiver. Although plaintiffs had the right to ask the trial court to reopen the case to present additional evidence (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886), nothing in the case law cited by defendants supports their contention that plaintiffs' failure to make such a request constitutes a waiver of plaintiffs' right to challenge the grant of nonsuit on appeal. We turn, therefore, to the merits of the two nonsuit motions.

1. Standard of review

"On appeal, we review a grant of nonsuit de novo. [Citation.]" (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1168; accord *Legendary Investors Group No. 1, LLC v. Nieman* (2014) 224 Cal.App.4th 1407, 1412.) "In reviewing a grant of nonsuit, the appellate court evaluates the evidence in the light most favorable to the plaintiff. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 [253 Cal.Rptr. 97, 763 P.2d 948] [(*Nally*)].) The judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving all presumptions, inferences and doubts in favor of the

plaintiff. (*Ibid.*)" (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App. 4th 659, 669.)

"Reversal of a judgment of nonsuit is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ . . . .' [Citation.]" (*McNair v. City and County of San Francisco, supra,* 5 Cal.App.5th at pp. 1168-1169.) "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.]" (*Nally*, *supra*, 47 Cal.3d at p. 291.) "Stated otherwise, to reverse the nonsuit, this court must find substantial evidence to support a verdict for appellant. (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 733 [51 Cal.Rptr. 534, 414 P.2d 830].)" (*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 685.) "An expert's opinion is substantial evidence if it has evidentiary support and is accompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 [8 Cal.Rptr.3d 363] [(*Jennings*)].)" (*San Diego Gas & Electric Company v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292.) "If a plaintiff produces no substantial evidence of liability or proximate cause then the granting of a nonsuit is proper." (*Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 520, internal quotation marks and citations omitted.)

2. There was no substantial evidence of causation on the nonsuited issues

"'[I]n order to prove facts sufficient to support a finding of negligence, a plaintiff must show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.'" (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629, quoting *Nally*, *supra*, 47 Cal.3d at p. 292.) As discussed previously, each defen-

dant admitted they had breached their duty of care and caused the respective accidents, but both maintained their negligence was not the cause of the damages alleged by plaintiffs. The trial court granted defendants' motions for nonsuit, limited to the traumatic brain injury and lower back injury Wolffe claimed to have suffered, on the ground there was no substantial evidence either accident was the cause of those injuries.

Plaintiffs argue the trial court erred in granting defendant's nonsuit motions because it "disregarded an abundance of testimony" regarding the cause of both of Wolffe's injuries at issue, namely, "brain injury with still-existing neurocognitive deficits" and lower back injury. As we will explain, plaintiffs' argument as to whether nonsuit was proper as to Wolffe's alleged traumatic brain injury is easily dismissed, and the argument as to Wolffe's lower back injury fails because the testimony plaintiffs identify is not substantial evidence that would support a jury finding of causation; rather, the few snippets of testimony are at best conclusory, merely describing the existence of a symptom or injury and attributing it to the automobile accidents without adequate explanation of how or why that was the case.

a. insufficient evidence of the cause of Wolffe's alleged traumatic brain injury

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Because plaintiffs conceded in the trial court that nonsuit was proper as to any claim by Pierson for future economic damages, and because that was the only ground on which the court granted nonsuit as to plaintiff Pierson, we discuss only the injuries allegedly suffered by Wolffe that were implicated by the court's nonsuit rulings.

Plaintiffs include in their briefs on appeal an argument that there was evidence of causation independent of Ruffalo's excluded testimony. But plaintiffs also concede that "[a]bsent the essential testimony of Dr. Ruffalo regarding causation, Appellant [Wolffe] was unable to establish the essential element of causation of her traumatic brain injury. Without this testimony, a nonsuit on this issue was granted in favor of both Respondents." We agree with and accept the concession, disregarding any inconsistent argument. Because we have held that the exclusion of Ruffalo's testimony on causation was proper, that holding disposes of plaintiffs' nonsuit argument as to Wolffe's traumatic brain injury.

