REL: September 4, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

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Kimberlee Spencer, as personal representative of the Estate of James Scott Spencer, deceased

v.

Michael A. Remillard, M.D., and Helena Family Medicine, LLC

Appeal from Shelby Circuit Court (CV-11-900701)

MENDHEIM, Justice.

Kimberlee Spencer ("Kimberlee"), as personal representative of the estate of James Scott Spencer ("Scott"), her deceased husband, appeals from a judgment as a matter of

law entered by the Shelby Circuit Court ("the trial court") at the close of Kimberlee's medical-malpractice case against Michael A. Remillard, M.D., and Helena Family Medicine, LLC, the entity through which Dr. Remillard operates his family-medicine clinic ("the clinic"). We reverse and remand.

I. Facts

A. Dr. Remillard's Patient Care of Scott

In 2001, Scott began seeing Dr. Remillard as his family doctor at the clinic. Dr. Remillard is board certified in the specialty of family-medicine practice and has been practicing medicine since 1997. On a visit in 2006 for a physical, Scott informed Dr. Remillard that his father had been diagnosed with early-stage prostate cancer. Scott had blood work and lab tests done during the 2006 visit, including a PSA test, which is a blood test used to assess a man's risk for developing prostate cancer. At that time, Scott's PSA level was 1.9, which was within the normal range for a man his age, 46 years old. On September 28, 2009, Scott again visited Dr. Remillard. Scott told Dr. Remillard that he had seen some blood in his stool, and Dr. Remillard performed a rectal examination on Scott. Dr. Remillard concluded from that exam

that Scott's prostate was firm and normal, so he recommended that Scott get a colonoscopy to determine if there was a problem with his colon. Scott also had blood work done during the 2009 visit. At that time, Scott's PSA level was 14.3, which Dr. Remillard and Kimberlee's medical experts agreed is an elevated PSA level for a 49-year-old.

A pivotal factual dispute in this case centers on when Dr. Remillard and Helena Family Medicine first informed Scott of the 2009 elevated PSA level. Dr. Remillard testified at trial that the standard practice at the clinic was to have patients who have lab tests taken during a visit fill out a postcard with the patient's mailing address. The patient is told that, if lab-test results come back as normal, the patient will receive the postcard in the mail approximately a week to 10 days later and that, if the lab-test results are in any way abnormal, the patient will receive a telephone call from the clinic. Dr. Remillard further testified that he evaluated Scott's 2009 lab-test results soon after he received them and that he wrote on the lab report that Scott's cholesterol level was normal but that his PSA level was elevated and that he needed to be evaluated by a urologist.

The 2009 lab report contains an undated handwritten note to that effect. Dr. Remillard's certified medical assistant ("CMA"), Joan Ehlman, testified that she received Dr. Remillard's lab-report note and that on October 1, 2009, she telephoned Scott and left a message on his cell-phone voicemail informing him that he had an abnormal lab-test result that he needed to discuss either with her or in a follow-up appointment with Dr. Remillard.[1] A notation written on Scott's lab report by Ehlman states: "10/1/09 - L.M. [left message] to call." Ehlman further testified that the next day she heard a voicemail message left by Scott sometime after 5:00 p.m. on October 1, 2009 -- after close of business at the clinic -- in which he stated that he would make a follow-up appointment with Dr. Remillard.[2] Ehlman made another notation

[1]Ehlman testified that she did not provide Scott's PSA lab-test result in the voicemail because it would violate regulations promulgated pursuant to the Health Insurance Portability and Accountability Act based on concerns as to who may have access to voicemail accounts.

[2]Scott's AT&T cell-phone call log for that period was introduced into evidence. Dr. Remillard and Helena Family Medicine contend that the phone records support Ehlman's testimony about her phone call and Scott's return call. Kimberlee contends that the call log demonstrates that Scott actually talked to a person when he called the clinic.

on Scott's lab report documenting that voicemail: "10-1-09 - pt. [patient] left message - he will RTO [return to office]."

In contrast, Scott testified by video deposition that he called the clinic on October 1, 2009, to inquire about his cholesterol level and that he spoke with an individual who "told [me] that my cholesterol was within acceptable levels and my triglycerides were a little out of whack. But, otherwise, no other information was provided to me. There was no mention of PSA levels." Scott stated that he therefore did not make a follow-up appointment with Dr. Remillard in 2009. Scott testified that his father passed away in April 2010 and that his mother became ill that same year, and so he failed to visit Dr. Remillard in 2010.

Scott next visited Dr. Remillard on April 7, 2011. Scott testified that he made the appointment because he was experiencing discomfort around his bladder area and was having some trouble urinating. During that visit, Dr. Remillard did not tell Scott about his 2009 elevated PSA level, but he did perform a rectal examination, and he determined that Scott's prostate was enlarged. Dr. Remillard diagnosed Scott with benign prostatic hyperplasia, and he prescribed Scott some

medication for the condition. Blood work was also performed on Scott at the April 7, 2011, visit.

Shortly after the April 7, 2011, visit, Scott called the clinic to relate that he was experiencing swelling in his right leg. The clinic scheduled a sonogram for Scott's right leg to determine whether he had a blood clot. On April 21, 2011, Scott returned to the clinic for the sonogram and saw Dr. Remillard. Dr. Remillard told Scott that the sonogram was negative, but he also informed Scott that he had an elevated PSA level and that he was referring Scott to a urologist for an immediate consultation.[3] Scott testified that it was at the April 21, 2011, clinic visit that he first learned that he had had an elevated PSA in 2009.

Scott visited a urologist the following day and was diagnosed with stage IV metastatic prostate cancer: scans showed that the cancer had spread to his lymph nodes and his bones. Scott underwent a variety of treatments over the course of a few years, but he died as a result of the cancer on March 6, 2014.

[3]Scott's PSA level from the blood work done on April 7, 2011, was 131, a dangerously high level.

B. Litigation in the Trial Court

On July 29, 2011, Scott and Kimberlee commenced an action under the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"), against Dr. Remillard and Helena Family Medicine (hereinafter referred to collectively as "the defendants"). They alleged that the defendants failed to inform the Spencers about Scott's 2009 elevated PSA level in a timely fashion and that, if Scott had been timely informed, he could have received treatment for his prostate cancer beginning in 2009. They further alleged that, in 2009, Scott's prostate cancer had not metastasized -- i.e., had not spread beyond his prostate to his bones and lymph nodes -- and thus that, if he had received treatment at that time, his prognosis for a cure of the cancer would have been very good. After Scott's death, Kimberlee amended the complaint to assert claims of wrongful death against the defendants based on the same alleged facts.

The case was initially set to be tried on December 11, 2017. The parties submitted several pretrial motions, including motions in limine. One motion in limine relevant to this appeal is the defendants' motion in limine #24

("MIL #24"), which sought to preclude Kimberlee from "offering any argument, evidence, or testimony regarding any alleged breach of the standard of care relative to Mr. Spencer's April 7, 2011 office visit to" the clinic. The defendants argued that Kimberlee had never alleged that a breach of the standard of care had occurred on April 7, 2011, and thus, they asserted, Kimberlee should not be permitted to insinuate that Dr. Remillard did anything wrong by not informing Scott of his 2009 elevated PSA level during the April 7, 2011, clinic visit. The trial court granted MIL #24, ruling that Kimberlee could elicit testimony from Dr. Remillard as to what did occur during the April 7, 2011, clinic visit but that she could not ask any questions pertaining to what did not happen on that visit -- e.g., that Scott was not told about the elevated 2009 PSA level.

In another motion in limine ("MIL #26"), the defendants sought to prohibit any witness "from offering testimony regarding 'safer' or 'better' approaches or otherwise equating or suggesting that safety defines the standard of care" because, they asserted, the actual standard of care under the AMLA is that a physician must provide "reasonable care." The

trial court granted MIL #26, concluding that the AMLA precluded any use of the term "patient safety."

The defendants filed three motions in limine that collectively sought to preclude Kimberlee's expert, Jennifer Wood, a CMA, from offering testimony concerning the standard of care for a CMA when notifying patients about abnormal lab-test results based on instructions from a supervising physician. The defendants contended that, under the AMLA, Wood was not a "similarly situated health care provider" to Ehlman because, in the year preceding the care at issue (2008-09), Wood had worked as a CMA at a cardiovascular clinic rather than at a family-medicine clinic and, as such, had not communicated an abnormal PSA lab-test result to a patient during that period. The trial court precluded Wood from testifying.

In the trial that began on December 12, 2017, Kimberlee's counsel gave an opening statement in which counsel purportedly violated the trial court's ruling pertaining to MIL #24 by referencing the fact that Dr. Remillard did not tell Scott about the elevated 2009 PSA level during the April 7, 2011, clinic visit. Upon a motion from the defendants, the trial

court granted a mistrial based on the purported violation. The second trial was set for April 8, 2019. At a pretrial hearing for the second trial, the trial court adopted its previous rulings concerning the parties' motions in limine after hearing some additional arguments regarding MIL #24 and the motions respecting CMA Wood.

During the second trial, Kimberlee presented video-deposition testimony from Scott, deposition testimony from AT&T phone analyst Marti Shuper, live testimony from CMA Ehlman, live testimony from Dr. Remillard, live testimony from Kimberlee's medical experts, Dr. Joe Haines and Dr. Joph Steckel, and live testimony from Kimberlee. We will recount the testimony that is pertinent to this appeal.

1. Testimony from Kimberlee's Standard-of-Care Expert

Kimberlee's standard-of-care expert, Dr. Joe Haines, testified that he had practiced in family medicine for 38 years and that he had been board certified in family-medicine practice for the past 30 years. Dr. Haines's deposition testimony and his curriculum vitae revealed that during most of his career he had been in private family-medicine practice, including founding and owning his own

family-medicine practice from 1982 to 1997, and that afterward he had worked in other family-medicine clinics. However, Dr. Haines testified at trial that, in 2005, he was commissioned as a lieutenant commander in the United States Navy Medical Corps and stayed in the service for 11 years. As part of that service, starting in 2007, he entered an aerospace residency program to earn his wings as a flight surgeon. During 2007-08, Dr. Haines did classroom work as part of the aerospace residency program to earn a master's degree in public health, and he did not treat patients during that period. Between 2008 and 2010, Dr. Haines practiced as a resident in the aerospace residency program at the Naval Air Station in Pensacola, Florida. Concerning that period, Dr. Haines testified on cross-examination as follows:

> "Q. And as you said in another deposition, that did not involve family medicine. You have testified to that?
>
> "A. No, that did involve seeing patients, family medicine patients, aerospace medicine patients, you know, anything within my privileges that I had with the Navy."

