

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GABRIEL L. ROMAN,

Plaintiff and Appellant,

v.

SARAH H. KIM et al.

Defendants and Respondents.

B276067

(Los Angeles County  
Super. Ct. No. EC058421)

APPEAL from the judgment and order of the Superior Court of Los Angeles County, William D. Stewart, Judge.  
Affirmed.

Gabriel L. Roman, in pro. per., for Plaintiff and Appellant.

Peterson • Bradford • Burkwitz, Avi Burkwitz, and Gil Burkwitz for Defendant and Respondent Sarah H. Kim.

Schmid & Voiles, Rodney G. Tomlinson, and Adam R. James for Defendant and Respondent Armen A. Kassabian.

---

## **INTRODUCTION**

This is the second appeal taken in Los Angeles Superior Court case No. EC058421. In the first appeal, we reversed the finding that plaintiff and appellant Gabriel L. Roman was a vexatious litigant. We reversed and remanded the dismissal of the case as to defendant and respondent Sarah H. Kim, M.D.

On remand, Roman brought a second amended complaint against Dr. Kim, alleging medical malpractice, lack of informed consent, and ordinary negligence. The trial court granted Dr. Kim's motion for summary judgment as to all causes of action, and declared Roman a vexatious litigant.

On appeal, Roman contends the trial court erred in granting Dr. Kim's motion for summary judgment. Roman also argues the trial court abused its discretion when it 1) granted protective orders related to the taking of depositions; 2) ordered Roman to pay one of the witness's deposition fees; 3) overruled one of his evidentiary objections; 4) denied his request for a continuance or denial of Dr. Kim's motion for summary judgment; and 5) declared him a vexatious litigant.

We conclude Roman's allegations have no merit and affirm the judgment.

## **FACTUAL BACKGROUND**

In February 2011, Roman was diagnosed with prostate cancer by his urologist, Dr. Kassabian. Dr. Kassabian referred Roman to Dr. Kim, a radiation oncologist with staff privileges at Glendale Adventist Medical Center (GAMC), who informed Roman of a new experimental cancer treatment called Cyberknife radiation. Roman met with Dr. Kim, signed an informed consent, and enrolled in the Cyberknife clinical study. Roman was informed that four gold seeds, known as fiducials, would be

implanted into his prostate by Dr. Kassabian to guide the Cyberknife machine to the area to be radiated. He was also informed that he may experience some discomfort during the procedure, but would receive local anesthesia.

On March 7, 2011, Roman underwent the fiducial placement procedure at Dr. Kassabian's office. Dr. Kim was present at Roman's request. According to Roman, Dr. Kim brought "huge and pretty thick" needles into the procedure room. Roman alleged Dr. Kassabian had informed himself how to conduct the procedure, but had never performed it as of that date. According to Roman, Dr. Kim was guiding Dr. Kassabian on where to implant the fiducials. Dr. Kim stated she did not participate in the placement of the fiducials other than to be present for the procedure.

During the procedure, Roman moaned in pain. Roman alleged he received no anesthesia during the procedure and "felt everything." Roman experienced excruciating pain, and felt like he had been raped and tortured.

After the procedure, Dr. Kim remained in the room briefly. While lying prone, naked from the waist down, Roman asked her twice to kiss him on the cheek. Dr. Kim refused and felt very uncomfortable; she told Roman his requests were inappropriate and left the room. Dr. Kim was stunned and had never experienced this with another patient. She eventually spoke about the incident with colleagues. A female African-American health care provider told Dr. Kim that Roman had told her he "never had sex with a black woman before." Dr. Kim was very conflicted—Roman was her patient, yet he acted very inappropriately toward her. Ultimately, Dr. Kim decided she could not continue to be involved with Roman's treatment, but

she did have further communications with him about the steps he needed to take following the fiducial implant procedure.

On March 17, 2011, 10 days after the implant procedure, Dr. Kim informed Roman the fiducials were not implanted in the right location and he would have to undergo another implant procedure to proceed on with the Cyberknife treatment. On March 21, 2011, Dr. Kim informed Roman that Dr. Fuller, the director of the Cyberknife study, had reviewed the CT scan images and confirmed the fiducials were not in the right location. Roman asked Dr. Kim whether she or Dr. Kassabian had committed malpractice, and whether she had malpractice insurance.