Even if we did not hold plaintiffs to their concession, we have reviewed the testimony of the three expert witnesses that plaintiffs highlight to argue there was substantial evidence on which the jury could rely to find defendants' negligence was the cause of Wolffe's alleged traumatic brain injury. In our judgment, the testimony of Dr. Lichtenfeld, who specializes in general

and family medicine; Dr. Regev, the neurologist; and Ruffalo do not constitute substantial evidence defendants' accidents caused Wolffe's alleged traumatic brain injury with neurocognitive deficit.

b. insufficient evidence of the cause of lower back-related damages

"An opinion as to causation must contain 'a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the negligent act was a cause-in-fact of the plaintiff's injury.' ([*Jennings*, *supra*, 114 Cal.App.4th at p. 1118].)" (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 166 [conclusory expert declaration insufficient to defeat summary judgment on negligence].) Stated differently, "an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to

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Plaintiffs highlight certain statements made by Ruffalo during the first day of his testimony—before defendants objected and the court ruled he would not be permitted to offer an opinion on causation—and they contend those statements can be considered for purposes of determining whether there was substantial evidence the car accidents caused Wolffe's traumatic brain injury. Plaintiffs' argument too narrowly understands the combined effect of the trial court's rulings. The trial court broadly concluded "Dr. Ruffalo may not testify as to causation" and the court gave effect to this ruling, as plaintiffs recognize, by declining to consider any of Ruffalo's testimony in determining defendant's nonsuit motions. Thus, the entirety of Ruffalo's statements on causation were excluded for purposes of deciding the nonsuit motions, and, having concluded that exclusion was proper, we likewise would not consider those statements for purposes of our review.

connect the facts with the ultimate conclusion, does not assist the jury. In this

. . . circumstance, the jury remains unenlightened in how or why the facts *could* support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts *do* support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred." (*Jennings, supra*, at pp. 1117-18 [affirming trial court striking conclusory expert testimony as inadmissible]; accord, *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App. 4th 1029, 1049 [two conclusory declarations insufficient evidence to defeat motion to dismiss].)

Plaintiffs contend two of their experts testified as to the cause of Wolffe's alleged lower back injury: Dr. Kreitenberg, an orthopedic surgeon, and Dr. Armstrong, a neurosurgeon. They contend portions of the testimony from Drs. Kreitenberg and Armstrong sufficiently described how the accidents injured Wolffe's lower back so that it was error to take the issue from the jury.

Dr. Kreitenberg testified he is a board certified orthopedic surgeon who treated Wolffe for the first time following her second accident. Plaintiffs specifically rely on two excerpts of Dr. Kreitenberg's testimony. In the first excerpt, he testified as follows: "Q [by plaintiffs' attorney]: Okay. Insofar as causation issues are concerned regarding Ms. Wolffe, to a reasonable orthopedic probability, what's your opinion as to the effect of the first accident insofar as Ms. Wolffe's back and neck were concerned? [¶ . . . ¶] [A by Dr. Kreitenberg]: Both accidents were substantial contributing factors to her back pain, need for diagnostic testing, and treatment including surgery. [¶] Q: That pretty much sums up all of the rest of the questions I needed to ask." In the second ex-

cerpt, Dr. Kreitenberg stated: "Q [by Guzman's attorney]: You testified to a medical probability—medical certainty that these accidents were the need for surgery; correct? [¶] A [by Dr. Kreitenberg]: Were . . . substantial contribut[ing] factors. Correct."

Despite extensive testimony from Dr. Kreitenberg, which spans over 100 pages of the trial transcript, these are the only portions of his testimony that plaintiffs have cited to contend the jury could have relied on his testimony to find causation. The testimony is deficient, however, because it is conclusory. At no other time during his testimony did Dr. Kreitenberg explain the basis for his conclusion the accidents caused the alleged injuries to Wolffe's lower back or give the jury a basis for reaching that conclusion. This was especially problematic because Dr. Kreitenberg admitted he did not have enough information about Wolffe's preexisting conditions that he acknowledged were unrelated to the accident and might be a factor in the need for lower back surgery. Because Dr. Kreitenberg did not testify as to how he determined Wolffe's alleged lower back injury was caused by the automobile accidents, the jury was not in a position to assess whether the failure to account for the preexisting conditions was relevant.