Also on cross-examination, Dr. Haines further testified that, during his aerospace residency, he "moonlighted" at private clinics outside the Naval station.

"Q. Moonlighting in emergency rooms and things of that sort?

"A. Urgent care centers primarily.

"Q. Urgent care?

"A. Yes.

"Q. Okay. Not a community-based family practice program. You may have brought some of those skills to bear at the urgent care, I'm not arguing that, but as you told me under oath, not in a private community-based family practice clinic, correct, sir?

"A. No. Some of these were hybrids, they were family practice/urgent care. The one in New Bern, North Carolina, for example, you did both family practice and urgent care simultaneously.

"Q. Did you testify in this case that you were not functioning in a private family practice clinic capacity during the time that you were in the aerospace program even though you did moonlight in these urgent care centers?

"A. Well, if I did, the statement -- [what] I meant was I was not operating a private practice on my own.

"....

"Q. So you wouldn't be -- during that period of time that you were in that residency program, you would not have been in the position of being the one to oversee or manage any system of notification of patients on a daily basis, would you?

"A. Correct.

> "Q. All right. And that would be true for the time that you were in the aerospace residency program from '08 to '10 until you finished and went back into private practice?
>
> "A. Yeah, but I had done it my whole career.
>
> "Q. I understand that. And you did it for years, I think, prior to going into the Navy? I'm not --
>
> "Q. Twenty-four years."

(Emphasis added.) Dr. Haines also stated that "I have always practiced family medicine in some capacity" and that, following his service in the military, he returned to private family-medicine practice and continues to practice family medicine.

With respect to the applicable standard of care in this case, Dr. Haines testified on direct examination that, in his opinion, Dr. Remillard had breached the standard of care in two respects.

> "Q. And what breaches did you identify?
>
> "A. Well, very -- very simply, in 2009, a failure to provide Mr. Spencer with the abnormal PSA result of 14.3. And secondly, a failure to refer him to a urologist for further evaluation, diagnosis and treatment of prostate cancer.
>
> "Q. So what -- what did the standard of care require in this case?

> "A. Well, the standard of care required some means of providing the patient with the information, that he had an elevated PSA and, in fact, it was seven times the elevation of what his previous PSA was, which was 1.9. And to be the advocate for that patient, and have him understand that this was a serious problem that could well be cancer, that could shorten his life.
>
> "Q. So why is that the standard of care?
>
> "A. Well, the standard of care is because, you know, as a physician, I have the -- other physicians, we have the knowledge, we understand what an elevated PSA means. And a layman may not. He may not understand what that means. And so standard of care says you -- we have -- we have a duty and responsibility to provide that information to the patient so they can make an informed decision, so they can, you know, realize in their mind, hey, this is important; I need to go, you know, follow through and get the right treatment and find out what the options are."

Dr. Haines expanded on this opinion as follows:

> "Q. ... If Mr. Spencer did, in fact, call the office, Helena Family Medicine, on October 1st, 2009, and leave a voicemail saying that he will return to the office, would the duty to inform Mr. Spencer about that abnormal PSA and the duty to refer him to a urologist, would it end at that point?
>
> "A. No, it would not.
>
> "Q. Why not?
>
> "A. Because the duty doesn't end until the physician knows that the patient has been turned over to the care of the urologist. So -- because if we don't know, then it may require additional phone calls, a

> letter, some sort of proof that he has, in fact, made that appointment and been seen.
>
> "Q. So when does the duty to inform end?
>
> "A. Once the urologist assumes care of the patient."

Concerning the clinic's patient-notification system, Dr. Haines testified that it was Dr. Remillard's responsibility to set up that system and to maintain its suitability for informing patients about lab-test results.

> "Q. ... Were there any other family physicians at Helena Family Medicine, based on your review, in 2008 and 2009 that would have had the responsibility of setting up the communication system for abnormal lab values?
>
> A. No, sir, not that I know of.
>
> Q. So is it -- who would have been responsible for putting that system in place?
>
> A. It was Dr. Remillard's practice, so he would be.
>
> "Q. So would it have been his responsibility to set that system up?
>
> "A. Yes, sir.
>
> "Q. And would it have been his responsibility to maintain that system?
>
> "A. Yes, sir.
>
> "Q. And if any changes needed to be made for that system, whose responsibility would it have been?
>
> "A. It would have been his."

On cross-examination, Dr. Haines was asked more questions about Dr. Remillard's responsibility to inform patients about abnormal lab-test results.

> "Q. Now, you also have said in this case that the opinion that you have expressed in response, for example, to [Kimberlee's counsel's] questions is that you were holding Dr. Remillard to a standard of ensuring or guaranteeing that the communication with the patient about the lab results and the referral to the urologist occurred, right?
>
> "A. Yes, sir.
>
> "Q. All right. The basis of your opinion is that you say that the -- Dr. Remillard fell below the standard of care by not informing the patient of his PSA results and ensuring that he saw a urologist in a timely fashion?
>
> "A. Correct.
>
> "....
>
> "Q. So if it was a -- and I got what you said in response to my questions a few minutes ago. Even if the physician has a reasonable and appropriate method for following up with his patients, a system, that is designed and that would be considered to be a reasonable approach for contacting and notifying patients about abnormalities, it is your position that even if such a reasonable system exists, the doctor is required to guarantee that the patient does get the information?
>
> "A. Yes, he's -- that's his duty, his responsibility. And the problem I had with this system is there was no red flag -- ....
>
> "...."

"Q. Okay. Now, I understand that the position that you take in this case is that even with a reasonable system in place, you're critical of a physician and his practice if that system does not produce the guaranteed result of patient notification of elevated PSA and referral to a urologist, correct?

"A. You're correct.

"Q. That's the standard you're applying, right?

"A. Yes.

"Q. All right.

"A. Absolutely.

"Q. And I'll just put it to you this way, as we did in your deposition. And, you know, I'm really not suggesting that your opinion is any different than what you have said that it is. But if the standard of care, in fact, required something different of Dr. Remillard than what you say, for example, if the standard of care simply requires that a physician such as Dr. Remillard and his practice take reasonable steps in an effort to communicate the abnormal lab results, but if the standard of care does not require the physician to continuously pursue the patient after the patient has agreed to return to the office, then you told me under oath it is true that Dr. Remillard met the standard of care. And if those facts are so, we're still in agreement, aren't we?

"A. Right. And I don't agree with those facts."

(Emphasis added.)

On redirect examination, Kimberlee's counsel had Dr. Haines reiterate his explanation of the standard of care applicable in this case.

> "Q. Doctor, I believe you gave us your definition of the standard of care earlier?
>
> "A. Right.
>
> "Q. Could you restate that, please?
>
> "A. Well, yes, in a nutshell, it's what a reasonable physician would do in treating the same or similar patient in the same or similar circumstances.
>
> "Q. Is that a standard of perfection?
>
> "A. No.
>
> "Q. Is that a standard of guaranteeing outcomes?
>
> "A. No.
>
> "Q. As you sit here today, are you using the standard as you defined it and not as a standard of guaranteeing an outcome of the service?
>
> "A. Right. It's not a guarantee of anything.
>
> "....
>
> "Q. ... What did the standard of care require of Dr. Remillard?
>
> "A. It required that he notify the patient of the elevated PSA and help him to understand the significance of that elevated PSA, and that it could shorten his life, that it could cause prostate cancer -- I mean it could be prostate cancer. Then his obligation under the standard of care was for

> him to refer that patient to the urologist. And then finally to follow up to be sure that that appointment with the urologist was made.
>
> "It's very simple. There's nothing complicated here at all.
>
> "....
>
> "Q. The criticisms that you have expressed here today in regard to the standard of care and the opinions that you have expressed, are those based on a reasonable standard?
>
> "A. Yes, sir."

2. Testimony from Kimberlee's Causation Expert

Kimberlee's causation expert, Dr. Joph Steckel, testified that he is a board-certified urologist with a subspecialty in oncology and that he has been in practice for 24 years. Dr. Steckel testified on direct examination that "close to sixty percent of all oncology patients that I see are prostate cancer patients." Specifically concerning Scott, Dr. Steckel testified that, "more probably than not," he had cancer in his prostate in 2009 because "[t]his is a man who is forty-nine years old whose PSA should be under two and a half and it is 14.3 with a family history of prostate cancer." Dr. Steckel then explained how urologists evaluate the range of PSA test scores.

> "Q. Now, in regard to the PSA as a risk assessment tool, are there any ranges of score where a urological oncologist would have more concern about the character and potential spread of the cancer?
>
> "A. Yes, absolutely.
>
> "Q. Can you talk to the Ladies and Gentlemen of the Jury about that?
>
> "A, We tend -- in PSAs less than 10, the chance of having metastatic spread with any type of prostate cancer is very, very low, almost to the point that we are -- we don't do bone scans or CAT scans in men who are diagnosed with prostate cancer provided their PSA level is less than 10.
>
> "Now, greater than 20, there's a chance that there's metastatic spread, in which case you definitely would do an evaluation to make sure that the bones or the lymph nodes are not involved. Between 10 and 20 is sort of the gray zone where there's a real but not a very high chance of probability that the prostate cancer has spread either to the bones or lymph nodes.
>
> "Under 10 it is unnecessary to do any scans because statistically we know that the chance of metastatic spread of that number is incredibly low."

(Emphasis added.)