On March 21, 2011, Dr. Mak from the Pasadena Cyberknife office also confirmed the fiducials were not implanted properly, and offered to conduct the procedure himself under full anesthesia in a hospital setting.

In April 2011, Dr. Kim followed up with Dr. Fuller, who also agreed to perform another fiducial implant procedure. Dr. Kim asked a member of her staff to inform Roman that Dr. Fuller would perform another procedure to place the fiducials in the proper location.

Roman alleged he went through an “emotional rollercoaster” because of Dr. Kim and Dr. Kassabian. As a result, he mistrusted all doctors and decided not to do any treatment for his prostate cancer.

## **PROCEDURAL HISTORY**

### **I. Procedural History Through the First Appeal**

On May 31, 2012, Roman, in pro. per., filed a complaint against Dr. Kassabian, Dr. Kim, and GAMC, alleging medical malpractice and lack of informed consent. Roman’s claims

against GAMC were predicated on an agency theory of liability based on Dr. Kim's alleged negligence.

Dr. Kim filed a motion for an order declaring Roman a vexatious litigant. The court denied the motion without prejudice, concluding there were only four previous actions decided adversely to Roman.

GMAC filed a motion for summary judgment alleging, among other grounds, that Dr. Kim was not an agent of GAMC. The trial court granted the motion, concluding there were no disputed facts on the issue of whether Dr. Kim was an agent of GAMC, and Roman's claims against the hospital were barred by the applicable statute of limitations.

Dr. Kassabian also filed a motion for summary judgment supported by an expert witness declaration that Dr. Kassabian's treatment of Roman met the standard of care. The trial court granted the motion on the ground Roman failed to present an expert witness declaration in support of his opposition to the motion.

Dr. Kim moved for summary judgment. The motion was supported by the expert declaration of Dr. Christopher King, a radiation oncologist, concluding Dr. Kim complied with the standard of care and did not cause Roman any harm. Dr. Kim also argued Roman's action was barred by the applicable statute of limitations.

Dr. Kim also renewed her motion to declare Roman a vexatious litigant based on the four previous actions decided against Roman, as well as two more recent cases decided adversely to Roman. On April 11, 2013, the trial court concluded Roman was a vexatious litigant and granted the motion, finding there had been five lawsuits decided adversely in the prior seven

years, and that he had no probability of success in his action against Dr. Kim. The court ordered Roman to post bond in the amount of \$10,000, or face dismissal of the action. Roman failed to post bond, the trial court dismissed the action against Dr. Kim, and the trial court did not entertain Dr. Kim's motion for summary judgment.

In August 2013, Roman appealed the judgments against him. On July 27, 2015, we affirmed the judgment in favor of GAMC. We concluded Roman failed to bring the action within the applicable statute of limitations and Dr. Kim was not an agent of GAMC. We also determined GAMC's expert witness declaration established Dr. Kim did not breach the standard of care because she did not perform the procedure, Roman failed to show that Dr. Kim's directions to Dr. Kassabian were deficient, and Roman did not present any expert testimony to create a dispute on his claim that Dr. Kim was responsible for the improper placement of the fiducials.

We also concluded the trial court erred in finding Roman a vexatious litigant because not all five of the actions identified by Dr. Kim had been finally determined against him at the time of the court's vexatious litigant finding on April 11, 2013. In our decision, we noted the reversal of the judgment in favor of Dr. Kim did not foreclose her from raising the vexatious litigant motion again upon a proper showing of predicate facts. We also noted reversal did not preclude the trial court from addressing Dr. Kim's motion for summary judgment on the merits.

We reversed the judgment in favor of Dr. Kassabian as to medical malpractice, concluding there remained a triable issue of material fact as to whether Roman received any anesthesia during the fiducial placement procedure. We found no disputed

facts regarding Roman's cause of action for failure to obtain informed consent because the record showed Roman was informed he would experience discomfort as a possible side effect of the fiducial implant procedure. We also rejected Roman's lack of informed consent cause of action which was based on his argument that he should have been warned he would receive no anesthesia. We determined his argument was merely an element of his cause of action for medical malpractice rather than a separate cause of action for lack of informed consent.