The testimony from Dr. Armstrong on the cause of Wolffe's alleged lower back injury was also insubstantial. Dr. Armstrong testified he first examined Wolffe about two years after her automobile accidents. He was retained and designated to testify on causation, among other topics.

Dr. Armstrong was asked at trial whether he was of the opinion that Wolffe's lower back was injured in the accident involving defendant Guzman, and he responded "yes." Plaintiffs' counsel then asked him to state the basis for his opinion. Dr. Armstrong acknowledged Wolffe's medical history indicated she previously suffered from back problems (including spondylolisthesis, i.e., slippage of the vertebrae), but he found it significant

that doctors only began prescribing significant treatment for her back trouble after the first car accident. In Dr. Armstrong's words, "[s]o something happened."

Asked if he had an opinion about whether the second accident involving defendant Benedict caused Wolffe's alleged lower back injury, Dr. Armstrong responded, it was "more complex." He noted he reviewed Wolffe's medical history and her reports that her pain had increased. He testified: "[I] think given the mechanism of injury, the accounts, and so forth—again, I'm not testifying about mechanism or forces of injury. But with an increase in pain after an accident. I think there's a contributing factor by that second accident. I don't have a scientific or medical basis, which is my job, to parse out how much is due to the second accident, how much is due to the first. But I would just say the second accident seemed to increase her pain. And after the second accident, she's continued, then, on a continuous track of pain management, epidurals, and leading now to surgery. So I think it's a contributing factor."

On the other hand, Dr. Armstrong agreed that during his exam of Wolffe, he found no objective signs of injury. Dr. Armstrong also agreed when asked to confirm "[t]here has been no objective evidence [from] MRI scans, CT scans of any traumatic injury from either accident." Dr. Armstrong conceded that "forces are very important to causation for an injury," and he made clear he was "not testifying about mechanism or forces of injury." Further, Dr. Armstrong was asked the following questions on cross-examination, and he gave the following answers: "Q [by Guzman's attorney] So, doctor, you're not giving a causation opinion today? [¶] A That's correct. [¶] Q Okay. So your opinions are then not based on what happened in the accident, but what Ms. Wolffe is telling you? [¶] A Yes."

Viewed in full, Dr. Armstrong's testimony might qualify as a scintilla of evidence supporting plaintiffs' causation theory, but

as we have already described, a scintilla is insufficient to defeat nonsuit on the issue of whether the automobile accidents caused Wolffe's alleged lower back injury. A discussion of the facts and holding in *Jennings*, *supra*, 114 Cal.App.4th 1108 illustrates the point.

In *Jennings*, the plaintiff sued his doctors for an abdominal infection he suffered after the doctors negligently left a retractor in his abdominal cavity after surgery. The defendant doctors admitted that leaving the retractor in plaintiff after surgery was negligent, but denied that it caused plaintiff's infection. (*Jennings*, *supra*, 114 Cal.App.4th at p. 1114.) Plaintiff called a qualified medical doctor to testify as to the cause of the infection. The doctor's "explanation was, in essence, that because the retractor was left in place and was probably contaminated, and a nearby area later became infected, '[i]t just sort of makes sense. We have that ribbon retractor and [it's] contaminated, he's infected.'" (*Id.* at p. 1115.) The trial court struck the testimony as inadmissible because it "did not show how the fact the retractor was not removed in the course of the original surgery was causally linked to the subsequent subcutaneous infection." (*Id.* at p. 1116.) The Court of Appeal affirmed, holding the doctor's opinion was "too conclusory to support a jury verdict on causation." (*Id.* at p. 1120.)

Dr. Armstrong's testimony provides little more explanation of causation than did the *Jennings* expert's "it just sort of makes sense." Reduced to its essence, and considering just the portions of Dr. Armstrong's testimony that support plaintiffs' argument on appeal, Dr. Armstrong indicated the accidents must each have caused injury to Wolffe's back simply because she reported experiencing more pain after each accident than she did before each accident. Wolffe's reports were not backed by any objective evidence, as Dr. Armstrong recognized, and he provided no explanation for *how* the accidents actually caused the alleged injury. Dr.

Armstrong's testimony on causation was therefore insubstantial and insufficient to prevent nonsuit on the issue of Wolffe's alleged lower back injury.

DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

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DUNNING, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.