Dr. Steckel then provided his medical opinion as to whether, in 2009, Scott's prostate cancer had spread beyond his prostate to his bones or his lymph nodes. This portion of Dr. Steckel's testimony is replete with objections from

counsel for the defendants, most of which were sustained by the trial court, but some which were not.

> "Q. Now, in regard specifically to your evaluation of whether or not Mr. Spencer had bone metastasis in October of 2009, is your review of the medical record, all the information about the cancer that was later diagnosed and based on your experience and training and knowledge of the literature, did you form an opinion as to the probability as to whether or not in October of 2009 Mr. Spencer's cancer had already metastasized to the bone?
>
> "MR. WRIGHT: We object to the question as calling for speculation and lack of foundation.
>
> "THE COURT: Overruled. You can go ahead.
>
> "Q. ... You can answer.
>
> "A. Yes, I have an opinion.
>
> "Q. And what is that opinion?
>
> "MR. WRIGHT: Same objection, same grounds.
>
> "THE COURT: Overruled.
>
> "A. My opinion is that most likely to a greater degree of certainty that the cancer was localized to his prostate given his PSA of 14 and his normal digital exam by the doctor's assessment.
>
> "....
>
> "Q. ... What is your understanding, Doctor, in a general sense as to what the rate of bony metastasis is in patients regarding their PSA levels?
>
> "...."

> "A. As I said before, the rate of bony metastasis in men with PSAs less than 10 is essentially zero, which is why we do not do bone scans once men are diagnosed with prostate cancers and their PSAs are below 10. We know that the rate of metastasis in patients -- bony metastasis patients with PSAs greater than 20 can be up to about twenty or thirty percent.
>
> "So somewhere between twenty and thirty percent and zero is where we fall in with this case because his PSA was 14.3. So if I were to ask -- if I were to give you a number, the probability of his having bony metastasis with a PSA --"

(Emphasis added.) At this point, counsel for the defendants interrupted and objected to Dr. Steckel's attempting to give a percentage, and the trial court sustained the objection. Kimberlee's counsel then continued with questioning about whether Scott's cancer was localized to his prostate in 2009.

> "Q. In regard to your evaluation of this case and in regard to the knowledge that you have formed over the years in taking care of these patients and looking at all of the information that was available to you, is it your opinion that Mr. Spencer had a treatable prostate cancer in 2009?
>
> "MR. WRIGHT: Same objection. Lack of foundation.
>
> "THE COURT: I am going to let him answer that one.
>
> "A. I can answer?
>
> "THE COURT: Yes.
>
> "A. Yes, I think he had a treatable prostate cancer when his PSA was 14.3, absolutely.

"Q. ... And can you describe for the Ladies and Gentlemen of the Jury what a urological surgeon would have done, what the standard of care required a urological surgeon to have done in assessing and treating [Scott] if he had been evaluated in October of 2009?

"....

"A. Absolutely. So a forty-nine-year-old man with a family history of prostate cancer with a PSA of 14.3 absolutely would have required a transrectal ultrasound guided by a --

"....

"A. A transrectal ultrasound-guided biopsy of the prostate. In other words, he needed his prostate biopsied to rule out a malignancy.

"....

"Q. ... And if indeed his biopsy was positive, what would the standard of care require the urological surgeon to do at that point?

"A. Well, with a positive biopsy, then you have to ask yourself is the cancer outside the prostate or contained. So he would have had a bone scan and a CAT scan, which gets us back to what we discussed before. In the absence of any metastatic disease in a patient like this, he would have been offered and should have certainly opted for definitive care and treatment for his prostate cancer.

"Q. When you say 'definitive care,' what options did that include?

"A. Either surgery, which would be complete removal of the prostate and the lymph nodes, or radiation therapy, which would be having him see a radiation

> oncologist. And they would use their devices to radiate the prostate and the surrounding tissue.
>
> "....
>
> "Q. Dr. Steckel, in regard to [Scott], in October of 2009, based on the factual knowledge that included that his PSA was 14.3, correct?
>
> "A. Uh-huh, correct.
>
> "Q. And he had a Gleason score of 4-5, which was aggressive, correct?[4]
>
> "A. Correct.
>
> "Q. The fact that he had a normal prostate exam, the fact that he had a father with prostate cancer, the fact that he had no symptoms from his prostate at that time, the fact that his prior PSA in 2006 had been 1.9, taking all that information into account, you've described to us that a urologist would then perform a biopsy, and it was your opinion that the biopsy at this time would more likely than not show a cancer of the prostate, correct?
>
> "A. Correct.
>
> "Q. Taking all that into account, if a bone scan had been done, hypothetically, at that time in October of 2009 and a CT scan had been done to look for lymph nodes, and if those two tests were both negative, do you have an opinion in regard to his

---

[4]Earlier in his testimony, Dr. Steckel had explained that "Gleason scoring is a scoring system, based on the histologic, meaning for all purposes pathologic, features of the cancer cells from a biopsy." The first Gleason number rates the most prominent cell configuration and the second Gleason number rates the less prominent cells biopsied. The combined score indicates the type of cancer cells in the patient's body, i.e., the aggressiveness of the cancer.

> prognosis, if he had undergone either a radical prostatectomy or radiation treatment of his prostate, do you have an opinion regarding his prognosis?
>
> "....
>
> A. I think it is more likely than not his prostate cancer would have been confined to his prostate and he had a good chance of cure.
>
> "[Trial Court again sustains an objection with respect to Dr. Steckel's giving a percentage on Scott's chances of a cure if treatment had been provided in 2009].
>
> "Q. Is it your opinion that the -- that you just shared with us in regard that the cancer would more likely than not be limited to the prostate and you say he had a good prognosis, is that opinion consistent with your opinion more probable than not he would have been cured of the prostate cancer?
>
> "A. Correct.
>
> "MR. WRIGHT: Same objection.
>
> "THE COURT: More probably than not but not the percentage.
>
> "A. More probably than not."

(Emphasis added.)

On cross-examination, counsel for the defendants probed Dr. Steckel's testimony that, in his opinion, Scott's cancer was localized in his prostate in 2009. In doing so, for

certain questions, counsel quoted from Dr. Steckel's deposition.

> "Q. ... Now, what you told me when I took your deposition was you could not rule out the presence of bone metastasis for Mr. Spencer in 2009 with a PSA of 14 and what we know to be a Gleason 9, 4 plus 5 Gleason 9 score. Do you remember telling me that?
>
> "A. You can't rely -- without a bone scan, you can't rule out the presence of bony metastasis. I agree.
>
> "....
>
> "Q. Is what I just asked you, that it is just as likely that he did have metastatic bone cancer as he didn't in 2009?
>
> "A. In 2009 when his PSA was 14.3, if he were to have metastatic disease, it is likely that he could have had it to his bones, to his lymph nodes. And it is just as likely his disease could have been totally localized to his prostate, totally localized to the prostate without any spread.
>
> "And the only way you are going to know that is by doing your tests to determine. The fact that tests were not done, you are only guessing as to where the tumor possibly could be.
>
> "....
>
> "Q. ... My question is, 'You, Dr. Steckel, cannot on the basis of any evidence that we have' -- did I read that part right so far?
>
> "A. So far.
>
> "Q. -- 'any evidence that we have rules out the possibility that Mr. Spencer had bony metastasis' -- meaning spread to the bone, right?

"A. Correct.

"Q. -- 'with a PSA of 14 and what we know was a Gleason 4-5 tumor in 2009, and that is a true statement.' And his answer -- your answer, I'm sorry, 'That is true because we don't have the bone scan or CAT scan at that point.' And that is part of what you just said, isn't it?

"A. Correct. If you don't have the tests, you don't know what the results are.

"Q. Let's read on, 'It would be speculation to say that he didn't, and you would tell me that it would be speculation to say that he did. It would be equal. Am I right?' And you said, 'Well, equal is saying it is a coin toss whether he had it.'

"And I said, question: 'The point is, we don't have any evidence that gives us anything but a coin toss.' And what was your answer?

"A. I said 'right.'

"....

"Q. And you have testified that with earlier diagnosis, there were some approaches to Mr. Spencer's workup that, in your opinion, if evaluation and potential treatment had occurred then, those approaches to his treatment could have made a difference in his outcome. You have testified to that, haven't you?

"A. I agree.

"Q. And then your testimony was it could have made a difference in the outcome and equally it could not have made any difference in the outcome. That is what you said under oath, isn't it?

"A. Yes.

"Q. All right. And you stand by that testimony, don't you?

"A. Right.

"Q. You have said also on this business of what you mentioned after -- right before lunch when I had asked you about metastatic cancer being uncurable, you said well, it is incurable but it might be controlled with treatment, right?

"A. Controlled, correct.

"Q. Controlled. And so I asked you in your deposition and I am now asking you to acknowledge this because you have stated and you do not know and you cannot say that Mr. Spencer would have been in a group of patients who might have been controlled by earlier therapy or one that might have been unaffected by the treatment. That is what you said when I took your deposition, isn't it?

"A. Correct.

"Q. As you told me, that would be speculation on your part to say that he would have been controlled.

"A. All we can say is in populations what would be the chances that he'd be more likely controlled or not likely controlled. But for the individual patient, you are right, that would be speculation.

"Q. Right. In Mr. Spencer's case, that is speculation?

A. In the individual patient, it is speculation.

"....

"Q. All right. For example, you said that with a known Gleason 9 and a PSA of 14, you have made the

> comment, indulging speculation, as you admitted, that you felt the tumor was confined to the prostate. That is what you said?
>
> "A. Correct.
>
> Q. All right. And you also told me, when I asked you about that in your deposition, there's no scientific study or research that you could point to to support that statement.
>
> "A. Correct.
>
> "Q. All right. No studies that you can point to that would suggest that the -- that high grade aggressive tumors in a young man of his age are confined to the prostate with just a normal digital examination and the PSA of 14?
>
> "A. Other than studies that have shown that men who have PSAs of 14, there's a twenty percent chance that they will require adjunctive treatment afterwards with an eighty percent chance of cure."

(Emphasis added.)