## **II. Procedural History on Remand**

In November 2015, Dr. Kim filed a renewed motion for an order declaring Roman a vexatious litigant based on additional adverse determinations entered against him, and requested an order requiring Roman to post a \$20,000 bond. Dr. Kassabian joined in the motion. The trial court determined Roman was a vexatious litigant because he had at least five adverse determinations against him within the meaning of Code of Civil Procedure<sup>1</sup> section 391. The court only granted the motion in part, however, finding Drs. Kim and Kassabian had not established the evidence foreclosed Roman from prevailing on the issue of whether he received anesthesia. Therefore, the court did not order Roman to furnish the security bond. The court also entered a prefiling order against Roman pursuant to section 391.7 prohibiting him from filing new litigation as a self-represented litigant without first obtaining leave of the court. The final order declaring Roman a vexatious litigant issued on February 19, 2016.

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

In January 2016, the court granted Roman leave to file a second amended complaint (SAC), which is the operative complaint in this appeal. In the SAC, Roman realleged his causes of action for medical malpractice and lack of informed consent. He also alleged a cause of action for negligence, which is subject to a two-year statute of limitations. The cause of action for lack of informed consent was based on his allegation that he was not informed he would receive no anesthesia or that the procedure would involve huge needles that would increase the risk his prostate cancer would spread.

In January 2016, Roman noticed the depositions of Dr. Kim and Dr. Mak to take place at his personal residence. He also asked that his wife, Luminita Roman, be allowed to pose questions at the deposition. On February 3, 2016, Dr. Kim filed a motion for a protective order precluding her deposition or, in the alternative, setting parameters to avoid being subjected to harassment. Dr. Mak, a nonparty witness, also filed a motion for a protective order on similar grounds; in the motion, he requested the court order Roman to either pay an hourly deposition fee or limit the subject matter of the questioning to “ ‘the reading of words and symbols contained in the relevant medical record’ ” under sections 2025.420, subdivision (b)(5), 2034.430, subdivision (a)(2), and 2034.430, subdivision (b).

On March 11, 2016, the court granted Dr. Kim’s and Dr. Mak’s protective orders as to the place and manner of the deposition based on Roman’s conduct throughout the proceedings. The court determined the deposition should not take place in Roman’s home and that Roman’s wife could not pose the questions at an oral deposition because doing so would constitute the unauthorized practice of law. The court indicated it would



issue an order that the deposition be performed through written questions if Roman was not able to ask them orally. The court also ordered Roman to pay Dr. Mak \$450 per hour in deposition fees.

On June 14, 2016, Dr. Kim filed a motion for summary judgment (MSJ) supported by her declaration and that of her expert, Dr. King. Roman opposed the motion and requested a continuance, arguing the protective orders precluded him from obtaining evidence. The court denied the request for continuance and granted Dr. Kim's MSJ in its entirety on September 15, 2016.

As to the cause of action for medical malpractice, the court found it barred by res judicata and the applicable statute of limitations. It also found Roman failed to meet his burden to show Dr. Kim's treatment fell below the standard of care because he did not offer an expert opinion on the standard of care.

As to the cause of action for lack of informed consent, the court found Roman's allegation that he was not informed he would receive no anesthesia was barred by res judicata because this court had already determined this was an issue of medical malpractice, not lack of informed consent. The court also determined Roman did not establish he should have been informed that the needles used in the fiducial placement procedure would increase the risk his cancer would spread because he failed to provide an expert opinion on the issue.

As to the cause of action for negligence, the court found it was based on alleged acts or omissions by Dr. Kim when she rendered professional services. The court determined the allegations against Dr. Kim were therefore not governed by the two-year statute of limitations for negligence, but were barred by the one-year statute of limitations for medical malpractice.

Roman filed two appeals. One challenged the vexatious litigant and prefilng orders, and the other challenged the judgment in favor of Dr. Kim. We issued an order to show cause on August 11, 2016, directing Roman to show his appeal had merit pursuant to section 391.7, subdivision (b). We received Roman's response on September 30, 2016. On January 30, 2017, we issued an order ruling Roman met his burden of showing his appeal has merit and was not made for purposes of harassment or delay, granting his request for a prefilng order, and consolidating the appeals.

Dr. Kassabian did not file a respondent's brief but joined in Dr. Kim's respondent's brief on the vexatious litigant issues.