3. Disposition by the Trial Court

At the close of Kimberlee's case, the defendants moved for a judgment as a matter of law ("JML"). Kimberlee filed a response in opposition to the motion. The trial court held a hearing on the motion following the conclusion of Kimberlee's presentation of her case on April 11, 2019. The trial court then orally announced that it was granting the defendants' motion for a JML. The trial court explained, in part:

> "I will tell you that it is somewhat troubling to me, some of the testimony given by the experts, when it came to speculation and coin tosses and that kind of thing. And in viewing this case in the light most favorable to the plaintiff, as [counsel for Kimberlee] has stated, in reaching my decision, that is what I am going to do, is in light of the most favorable to the plaintiff.
>
> "However, after careful consideration of the law and applying the testimony to the law, it is my opinion that the defendants in this matter are entitled to a judgment as a matter of law in this case."

On April 12, 2019, the trial court entered a written order granting the defendants' motion for a JML. On April 30, 2019, the trial court entered a "Memorandum Opinion and Order" explaining its decision. In the April 30, 2019, order, the trial court noted the arguments of the defendants pertaining both to Dr. Haines and to Dr. Steckel, and it quoted some opinions of this Court addressing the issue of causation in an AMLA action. The trial court then concluded:

> "After closely reviewing the applicable case law and trial testimony of Dr. Haines and Dr. Steckel, and upon careful consideration of the oral arguments and extensive briefing submitted by both sides, the Court finds that the Motion for Judgment as a Matter of Law filed by the defendants is well taken and due to be granted."

II. Standards of Review

This Court's standard of review for a ruling on a motion for a JML is de novo:

> "'"When reviewing a ruling on a motion for a [judgment as a matter of law], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a [judgment as a matter of law]. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a [judgment as a matter of law]. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a [judgment as a matter of law], this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable

> inferences as the jury would have been free to draw. Id."'"

Thompson v. Patton, 6 So. 3d 1129, 1133 (Ala. 2008) (quoting Leiser v. Raymond R. Fletcher, M.D., P.C., 978 So. 2d 700, 705-06 (Ala. 2007), quoting in turn Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003)).

> "In reviewing a ruling on the admissibility of evidence, including expert testimony, the standard is whether the trial court exceeded its discretion in excluding the evidence. In Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 71 (Ala. 2001), this Court stated: 'When evidentiary rulings of the trial court are reviewed on appeal, "rulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion."' (Quoting Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc., 723 So. 2d 29, 32 (Ala. 1998).)"

Swanstrom v. Teledyne Cont'l Motors, Inc., 43 So. 3d 564, 574 (Ala. 2009).

III. Analysis

Kimberlee raises several issues in this appeal, but the two most pressing issues concern the qualifications of her standard-of-care expert and the admissibility of testimony presented by her experts on the standard of care and causation because those are indispensable elements of an action under

the AMLA. See, e.g., Kraselsky v. Calderwood, 166 So. 3d 115, 118 (Ala. 2014) ("To prevail in a medical-malpractice action under the [AMLA], a plaintiff must establish 1) the appropriate standard of care, 2) that the defendant health-care provider breached that standard of care, and 3) a proximate causal connection between the health-care provider's alleged breach and the identified injury."). Thus, we will first address the arguments concerning those two experts. Although our conclusions as to those issues require reversal of the trial court's judgment, for the sake of judicial economy we will also analyze the trial court's rulings with respect to the defendants' motions in limine that Kimberlee challenges in this appeal. See, e.g., Ex parte Johnson, 620 So. 2d 709, 712 (Ala. 1993) (explaining that, "[a]lthough we reverse for the reasons stated above, for the sake of judicial economy we address two other issues raised by Johnson, which are almost certain to come up again on remand for a new trial").

A. Issues Concerning Dr. Haines's Testimony

1. Dr. Haines's Qualifications as an Expert Witness

Section 6-5-548(a), Ala. Code 1975, provides:

> "(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case."

(Emphasis added.) Because Dr. Remillard is board certified in a medical specialty, family-medicine practice, the standard for what constitutes a "similarly situated health care provider" is further defined by § 6-5-548(c):

> "(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a 'similarly situated health care provider' is one who meets all of the following requirements:
>
> > "(1) Is licensed by the appropriate regulatory board or agency of this or some other state.
> >
> > "(2) Is trained and experienced in the same specialty.
> >
> > "(3) Is certified by an appropriate American board in the same specialty.
> >
> > "(4) Has practiced in this specialty during the year preceding the date that the

> alleged breach of the standard of care occurred."

(Emphasis added.) Section 6-5-548(e) adds that "[a] health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a 'similarly situated health care provider' as defined above."

As is recounted in the rendition of the facts, Kimberlee's standard-of-care expert, Dr. Haines, like Dr. Remillard, is board certified in family-medicine practice. He had his own private family-medicine practice for 14 years and practiced in other similar clinics for a few years after that. However, Dr. Haines testified that, in the year preceding the alleged breach, he was in the Navy's aerospace residency program at the Naval Air Station in Pensacola, Florida. Dr. Haines explained that, as part of the aerospace residency program, he saw as patients the pilots in the program and their family members. He also testified that he "moonlighted" at urgent-care clinics and at some hybrid urgent-care/family-medicine establishments in his off-duty hours during the period when he was in the residency program. Dr. Haines admitted that during this period he did not oversee

a patient-notification system, but, he said, he had done so for much of his career.

As they did in the trial court, the defendants argue that Dr. Haines "was not qualified to define the standard of care applicable to Dr. Remillard ... because he did not practice as a board-certified family practice physician in a family practice clinic overseeing and managing patient notification systems in the year preceding the alleged breach." The defendants' brief, pp. 53-54.

Kimberlee contends that this is "a hyper-technical analysis of the similarly-situated rule. ... The requirement under § 6-5-548 is that Dr. Haines had to practice family medicine during the year preceding alleged breach of the standard of care. There is no requirement that his private practice must be identical to Dr. Remillard's in each and every aspect." Kimberlee's brief, pp. 36-37.

In sum, the crux of the parties' dispute is whether Dr. Haines was unqualified to testify about the applicable standard of care because of two facts: (1) Dr. Haines was not rendering patient care in medical practice identical to that of Dr. Remillard between 2008 and 2009 because Dr. Haines was

practicing at the Naval Air Station in Pensacola and not at a private-practice clinic and (2) Dr. Haines did not oversee a patient-notification system during that year. In the trial court and on appeal, the defendants have emphasized two cases in support of this position: Carraway v. Kurtts, 987 So. 2d 512 (Ala. 2007) ("Carraway"), and Holcomb v. Carraway, 945 So. 2d 1009, 1020–21 (Ala. 2006) ("Holcomb").

In Carraway, the Court concluded that the plaintiff's proffered medical expert, Dr. Toni Cutson, was not qualified under § 6-5-548(c) because the admissible evidence before the trial court did not establish that Dr. Cutson was board certified in the same specialty as the defendant or that she had practiced in that specialty during the year preceding the alleged breach of the standard of care. See Carraway, 987 So. 2d at 518 ("The affidavit does not state whether Dr. Cutson is a board-certified family practitioner; neither does it state whether Dr. Cutson had practiced in the same specialty as Dr. Kurtts during the year preceding the alleged breach."). The Carraway Court went on to discuss whether, if inadmissible evidence was considered, Dr. Cutson would be qualified under § 6-5-548(c). The Court noted that the

curriculum vitae of Dr. Cutson indicated that, like the defendant, she was a board-certified family practitioner.

> "[H]owever, none of the professional appointments listed on Dr. Cutson's curriculum vitae indicate that she practiced in the same general area of practice at the time of the hearing or during the year preceding the alleged breach, as is required of similarly situated physicians. § 6-5-548(c)(4), Ala. Code 1975. Only those positions Dr. Cutson held for the year preceding May through November 2003 are relevant to whether Dr. Cutson qualifies as a similarly situated physician. See § 6-5-548(c)(4), Ala. Code 1975. Dr. Cutson's curriculum vitae states that during the relevant period she served as an 'Assistant Medical Director,' a 'Staff Physician, Geriatric Research, Education and Clinical Center,' a 'Staff Physician, Spinal Cord Injury & Dysfunction Team,' a 'Medical Director of the Palliative Care Consult Team,' and a 'Physician member of VISN 6 VHA Palliative Care Team.' Dr. Kurtts is not accused of breaching the standard of care applicable to a medical director, a researcher in geriatrics, a spinal-cord specialist, or a palliative-care specialist, nor do any of these positions affirmatively indicate that Dr. Cutson was involved in the specialty of family practice during the relevant period. To conclude that she was would require us to speculate as to what she might have been doing as a medical director or researcher or in her other specialties, something that she could easily have made clear in her affidavit if she had in fact been actively engaged in family-practice medicine at the relevant time. Therefore, even if we were to consider the curriculum vitae, it is not apparent from the curriculum vitae that the positions listed are sufficient to qualify Dr. Cutson as a similarly situated physician."

Carraway, 987 So. 2d at 519 (footnote omitted; emphasis added). Although the defendants do not expressly say so, presumably they believe there is a parallel between the Carraway Court's conclusion that Dr. Cutson had not been "actively engaged in family-practice medicine at the relevant time," id., and Dr. Haines's position in the military in 2008-09.

However, there are several ways in which Carraway is distinguishable from this case. First, the Carraway Court's primary conclusion was that no admissible evidence indicated that Dr. Cutson was board certified in family medicine. No such impediment exists here, because the defendants readily concede that Dr. Haines is board certified in family-medicine practice. Second, the Carraway Court went on to discuss -- as dictum -- the fact that "none of the professional appointments listed on Dr. Cutson's curriculum vitae indicate that she practiced in the same general area of practice at the time of the hearing or during the year preceding the alleged breach, as is required of similarly situated physicians. § 6-5-548(c)(4), Ala. Code 1975." Carraway, 987 So. 2d at 519 (emphasis added). The same cannot be said of Dr. Haines.

Dr. Haines plainly testified that he was actively engaged in family-medicine practice in 2008-09, both on the Naval base and during his moonlighting while off-duty. Carraway offers no support for the proposition that the specialty of family-medicine practice means being engaged in a family-medicine practice identical to that of the defendant; the positions held by Dr. Cutson in Carraway were, on their face, clearly different from the role of a family-medicine practitioner.

In Holcomb, the plaintiff commenced an action against multiple doctors for a failure to diagnose her with breast cancer in a timely fashion. Three of the defendants were radiologists who, the plaintiff alleged, negligently misread her mammograms. The plaintiff's proffered expert, like those defendants, was board certified in radiology, and those defendants conceded that the plaintiff's expert "meets the technical requirements of § 6-5-548(c) ...." 945 So. 2d at 1015. However, the defendant radiologists argued that the trial court had properly excluded the plaintiff's expert from testifying as a "similarly situated health care provider" because he had not performed or interpreted mammograms during

the relevant period.[5] Thus, the defendant radiologists contended that the plaintiff's expert "could not have been familiar with the standard of care applicable to a radiologist performing mammograms during the 12-month period preceding their alleged breaches," 945 So. 2d at 1016, and therefore, they asserted, the trial court had discretion under Rule 702, Ala. R. Evid., to exclude testimony from the plaintiff's expert. The Holcomb Court engaged in an extensive analysis of the language used in § 6-5-548 and concluded that the statute did not inhibit the discretion a trial court otherwise possessed under the Rules of Evidence to exclude evidence if the trial court believed it would not "assist the trier of fact." Rule 702(a), Ala. R. Evid. The Holcomb Court therefore concluded that the trial court did not exceed its discretion in excluding the testimony of the plaintiff's expert.

The defendants contend that, as in Holcomb, "the trial court was well within its discretion to determine testimony from Dr. Haines regarding Dr. Remillard's care would not have

[5]The plaintiff's expert testified that "the earliest breach by any of the defendant radiologists occurred in June 1997." Holcomb, 945 So. 2d at 1015. Thus, the relevant period was June 1996 to June 1997.

assisted the trier of fact because Dr. Haines was not qualified to define or testify as to any alleged deviation from the standard of care." The defendants' brief, p. 61. Again, the defendants argue that Dr. Haines was unqualified because in 2008-09 he was not engaged in a private family-medicine practice and was not overseeing a patient-notification system.

But, as in Carraway, Holcomb presented a situation in which the plaintiff's proffered expert had not engaged at all in the practices at issue, i.e., performing and reading mammograms, for at least three or four years up to the relevant period. In fact, the plaintiff's expert admitted that he had "consider[ed] himself 'semi-retired to his office since 1996 or '97.'" Holcomb, 945 So. 2d at 1016 n.6. In contrast, Dr. Haines testified that he has "always practiced family medicine in some capacity" and that he continued to do so up to the time of trial. Thus, Holcomb, like Carraway, does not illuminate the specific issue here of what constitutes "practic[ing] in this specialty [of family-medicine practice] during the year preceding the date that the

alleged breach of the standard of care occurred." § 6-5-548(c)(4).

There is no dispute that Dr. Haines was "trained and experienced in the same specialty" as Dr. Remillard and that he was "certified by an appropriate American board in the same specialty" as Dr. Remillard. § 6-5-548(c)(2) & (3). That "same speciality" was family-medicine practice. Given that context, we conclude that the requirement in § 6-5-548(c)(4) that an expert must have "practiced in this specialty" in the year preceding the alleged breach of the standard of care refers to the actual practice of the specialty at issue rather than the exact setting in which the defendant doctor practices the speciality. Cf. Medlin v. Crosby, 583 So. 2d 1290, 1296 (Ala. 1991) (noting that § 6-5-548 "does not specify the amount of time spent practicing or the nature and quality of the practice"). Even though Dr. Haines's family-medicine-practice experience in 2008-09 was not "in a community based family practice clinic," the defendants' brief, p. 31, Dr. Haines testified that he was still practicing family medicine in 2008-09. Therefore, we believe that Dr. Haines could assist the jury with the standard of care applicable to

a family-medicine practitioner who receives a patient's abnormal PSA lab-test result.

Moreover, the defendants repeatedly conflate whether Dr. Haines was overseeing a patient-notification system in 2008-09 with whether he was "practic[ing] in th[e] specialty [of family-medicine practice] during the year preceding the date that the alleged breach of the standard of care occurred." § 6-5-548(c). According to Medlin, identifying the breach of the standard of care at issue is necessary in order to "decid[e] whether a proffered expert witness qualifies as a 'similarly situated health care provider' within the meaning of the statute." 583 So. 2d at 1293. Dr. Haines identified the standard of care as follows:

> "[A] failure to provide Mr. Spencer with the abnormal PSA result of 14.3. And secondly, a failure to refer him to a urologist for further evaluation, diagnosis and treatment of prostate cancer."

An expert is required to assist the jury in answering those questions because a family-medicine practitioner would need to inform the jury as to whether a physician with such a specialty would comprehend the meaning of a PSA lab-test result of 14.3, i.e., whether that result was abnormal,

whether the result needed to be communicated to the patient, and whether such a result necessitated referral of the patient to a urologist. The defendants fail to provide any authorities establishing that identifying and maintaining an acceptable method for notifying patients of abnormal lab-test results is unique to the specialty of family medicine and that, therefore, evidence on that subject would require expert testimony from a family-medicine practitioner. Indeed, given that lab-test results are used by doctors in many different fields of practice, there is no reason to assume that communicating the results from such lab tests belongs to any particular medical specialty. Even if evaluating the effectiveness of a patient notification did require medical-expert testimony, there is no dispute that Dr. Haines has extensive experience overseeing a patient-notification system; he just did not do so in the year before Dr. Remillard's alleged breach of the standard of care. Thus, we conclude that Dr. Haines cannot be deemed unqualified to testify regarding the applicable standard of care on the basis of the fact that he did not oversee a patient-notification system in 2008-09.

2. The Admissibility of Dr. Haines's Testimony

At trial and again on appeal, the defendants have also objected to Dr. Haines's testimony on the ground that allegedly "he sought to hold Dr. Remillard and his clinic to a heightened standard of insuring or guaranteeing outcome (that certain communication with the patient and follow up with a specialist occurred), which is contrary to Alabama law." The defendants' brief, p. 58. They argue that "[a] physician's duty to a patient is to exercise 'reasonable care,' not to 'insur[e] ... the successful issue of treatment or service.' Ala. Code § 6-5-484," but that "Dr. Haines' criticisms were premised on the flawed position that the defendants had a duty beyond having a reasonable system in place and instead had a duty to guarantee outcome." Id., pp. 59 & 60 (emphasis in original). In support of this argument, the defendants cite answers Dr. Haines provided on cross-examination in which he appeared to state that the defendants had a duty to guarantee that Scott received the result of his 2009 PSA lab test.

Kimberlee responds that "Dr. Haines made clear that his opinion was based on a reasonable standard -- not some

standard of perfection." Kimberlee's brief, pp. 37-38. In support, Kimberlee cites portions of Dr. Haines's testimony on direct examination, as well as this Court's opinion in Downey v. Mobile Infirmary Medical Center, 662 So. 2d 1152 (Ala. 1995). In Downey, the Court reversed a trial court's exclusion of standard-of-care testimony from the plaintiff's proffered nursing expert, concluding that the trial court had failed to evaluate the expert's testimony as a whole.

> "After reviewing Nurse Read's testimony as a whole, we conclude that the trial court erred in determining that her testimony was insufficient on the basis that she did not accurately state the standard of care required by law. The trial court focused on only one of her answers, ignoring the rest of Nurse Read's 196-page deposition and ignoring her affidavit. When asked her understanding as to the standard of care that is to be exercised by nurses in Alabama, Nurse Read responded: 'To ensure the safety and the welfare of patients.' The trial court read the use of the word 'ensure' as violating § 6-5-484(b), which provides that a health care provider is not considered 'an insurer of the successful issue of treatment or service.' The statement that a nurse should ensure the safety and welfare of patients is not a statement that the nurse should '[insure] the successful issue of treatment or service' and guarantee the treatment or service. This interpretation of Nurse Read's testimony ignores the rest of her deposition and her affidavit, in both of which she clearly demonstrates her knowledge of the standard of care.

> "This Court has consistently held that the testimony of an expert witness in a medical malpractice case must be viewed as a whole, and that a portion of it should not be viewed abstractly, independently, or separately from the balance of the expert's testimony. Hines v. Armbrester, 477 So. 2d 302 (Ala. 1985); Malone v. Daugherty, 453 So. 2d 721 (Ala. 1984). Here the trial court erred in striking Nurse Read's affidavit, which was presented to the trial court in response to the trial judge's statement to the lawyers that they should 'go back and brief this and give me something to go on why I shouldn't grant it [the summary judgment motion].' Rather than presenting a 'new opinion,' as the trial court said the affidavit did, the affidavit presented an explanation that further clarified Nurse Read's knowledge of the standard of care. Nurse Read stated in that affidavit:
>
> > "'I was asked during my deposition what was the standard of care for nurses in Alabama. I responded to ensure patient safety. By using the word ensure I was not indicating that a nurse was an insurer of the successful issue of treatment or service. By using the word ensure, it was not my meaning, nor do I contend that the nurse was responsible to guarantee the safety of the patient. I used the word only in the context that it was a nurse's duty to make reasonable provision and/or take reasonable and necessary measures to provide for a patient's safety and I further testified as to the proper measures which should have been taken with regard to Mr. Downey.'"

Downey, 662 So. 2d at 1154 (emphasis added).