### **DISCUSSION**

On appeal, Roman alleges the trial court erred by granting summary judgment in favor of Dr. Kim because: 1) ordinary negligence applies to Dr. Kim's actions during the fiducial placement procedure and is therefore not barred by the one-year statute of limitations (Section II, *post*); 2) Dr. Kim committed medical malpractice by failing to inform Roman the needles used in the procedure might cause his cancer to spread and that he could have undergone the procedure under full anesthesia (Section III(A), *post*); 3) the court did not address his allegation that Dr. Kim committed medical malpractice when she abandoned him as a patient (Section III(B), *post*); 4) the court abused its discretion by overruling his evidentiary objections to Dr. King's expert declaration (Section IV, *post*); 5) the court abused its discretion in granting Dr. Kim's protective orders and granting expert witness fees to Dr. Mak (Section V, *post*); 6) the court should have granted his request to deny or continue the hearing on the MSJ due to his inability to depose Dr. Kim and

Dr. Mak (Section VI, *post*); 7) and the evidence was insufficient to justify declaring Roman a vexatious litigant and to enter a prefilings order against him (Section VII, *post*).<sup>2</sup>

### **I. Standard of Review**

We review a trial court's grant of summary judgment *de novo*, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We review the trial court's rulings on evidentiary objections in connection with a summary judgment motion for abuse of discretion. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1254.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

In a medical malpractice case "where the conduct required of a medical professional is not within the common knowledge of laymen, a plaintiff must present expert witness testimony to prove a breach of the standard of care." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

Finally, we review a trial court's order declaring a party a vexatious litigant for substantial evidence. (*Goodrich v. Sierra Vista Regional Medical Center* (2016) 246 Cal.App.4th 1260,

---

<sup>2</sup> Roman also argues his cause of action for medical malpractice is not barred by *res judicata*. Because we affirm the grant of summary judgment on the merits, we do not address this argument.

1265.) “We are required to presume the order declaring a litigant vexatious is correct and imply findings necessary to support that designation.” (*Id.* at pp. 1265-1266.) Reversal is required only where there is no substantial evidence to imply findings supporting the designation that a party is a vexatious litigant. (*Id.* at p. 1266.)

## **II. Ordinary Negligence**

In the SAC, Roman alleged a cause of action for negligence in addition to realleging the cause of action for medical malpractice. Roman contends the fiducial implant surgery was not a part of Dr. Kim’s training and expertise and was therefore not within the scope of her medical practice. Accordingly, he argues, “ ‘ordinary’ ” negligence applies to Dr. Kim’s actions during the surgery, not “ ‘professional’ ” negligence. Additionally, he argues, since the statute of limitations for negligence is two years, he was not time-barred from bringing the action for ordinary negligence.

Roman cannot have it both ways. A plaintiff “cannot, on the same facts, state causes of action for ordinary negligence as well as professional negligence, as a defendant has only one duty that can be measured by one standard of care under any given circumstances.” (*Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797, 804.) Labeling a cause of action as negligence does not distinguish it as separate and independent from medical malpractice. (See *Flowers v. Torrance Memorial Hospital Medical Center*, *supra*, 8 Cal.4th at p. 998 [denominating cause of action professional negligence does not transmute its underlying character, nor does it distinguish it as separate from other forms of negligence].) Only one standard of

care applies to a set of facts, “even if the plaintiff attempts to articulate multiple or alternate theories of liability.” (*Ibid.*)

Dr. Kim owed Roman one duty of care while treating him, not two. That duty was to use the reasonable degree of skill, knowledge, and care “ordinarily possessed and exercised by members of the medical profession” under similar circumstances. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470.) The “primary consideration” for the court in determining whether a medical professional’s allegedly negligent act or omission constitutes ordinary negligence or medical malpractice is whether the physician’s conduct occurred while rendering professional services. (*So v. Shin* (2013) 212 Cal.App.4th 652, 661; *Bellamy v. Appellate Department, supra*, 50 Cal.App.4th at p. 808.)

Here, there is no doubt Dr. Kim was rendering professional medical services on March 7, 2011, when Roman had surgery. Roman acknowledges that courts have “broadly interpreted” the phrase “in the rendering of professional services,” to mean those services for which the health care provider is licensed. (*So v. Shin, supra*, 212 Cal.App.4th at p. 663.) Yet, he maintains that because Dr. Kim was not trained in fiducial implant surgery, she was not rendering services for which she was licensed.

However, Roman presented no evidence establishing what professional services fall within the scope of Dr. Kim’s license. According to Dr. Kim, California’s medical providers are licensed to practice medicine in any capacity without restriction. Roman does not refute this claim and has not provided any evidence to the contrary. We therefore have no basis upon which to determine what treatment Dr. Kim may offer or which

procedures she may conduct according to the terms of her medical license.