It is true that Dr. Haines's testimony could be understood as setting up a standard of guaranteed care for a

patient; however, it is also true that his testimony could be understood as simply opining that, in his opinion, Dr. Remillard did not follow the protocols that a reasonable family-medicine practitioner would have followed upon receiving the abnormal PSA lab-test result from Scott's September 28, 2009, clinic visit. This Court has "cautioned against the practice of relying on isolated excerpts from ... testimony to argue in favor of a proposition the testimony as a whole does not support." Kraselsky, 166 So. 3d at 121. Moreover, as we noted in the standards-of-review section of this opinion, on a motion for a JML the trial court is supposed to view the evidence in the light most favorable to the nonmovant and to entertain such reasonable inferences as the jury would have been free to draw. See, e.g., Thompson, 6 So. 3d at 1133. When Dr. Haines's testimony is viewed in its totality and in a light most favorable to Kimberlee, it cannot be concluded that his testimony should be excluded for attempting to hold Dr. Remillard to a heightened standard of ensuring or guaranteeing an outcome in patient care.

3. Dr. Remillard's Standard-of-Care Testimony

Finally, with respect to the standard of care, we also observe that Kimberlee has argued -- correctly in our view -- that Dr. Remillard himself provided the applicable standard of care in this case in light of a key factual dispute between the parties. Specifically, Dr. Remillard testified under questioning from Kimberlee's counsel as follows:

> "Q. Now, once you were aware of this elevated PSA in a general sense, did you have a duty under the standard of care to try to notify your patient of both the elevated PSA and the need for a urology specialist referral?
>
> "A. Yeah. We had a duty to make a reasonable attempt to notify Mr. Spencer of the abnormal lab.
>
> "....
>
> "Q. Now, if Mr. Spencer, once you had this result, if he had direct communication with you October 1st, September 30th, October 2nd of 2009, right around this time when you found out about this PSA test -- if he had direct communication with you by phone or by coming to the clinic to see you personally, would the standard of care have required you to tell him about his elevated PSA, and would it have required you to refer him to a urologist?
>
> "A. Yes, sir."

Based on the foregoing testimony, if the jury chose to believe that Scott's version of the events of October 1, 2009, is what unfolded -- i.e., that he talked to someone at the

clinic but that person did not tell him about his elevated PSA level -- then Dr. Remillard himself established the applicable standard of care and admitted to a breach of that standard. In other words, given that what transpired on October 1, 2009, with respect to the clinic's communication to Scott about his lab-test results is clearly an issue of fact to be resolved by a jury, then, by Dr. Remillard's own testimony, a scenario exists in which a jury could find that he breached the standard of care. Therefore, even apart from the facts that Dr. Haines was qualified as an expert in family-medicine practice and that his testimony should have been viewed as a whole more favorably toward Kimberlee, the trial court erred to the extent it entered a JML in favor of the defendants on the basis of an alleged failure by Kimberlee to present competent testimony regarding the standard of care.

B. Causation Testimony from Dr. Steckel

"With regard to proximate causation in an AMLA case, this Court has stated that 'the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury.'" Kraselsky, 166 So. 3d at 119 (quoting University of

Alabama Health Servs. Found. v. Bush, 638 So. 2d 794, 802 (Ala. 1994)) (emphasis added in Kraselsky). By the same token, "[t]he standard for proving causation in a medical-malpractice action is not proof that the complained-of act or omission was the certain cause of the plaintiff's injury. Instead, as this Court has frequently reiterated, the standard is one of the 'probable' cause ...." Hill v. Fairfield Nursing & Rehab. Ctr., LLC, 134 So. 3d 396, 406 (Ala. 2013).

At trial and again on appeal, the defendants have contended that Kimberlee did not present competent causation testimony because, they assert, her causation expert's opinions were based on speculation. They concede that Kimberlee's causation expert, Dr. Steckel, was an eminently qualified urologist who had 24 years of experience treating cancer patients and who estimated that approximately 60% of his practice was composed of prostate-cancer patients. However, the defendants insist that Dr. Steckel's opinion that Scott would have had a much better prognosis in 2009 than in 2011

> "required an assumption that Mr. Spencer probably did not have bone metastasis in 2009. Ultimately,

> on cross-examination, Dr. Steckel admitted it would be speculation to say Mr. Spencer's disease was probably not metastatic in 2009, and consequently it would be speculative to say that the outcome could have been different with earlier treatment. Such testimony simply amounts to a personal opinion based on no fact or science, which he admitted would require the indulgence of speculation that Mr. Spencer lost a possible chance at survival based on the alleged delay in diagnosis. This testimony cannot rise to satisfy the Plaintiff's burden of proof under Alabama law."

The defendants' brief, pp. 41-42. In support of this argument, the defendants cite testimony from Dr. Steckel on cross-examination in which he stated that, "without a bone scan, you can't rule out the presence of bony metastasis" and that, absent such a scan, it would be "speculation" to say whether Scott did or did not have "bony metastasis." The defendants emphasize that this Court has explained that

> "'[t]he opinions of an expert may not rest on "mere speculation and conjecture." Townsend v. General Motors Corp., 642 So. 2d 411, 423 (Ala. 1994).' Dixon v. Board of Water & Sewer Comm'rs of Mobile, 865 So. 2d 1161, 1166 (Ala. 2003). '[A]s a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. See, e.g., Griffin Lumber Co. v. Harper, 247 Ala. 616, 25 So. 2d 505 (1946).' Alabama Power Co. v. Robinson, 447 So. 2d 148, 153–54 (Ala. 1983). An expert witness's opinion that is conclusory, speculative, and without a proper evidentiary foundation cannot create a genuine issue of material fact. Becton v.

> Rhone-Poulenc, Inc., 706 So. 2d 1134, 1141-42 (Ala. 1997)."

Bradley v. Miller, 878 So. 2d 262, 266 (Ala. 2003).

The defendants further argue that, because of the nature of Dr. Steckel's testimony, this is not a case in which the plaintiff presented "sufficient evidence that prompt diagnosis and treatment would have placed the patient in a better position than [he] was in as a result of the inferior medical care." Hrynkiw v. Trammell, 96 So. 3d 794, 806 (Ala. 2012). Instead, they insist, because Dr. Steckel's theory that Scott's prostate cancer was curable in 2009 is based on speculation about how far the disease had spread at that time, Kimberlee's claims amounted to seeking "recovery for the loss of any chance of recovery resulting from medical malpractice," which is not permitted in Alabama. Id. In other words, they contend that Kimberlee's claims are based on a mere possibility, rather than a probability, that Scott's cancer was treatable in 2009. The trial court apparently agreed with the defendants' contentions concerning Dr. Steckel's causation testimony.

In contrast, Kimberlee argues that Dr. Steckel

> "provided substantial evidence on direct examination that is sufficient for a reasonable juror to find that the alleged dilatory diagnosis and treatment severely worsened Scott's prognosis and proximately caused his death. He testified that Mr. Spencer probably did not have metastatic disease in October 2009, and thus, he probably would have had a good prognosis if he had been promptly informed of his elevated PSA and treated by urology."

Kimberlee's brief, p. 27. For support, Kimberlee points to testimony on direct examination in which Dr. Steckel stated that "[m]y opinion is that most likely to a greater degree of certainty that the cancer was localized to [Scott's] prostate given his PSA of 14 and his normal digital exam by the doctor's assessment" and that Scott "absolutely ... had a treatable prostate cancer when his PSA was 14.3."

Kimberlee also cites Hrynkiw, supra, in which this Court discussed at length the necessity of viewing a witness's testimony as a whole and that the jury must be permitted to determine the weight and credibility of witness testimony.

> "At the outset, we note that the jury determines the credibility of the expert witnesses and determines the weight to give to their opinions. Kilcrease v. John Deere Indus. Equip. Co., 663 So. 2d 900 (Ala. 1995). Here, it was for the jury to determine whether it believed Dr. Hash's explanation of his earlier testimony given during his deposition. In Graves v. Brookwood Health Services, Inc., 43 So. 3d 1218 (Ala. 2009), the plaintiff's expert testified in a deposition that

the intravenous infiltration probably caused the injury to the plaintiff's right hand. Then, in a subsequent deposition, the same expert told defense counsel that it was merely 'possible' that the infiltration caused plaintiff's injury and that he could not say that it was the 'probable' cause. This Court reversed the summary judgment for Brookwood Health Services and held that any contradictions or unclarity in the expert's testimony created jury questions of weight and credibility. This Court said:

> "'Our cases make it abundantly clear, however, that a portion of the testimony of the plaintiff's expert cannot be viewed "abstractly, independently, and separately from the balance of his testimony." Hines v. Armbrester, 477 So. 2d 302, 304 (Ala. 1985). See, e.g., Downey v. Mobile Infirmary Med. Ctr., 662 So. 2d 1152, 1154 (Ala. 1995)(noting that "[t]his Court has consistently held that the testimony of an expert witness in a medical malpractice case must be viewed as a whole, and that a portion of it should not be viewed abstractly, independently, or separately from the balance of the expert's testimony").
>
> "'....
>
> "'"'We are to view the [expert] testimony as a whole, and, so viewing it, determine if the testimony is sufficient to create a reasonable inference of the fact the plaintiff seeks to prove.'" Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 550 (Ala. 2008) (quoting Hines, 477 So. 2d at 304-05). Viewing Dr. Buckley's testimony as a whole and viewing the evidence in the light most favorable to Graves, we conclude that Graves

> demonstrated the existence of a genuine issue as to medical causation and that the trial court's summary judgment against her on this basis therefore was in error.'
>
> "43 So. 3d at 1228."

Hrynkiw, 96 So. 3d at 800-01. Based on Hrynkiw, Kimberlee argues that the jury should have been permitted to sort through any perceived discrepancies in Dr. Steckel's testimony about the likelihood that Scott's cancer had already metastasized in 2009.

Kimberlee also contends that Dr. Steckel's opinion that Scott's prostate cancer had not metastasized in 2009 was not based on speculation because Dr. Steckel plainly testified that his assessment was based upon Scott's 2006 PSA level of 1.6, his 2009 PSA level of 14.3, the fact that bone scans are not ordinarily mandated unless a patient has a PSA level of 20 or above,[6] the fact that Dr. Remillard's rectal scan of Scott in 2009 found no abnormalities in Scott's prostate, and Dr. Steckel's extensive experience in working with prostate-cancer patients. Thus, Kimberlee argues, Dr. Steckel's conclusion is a reasonable inference deducible from the facts

[6]Dr. Steckel testified that PSA levels between 10 and 20 are in a "gray zone" in which ordering a scan is based on the individual characteristics of a patient.

rather than just a conjecture. See Bradley, 878 So. 2d at 266. Kimberlee insists that Dr. Steckel's statements on cross-examination referred to the fact that it could not be known for certain that Scott's cancer was localized to his prostate in 2009 because no scan by a urologist was performed at that time, but he clearly believed it was probable that the cancer had not spread at that time. In Kimberlee's view, categorizing Dr. Steckel's testimony as purely speculative conflates "the inability to rule out the possibility of metastatic disease in 2009 with Scott's likely prognosis in 2009 had he been promptly diagnosed and treated." Kimberlee's reply brief, p. 17.

The evaluation required with respect to Dr. Steckel's causation testimony is similar to what is required in examining the defendants' objection that Dr. Haines's standard-of-care testimony sought to impose a heightened standard of care. That is, Dr. Steckel's testimony could be understood as positing a "probability of a possibility" that Scott's cancer had not metastasized in 2009, as the defendants put it. The defendants' brief, p. I. However, Dr. Steckel's testimony also could be understood as stating that, in all

probability, Scott's cancer had not metastasized in 2009, and probability, not certainty, is what is required to present substantial evidence of causation under the AMLA. As we concluded with respect to the testimony of Dr. Haines, when Dr. Steckel's testimony is viewed in its totality and in a light most favorable to Kimberlee, his testimony should not have been excluded for a failure to provide substantial evidence of causation. It should have been left to a jury to decide if Dr. Steckel established that the defendants' alleged breach of the standard of care probably caused Scott not to be in a better position than he otherwise would have been if he had been informed of the PSA lab-test result in 2009.

In fact, the defendants' argument seems to ignore the premise of the "better-position" principle that "'the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than [he] was in as a result of inferior medical care.'" Hamilton v. Scott, 278 So. 3d 1180, 1186 (Ala. 2018) (quoting Parker v. Collins, 605 So. 2d 824, 827 (Ala. 1992)) (emphasis

altered). As Kimberlee's counsel observed during the hearing on the motion for a JML:

> "Judge, under the circumstances where a patient was not diagnosed, and there's no imaging test to completely rule in or rule out bony metastasis or no CT scan test that was done to rule out lymph node metastasis, the plaintiff is left in the position of looking at all of the data points that we have present in this case, applying that to what is the general knowledge in the field of urological surgery, knowledge that was admitted by both experts in this case, that a PSA level of 14 relates to a risk of metastasis of less than thirty percent. And based on that exercise, that it is more probable than not that you would not -- that he did not have metastatic disease."

In other words, the defendants complain that Kimberlee cannot prove that the cancer was localized in Scott's prostate in 2009 because no scan was performed at that time even though the whole premise of Kimberlee's action is that no diagnosis was made and no referral for urological testing was done in 2009. It is inherent in a failure-to-diagnose-and-treat case that a medical judgment assessing a patient's prognosis if earlier treatment had occurred is necessarily based on less evidence than would be available if that earlier treatment actually had occurred. The key issue is whether the expert medical judgment is, in fact, based on evidence rather than just a baldly stated opinion. Dr. Steckel clearly did testify

that facts supported his medical opinion, namely Scott's 2006 PSA level of 1.6, his 2009 PSA level of 14.3, the fact that bone scans are not ordinarily mandated unless a patient has a PSA level of 20 or above, the findings of Dr. Remillard's 2009 rectal scan of Scott's prostate, and Dr. Steckel's extensive experience with similar cancer patients. Accordingly, Dr. Steckel's testimony provided sufficient evidence of causation for the issue to be submitted to a jury.

C. Testimony from CMA Wood

Kimberlee takes issue with the trial court's rulings on three motions in limine filed by the defendants that prevented CMA Wood from testifying about the standard of care applicable to a CMA's informing patients of abnormal lab-test results based on instructions from a supervising physician. Kimberlee sought this witness testimony ostensibly to counter testimony from CMA Ehlman who worked for Dr. Remillard at the clinic.

For someone who is not a specialist, an expert witness will be considered a "similarly situated health care provider" if the person meets the three criteria stated in § 6-5-548(b), Ala. Code 1975:

> "(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

> "(2) Is trained and experienced in the same discipline or school of practice.
>
> "(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred."

(Emphasis added.) The trial court excluded Wood's testimony on the basis of § 6-5-548(b)(3) because Wood had worked in a cardiovascular clinic during the year immediately preceding the alleged breach of the standard of care, whereas Ehlman had been working in Dr. Remillard's family-medicine practice.

Kimberlee contends that the trial court's reasoning is erroneous:

> "The relevant inquiry under § 6-5-548 is whether Joanne Ehlman and Jennifer Wood both practiced in the same discipline or school of practice during the year preceding October 1, 2009. Both Jennifer Wood and Joanne Ehlman are certified medical assistants with experience communicating abnormal lab values in the year preceding the alleged breach. CMAs are not specialists, and both Jennifer Wood and Joanne Ehlman have worked in multiple different types of medical offices.
>
> "There is no distinction between the certification for a CMA who works in a family practice clinic and a CMA who works in a cardiovascular setting. And the communication of an abnormal lab value is general and not specific. Jennifer Wood is therefore similarly situated to Joanne Ehlman and qualified to proffer standard-of-care testimony."

Kimberlee's brief, p. 46.

The defendants agree with the trial court's finding that Wood had not "practiced the same discipline or school of practice" as Ehlman during the year preceding the alleged breach of the standard of care. For support, they cite Anderson v. Alabama Reference Laboratories, 778 So. 2d 806 (Ala. 2000). In Anderson, the plaintiffs alleged that a medical-lab testing company, Alabama Reference Laboratories ("ARL"), had

> "failed to properly perform tuberculosis testing on Mr. Anderson's sputum specimen, by allowing it be contaminated with the specimen of another donor, so that it gave an inaccurate test result. Thus, the standard of care to be applied to this case is that of a 'health care provider' practicing tuberculosis testing."

778 So. 2d at 812. The erroneous testing had caused Mr. Anderson to be diagnosed with tuberculosis even though he, in fact, had not contracted the disease. ARL filed a summary-judgment motion that it supported with an affidavit from "a medical technologist certified by the American Society of Clinical Pathologists ('ASCP') and [who] was the supervisor of microbiology at ARL when it tested Mr. Anderson's sputum specimen." Id. at 810. In opposition to motion, the

Andersons countered with deposition testimony from their expert, Dr. Linda Pifer. The trial court concluded that Dr. Pifer was not qualified to testify against ARL as to the applicable standard of care and its alleged breach under § 6-5-548(b)(3). This Court agreed with the trial court's conclusion:

> "Dr. Pifer does not ... meet the requirement of (b)(3). Although Dr. Pifer has training and experience in the general field of microbiology, she does not have recent training or experience in the specific field of tuberculosis testing. In her deposition testimony, Dr. Pifer admits that she has never worked in a reference or clinical laboratory or a mycobacteriology department; that prior to the time of the testing that is the basis of this case, she never supervised, or participated in, the performance of tuberculosis testing and never did any of the kinds of tuberculosis testing that were performed by ARL on Anderson's sputum specimen; that she has no practical experience in the field of mycobacteria or tuberculosis testing; that she has no personal knowledge of quality-assurance programs at clinical or reference laboratories that conduct tuberculosis testing; that she is not familiar with the tuberculosis-testing guidelines recommended by the primary certifying agency for clinical laboratories; that she is not familiar with the Centers for Disease Control guidelines relating to mycobacteriology and tuberculosis testing; that she has not written any article relating to tuberculosis testing; and that she has no teaching experience in the area of tuberculosis testing. Finally, in her deposition testimony, Dr. Pifer admits that she does not practice in the same specialty as Decker or Green. ... Because Dr. Pifer's own testimony shows that she did not practice in the specialty of

> tuberculosis testing in the year preceding the testing of Anderson's sputum specimen, she does not qualify as a 'similarly situated health care provider' and, thus, is not competent to give expert testimony concerning ARL's alleged breach of the applicable standard of care."

Anderson, 778 So. 2d at 812-13.

The defendants contend that Anderson is analogous because, like Dr. Pifer in that case, Wood did not practice in the same discipline or school of practice as Ehlman during the year preceding the date of the alleged breach of the standard of care. However, Anderson is factually distinguishable from this case because Dr. Pifer admitted she had never performed the types of tuberculosis testing at issue in that case, whereas Wood testified in her deposition that she had worked as a CMA for a family-medicine practitioner between 1989 and 1994. Moreover, Anderson does not illuminate the issue of what is the applicable standard of care with respect to CMA Ehlman? Does the standard of care entail notifying patients about abnormal PSA lab-test results -- which Wood admitted she had not notified patients about in the relevant year because she worked in a cardiovascular clinic -- or did it entail notifying patients about abnormal lab-test results in general -- which Wood testified was one of her regular

responsibilities? In short, does "the same discipline or school of practice" in § 6-5-548(b)(3) mean that which is identical to the defendant, including the type of lab test to be reported to a patient?

The question of what constitutes "the same discipline or school of practice" for purposes of the applicable standard of care of a CMA is similar to the issue we addressed earlier with regard to whether Dr. Haines was qualified to offer an opinion as to the standard of care for a family-medicine practitioner because he was not working in a private, community-based family-medicine practice during the year preceding the breach of the standard of care. On that issue, we concluded that "this speciality" in § 6-5-548(c)(4) refers to the board-certified specialty practiced by the defendant doctor rather than the exact setting in which the defendant doctor practiced that speciality. Likewise, a CMA who carries out a task that is very similar, though not identical, to the task of the defendant CMA[7] is still "practic[ing] in the same discipline or school of practice." § 6-5-548(b)(3). The defendants have not identified anything about notifying a

[7]We recognize that CMA Ehlman is a "defendant" only in the sense that she is an employee of the defendants in this case.

patient of an abnormal PSA lab-test result based on instructions from a supervising physician that is significantly different from notifying a patient about an abnormal lab-test result concerning a heart condition. Accordingly, with respect to a CMA, the relevant question in this case is what are the proper measures for notifying a patient of an abnormal lab-test result based on instructions from a supervising physician, not what are the proper measures for notifying a patient regarding a specific kind of lab-test result. Given that standard, we conclude that CMA Wood should have been permitted to testify regarding the standard applicable to a CMA in this case.