Roman failed to establish Dr. Kim could be held liable for ordinary negligence; the only cause of action Roman could bring against Dr. Kim was one for medical malpractice. Accordingly, the trial court did not err in granting summary judgment on his cause of action for negligence.

### **III. The Court Properly Granted Dr. Kim's Motion for Summary Judgment on Roman's Cause of Action for Medical Malpractice**

#### **A. *Informed Consent***

On appeal, Roman asserts the court erred in granting summary judgment on his claims that Dr. Kim did not inform him that prostate cancer could be spread by the needles used in the fiducial placement surgery, or that he would receive no anesthesia during the procedure. He alleged that he learned in September 2012 that his prostate cancer "might have spread" and that his oncologist at the time informed him that his prostate cancer was spread by the thick needles Dr. Kassabian used to implant the fiducials in a process called "needle tracking." He also alleged he was informed by Dr. Mak that the fiducial implant procedure is done under full anesthesia.

As a preliminary matter, Roman contends his cause of action for medical malpractice based on his alleged discovery that his prostate cancer might have spread is not time-barred because he was unaware of this information until September of 2012. Assuming Roman is correct, his claim nevertheless fails because he never provided an expert declaration in his opposition to the MSJ.

When a procedure inherently involves a known risk of serious bodily injury, a physician has a duty to disclose to a patient the risk of death, serious injury, and other significant complications associated with a procedure; and any additional information a skilled practitioner would provide under similar circumstances. (*Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 845; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244.) Whether the fiducial implant surgery increased the risk Roman’s prostate cancer would spread, and whether the surgery required full anesthesia are not within the common knowledge of a layperson. Accordingly, Roman was required to provide the court with expert opinion on these matters to prove a breach of the standard of care based on lack of informed consent. (*Bushling v. Fremont Medical Center, supra*, Cal.App.4th at p. 509; *Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 1001.)

The trial court noted that Roman offered no expert opinion that the needles used in the fiducial placement surgery increased the risk that his prostate cancer would spread. Nor did Roman offer an expert opinion that the fiducial implant procedure should be done under general anesthesia. The failure to provide expert opinions on these matters is fatal to Roman’s claim.<sup>3</sup>

---

<sup>3</sup> Roman asserts that expert testimony is not required to prove a lack of informed consent. Yet, he provides no authority for this proposition, nor are we aware of any. Nor does he explain why an expert declaration is never required to establish a lack of informed consent. We therefore disregard the argument, as it is conclusory, “not supported by pertinent legal authority,” and “fail[s] to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.” (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.)

Accordingly, the trial court did not err in granting summary judgment on Roman's cause of action based on lack of informed consent.

B. *Patient Abandonment*

Roman claims Dr. Kim abandoned him on March 21, 2011, when she informed him she would no longer treat him. Because he served his 90-day notice of intent to sue on March 12, 2012, he alleges, this claim is not time-barred. Again, even if he timely filed his action with respect to patient abandonment, his cause of action nevertheless fails.

Patient abandonment is not a separate cause of action; rather, it is one of medical malpractice. (See CACI No. 509, BAJI No. 6.05.) It therefore must be supported by an expert declaration, as a layperson would not know what Dr. Kim's professional and ethical responsibilities were to Roman after the fiducial implant surgery. Nor would a layperson know what a physician's responsibilities are to a patient once he or she decides to withdraw from the doctor-patient relationship. Roman declares Dr. Kim was required to give him at least 30 days' written notice; however, he provides no citations to the record or other evidence to support this assertion.

Dr. King stated in a sworn declaration that Dr. Kim communicated to Roman the further steps Roman needed to take to proceed with the Cyberknife treatment. Dr. Kim's expert stated she terminated the relationship with Roman due at least in part to Roman's sexually inappropriate behavior toward her. Ultimately, Dr. Kim's expert stated her services to Roman fell at all times within the applicable standard of care, including her communications with Roman postsurgery.



The issue of patient abandonment was argued in the trial court at the hearing on the MSJ. The trial court noted Roman had not provided an expert declaration “that would make [it] find a question of fact.” The trial court was correct in concluding Roman’s failure to provide an expert declaration on the issue of patient abandonment was fatal to his claim. Accordingly, we conclude the court did not err in granting Dr. Kim’s MSJ as to the medical malpractice claim.