D. Trial Court's Ruling on Scott's April 7, 2011, Clinic Visit

By granting MIL #24, the trial court prohibited Kimberlee's counsel from asking Dr. Remillard about his not telling Scott about the 2009 abnormal PSA lab-test result during Scott's April 7, 2011, clinic visit. The trial court based that prohibition on § 6-5-551, Ala. Code 1975, which requires the plaintiff in an AMLA action to "include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by

plaintiff to render the health care provider liable to plaintiff ...." The trial court concluded that, because Kimberlee had not alleged that Dr. Remillard had breached the standard of care on April 7, 2011, questioning Dr. Remillard about his "failure" to notify Scott about the 2009 abnormal PSA lab-test result on that visit would amount to adding an act or omission that Kimberlee had not pleaded in the complaint.

Kimberlee argues that the trial court's ruling on MIL #24 was erroneous because the complaint did include an allegation that Dr. Remillard did not inform Scott about the 2009 abnormal PSA lab-test result during the April 7, 2011, clinic visit. Kimberlee contends that the failure to inform Scott of the test result was "an integral part of the theory of liability" because

> "[Kimberlee's] main theory of liability is that [Dr.] Remillard failed to timely inform Scott about the 2009 PSA results. Given that [Dr.] Remillard did not inform Scott about his prior 2009 elevated PSA test when Scott presented just eighteen months later complaining of prostate issues, the jury could reasonably infer that Dr. Remillard missed the elevated PSA in 2009 and didn't know about it until later. In other words, a jury can reasonably infer that Dr. Remillard didn't tell Scott about the prior 2009 elevated PSA on April 7th because he didn't know it was elevated. ... A juror should be able

> to consider why Dr. Remillard, if he had truly known that Scott had an elevated PSA test from just eighteen months earlier, would diagnose Scott with a benign condition and not inform him about the prior elevated PSA and serious concern for prostate cancer. The exclusion of this evidence was highly prejudicial and substantially affected [Kimberlee's] rights and ability to try the case."

Kimberlee's brief, pp. 19-21.

The defendants contend that Kimberlee's argument should be "rejected out of hand" because Kimberlee's counsel stated numerous times that Kimberlee was not accusing Dr. Remillard of a breach of the standard of care during the April 7, 2011, clinic visit. The defendants's brief, p. 62. For example, during one argument concerning MIL #24, Kimberlee's counsel stated: "[W]hether it was finally diagnosed on April 7th or April 21st, it makes no difference to the causation issue of the case." In the same argument, Kimberlee's counsel flatly stated: "We're not saying that they breached the standard of care on April 7[, 2011]. I'm not saying that, Judge." Therefore, the defendants argue, the trial court was clearly within its discretion to prohibit questioning about an omission that had no bearing on the alleged injury to Scott. The defendants also observe that Kimberlee was permitted to ask Dr. Remillard anything about what was said to Scott during

the April 7, 2011, clinic visit, so the jury was not being deprived of details as to what occurred during the visit.

Kimberlee's argument with respect to MIL #24 at best confuses the issue of what was the actual omission that was alleged as a breach of the standard of care. The consistent allegation regarding a breach of the standard of care concerned a failure to inform Scott in a timely manner about the 2009 abnormal PSA lab-test result. Yet, Kimberlee argues that Dr. Remillard's failure to tell Scott about that result during the April 7, 2011, clinic visit indicates that "Dr. Remillard missed the elevated PSA in 2009 and didn't know about it until later." Kimberlee's brief, p. 21. The timing of Dr. Remillard's knowledge of the 2009 abnormal PSA lab-test result is ultimately irrelevant to whether the defendants took appropriate steps to inform Scott of the test result in a timely manner. It is true that if Dr. Remillard was unaware of the 2009 PSA lab-test result until April 21, 2011, that fact could lend credence to Scott's testimony that he was not told about an abnormal test result in 2009. On the other hand, it is also true that specific questions to Dr. Remillard about his failure to tell Scott about the 2009 abnormal PSA

lab-test result on April 7, 2011, could confuse a jury as to the ultimate issue in the case. See, e.g., Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330, 338 (Ala. 2006) (noting that "[a] trial court has discretion to exclude otherwise admissible evidence in order to avoid misleading the jury" (citing Rule 403, Ala. R. Evid.)). Moreover, a review of Dr. Remillard's testimony about the April 7, 2011, clinic visit reveals that Kimberlee's counsel was able to ask Dr. Remillard about everything that did occur during that visit. Further, Kimberlee's counsel was also permitted to ask Dr. Remillard about informing Scott of his elevated PSA level on April 21, 2011. Thus, the jury was free to infer that Dr. Remillard did not inform Scott about the 2009 abnormal PSA lab-test result during the April 7, 2011, clinic visit. Kimberlee was just not permitted to draw an inference for the jury as to what Dr. Remillard's failure to mention the 2009 PSA lab-test result on April 7, 2011, meant with respect to the alleged breach of the standard of care. Given all of the foregoing, we cannot conclude that the trial court erred in its ruling on MIL #24.

E. The Trial Court's Ruling on Kimberlee's Use of the Term "Patient Safety"

The trial court granted MIL #26, which sought to prohibit any witness "from offering testimony regarding 'safer' or 'better' approaches or otherwise equating or suggesting that safety defines the standard of care" because the actual standard of care under the AMLA is that a physician must provide "reasonable care." Kimberlee contends that this was error because

> "it does not run afoul of the AMLA, applicable case law, ... or Ala. R. Evid. 402-403, to allow the plaintiff to address, through qualified experts, 'better' or 'safer' approaches than the approach used by the defendants, so long as the plaintiff's expert addresses what the standard of care requires and the approaches that fall within it."

Kimberlee's brief, p. 42.

We decline to examine the substance of this argument because -- as the defendants observe -- Kimberlee did not preserve this error for appellate review.

> "When there is no indication in the record that a trial court's ruling on a motion in limine was absolute or unconditional, the proponent of the contested evidence must attempt to admit the evidence at trial and obtain a specific adverse ruling in order to preserve the issue for appellate review."

Pensacola Motor Sales, Inc. v. Daphne Auto., LLC, 155 So. 3d 930, 936-37 (Ala. 2013). There is no indication in the record that the trial court's ruling on MIL #26 was absolute or unconditional. Therefore, it was incumbent upon Kimberlee to proffer the testimony with respect to "patient safety" at trial and to obtain an adverse ruling. Kimberlee did not do so, and Kimberlee did not address the defendants' response to this argument in her reply brief. Accordingly, this argument has not been properly preserved for our review, and we uphold the trial court's ruling on this issue.

IV. Conclusion

Based on the foregoing, we conclude that Kimberlee presented competent expert-witness testimony regarding the standard of care and causation. In the interest of judicial economy, we also have addressed other rulings by the trial court challenged by Kimberlee in this appeal. Concerning those rulings, Kimberlee's CMA nursing expert should have been permitted to testify, but the trial court properly excluded Kimberlee's counsel from directly questioning Dr. Remillard about his failure to tell Scott about his 2009 abnormal PSA lab-test result during his April 7, 2011, visit to the clinic.

Moreover, Kimberlee's challenge to MIL #26 was not properly preserved for appellate review. The judgment of the trial court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Parker, C.J., and Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Sellers, J., concurs in part and dissents in part as to the rationale and concurs in the result.

Shaw, J.,* concurs in the result.

*Although Justice Shaw did not sit for oral argument of this case, he has reviewed a recording of that oral argument.

SELLERS, Justice (concurring in part and dissenting in part as to the rationale and concurring in the result).

I respectfully dissent from the holding that the trial court erred in determining that plaintiff Kimberlee Spencer's expert certified medical assistant ("CMA"), Jennifer Wood, is not a similarly situated health-care provider with respect to CMA Joan Ehlman. I concur in the result as to the resolution of the issue whether the plaintiff's expert physician, Dr. Joe Haines, is a similarly situated health-care provider with respect to defendant Dr. Michael A. Remillard. I concur fully in all other aspects of the opinion, and I agree that the judgment as a matter of law in favor of the defendants should be reversed and the cause remanded for a new trial.

CMA Wood was prepared to testify as to the standard of care applicable to a CMA's responsibility to inform patients of abnormal laboratory-test results based on instructions from a supervising physician. The trial court concluded that CMA Wood had not "practiced in the same discipline or school of practice during the year preceding the date" that CMA Ehlman allegedly breached the standard of care. § 6-5-548(b)(3), Ala. Code 1975. Thus, the trial court determined that CMA

Wood was not a similarly situated health-care provider under § 6-5-548(b)(3) and that her testimony could not establish whether a breach of the standard of care occurred. In Anderson v. Alabama Reference Laboratories, 778 So. 2d 806 (Ala. 2006), this Court held that an expert microbiologist/medical-laboratory professional was not a similarly situated health-care provider with respect to a medical technologist who had tested the plaintiff for tuberculosis, an infectious disease caused by bacteria. Although the expert had significant knowledge and experience in microbiology, which includes "the laboratory analysis of different types of bacteria and viruses," she had not practiced in the specific area of tuberculosis testing in the year preceding the alleged breach of the standard of care. 778 So. 2d at 812. In the present case, the alleged breach of the standard of care was the failure to timely inform Scott Spencer of his elevated PSA levels. During the year preceding the alleged breach of the standard of care, CMA Wood had experience with receiving and reporting abnormal test results with respect to some conditions, but not elevated PSA levels. As the appellant, Kimberlee Spencer bears the burden of

demonstrating that the trial court exceeded its discretion. I do not believe that she has demonstrated that there is no significant difference between receiving and reporting abnormal PSA test results and receiving and reporting other abnormal test results.