#### **IV. Evidentiary Objections**

Roman made several evidentiary objections to the declaration supplied by Dr. King in support of Dr. Kim’s MSJ. Roman argues the court abused its discretion in overruling his objection to Dr. King’s claim that an anesthetic gel was used on Roman during the fiducial implant procedure because there was no evidence in the record Roman received any anesthesia.

Any error by the trial court in overruling this objection is harmless. Even if the trial court had sustained the objection, Roman was required to bring the cause of action for alleged negligence occurring during the surgery on March 7, 2011, within the applicable one-year statute of limitations for medical malpractice.<sup>4</sup> As discussed above, Dr. Kim was rendering professional services to Roman during the fiducial implant procedure on March 7, 2011. Roman alleged he suffered excruciating pain during the procedure; accordingly, he

---

<sup>4</sup> An action for injury against a health care provider based on alleged professional negligence must be filed either within three years of the injury; *or* one year after the plaintiff discovers injury, or should have discovered the injury through reasonable diligence. (§ 340.5.)

discovered the injury on March 7, 2011. Yet, Roman did not file his 90-day notice of intent to sue upon Dr. Kim until March 12, 2012.<sup>5</sup>

Any alleged error by the trial court in overruling Roman's objection to Dr. Kim's statement is harmless.<sup>6</sup>

## **V. Protective Orders**

Roman alleges the court abused its discretion when it granted Dr. Kim's and Dr. Mak's motions for protective orders on March 11, 2016. Specifically, Roman contends the court erred by precluding his wife from posing prewritten questions at oral depositions. Roman ultimately chose not to conduct any depositions and now argues the court's ruling deprived him of his ability to depose any witness in his case.

---

<sup>5</sup> "If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice." (§ 364, subd. (d).)

<sup>6</sup> We also note the trial court was required to rule only on those objections to the evidence it deemed material to the disposition of the MSJ. (§ 437c, subd. (q).) Whether Dr. Kassabian applied a numbing gel is immaterial to whether Dr. Kim acted within the applicable standard of care. Dr. King declared that Dr. Kim was "under no medical responsibility to be present during the procedure," and the placement of the fiducials was the responsibility of the surgeon, not the radiation oncologist. Dr. Kim was only present because Roman asked her to be there. Because she cannot be held responsible for the acts or omissions of Dr. Kassabian, whether Dr. Kassabian gave Roman a numbing gel is immaterial to whether Dr. Kim breached her duty of care.

Roman filed an ex parte request for accommodation in December 2015 pursuant to California Rules of Court, rule 1.100, asking that his wife be allowed to ask prewritten questions of the deponents rather than simply deposing the witnesses by written questions under section 2028.010. Roman attached a letter from his psychiatrist attesting to Roman's emotional disabilities, and suggesting Mrs. Roman be allowed to ask prewritten questions at the deposition rather than Roman himself. The court granted the request for accommodation as follows: "plaintiff may engage in any and all discovery devices pursuant to Code of Civil Procedure and associated Rules of Court, so long as Luminita Roman or any other person does not engage in the unauthorized practice of law."

In her motion for protective order, Dr. Kim argued allowing Mrs. Roman to pose questions at an oral deposition would constitute the unauthorized practice of law. Dr. Mak, in his motion for protective order, noted Mrs. Roman was not an attorney or a party to the case, and also argued Mrs. Roman's taking of the deposition would constitute the unauthorized practice of law. Dr. Mak also attached a sworn declaration alleging Mr. and Mrs. Roman were aggressive with his staff when they came to serve the deposition subpoena. Dr. Mak alleged they called his staff liars when they said Dr. Mak was not in the office and that the following day, Mrs. Roman called his office and again accused them of lying about his availability for service. Dr. Mak's staff informed Mrs. Roman if she came to the office, they would call the police.

In its order granting Dr. Kim's and Dr. Mak's requests for protective orders on March 11, 2016, the court barred Mrs. Roman from asking any questions, but also stated it would order

the depositions be performed through written questions if Roman was unable to ask the questions himself.

The “ ‘issuance and formulation of protective orders are to a large extent discretionary.’ ” (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 316.) “ ‘The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery.’ ” (*Id.* at p. 317.) Here, the record reflects that Mrs. Roman had been hostile and aggressive toward one of the witnesses Roman sought to depose. It was entirely within the court’s discretion to weigh the need for an accommodation for Roman’s disability with the interest of the witnesses in being free from harassment. We find no abuse of discretion in the court’s determination that it was unacceptable to allow Mrs. Roman to pose questions at the depositions.

Even if the court had allowed Mrs. Roman to pose the questions, however, we would still find no error. As discussed above, any claim alleging Dr. Kim committed medical malpractice at the fiducial implant procedure was barred by the statute of limitations. With respect to both Dr. Kim and Dr. Mak, Roman never provided an expert declaration supporting his allegations of abandonment and lack of informed consent. Even if the court had allowed Mrs. Roman to pose questions at the deposition, his failure to timely file his complaint and to provide an expert declaration would still have been fatal to his claims. Roman has not explained on appeal how these deficiencies would have been overcome had his wife been allowed to depose Dr. Kim and Dr. Mak. Accordingly, we affirm the grant of Dr. Kim’s and Dr. Mak’s protective orders.

Roman also argues the court erred when it ordered Roman to pay Dr. Mak expert witness deposition fees. The court’s order

stated Roman shall tender the equivalent of three hours of fees to Dr. Mak at his hourly rate of \$450 per hour 48 hours in advance of the deposition. Roman never deposed Dr. Mak. Accordingly, we reject Roman's allegation as moot.

## **VI. Motion for Denial or Continuance**

Next, Roman contends the court abused its discretion in denying his motion for a continuance or in refusing to deny Dr. Kim's MSJ. Not so.

In his opposition to Dr. Kim's MSJ, Roman asked to continue the motion or that the court deny the motion because he was unable to depose Dr. Kim and Dr. Mak due to the protective orders. Section 437c, subdivision (h) provides: "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

With respect to Dr. Kim, Roman failed to state in his motion that facts essential to justify his opposition had to be obtained by deposition. Roman claimed he needed to depose Dr. Kim to ascertain Dr. Kim's contribution to the placing of the fiducials, to determine whether she insisted Roman be given anesthesia, whether she received his 90-day notice of intent to sue on March 12, 2012, whether she heard Dr. Kassabian say he never performed the fiducial implant procedure before, and whether Dr. Kassabian appeared intoxicated. As the court noted in its order granting Dr. Kim's MSJ, Roman was on notice of his injury on the date of the procedure on March 7, 2011. All of the above questions go directly to the alleged injuries Roman received

on that date. None of the posed issues go to the claims that might have survived the statute of limitations challenge had he provided an expert declaration: whether Dr. Kim provided adequate informed consent or abandoned Roman as a patient. As Roman failed to timely file his complaint within one year of his alleged injuries, none of the answers to the questions he wanted to pursue would have successfully supported his opposition to the MSJ.

Roman also claimed in his motion that he needed Dr. Mak to testify under oath at a deposition that Dr. Mak performed the same fiducial implant procedure under full anesthesia, and to ask Dr. Mak whether Dr. Kassabian placed the fiducials in the wrong location under Dr. Kim's guidance. Roman failed to provide any reason why the facts he sought to elicit from Dr. Mak through a deposition could not have been provided through a sworn expert declaration.

We find no error in the court's denial of Roman's motion for continuance or refusal to deny Dr. Kim's MSJ.

## **VII. Vexatious Litigant Claim**

### *A. Applicable Law*

"The vexatious litigant statutes (§§ 391–391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169.) "The constant suer . . . becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the

taxpayers who must provide the courts.’ ” (*In re Kinney* (2011) 201 Cal.App.4th 951, 958.)

Section 391 sets forth the definitions applicable to the vexatious litigant statutes. The definitions relevant to Roman’s appeal are:

“(a) ‘Litigation’ means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

“(b) ‘Vexatious litigant’ means a person who does any of the following:

“(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.”

B. *The Vexatious Litigant Statutes Are Constitutional*

Roman alleges California’s vexatious litigant statutes violate the supremacy clause and are unconstitutional under the First, Fifth, Seventh, Eighth, and Fourteenth Amendments. Despite repeated challenges on these grounds, the vexatious litigant statutes have consistently been upheld as constitutional. (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1170-1171; *In re R.H.* (2009) 170 Cal.App.4th 678, disapproved on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91; *Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120; *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43; *Muller v. Tanner* (1969) 2 Cal.App.3d 445; *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521.) Accordingly,

we reject Roman's challenges to the constitutionality of California's vexatious litigant statutes.

C. *The Security Bond*

Drs. Kim and Kassabian also asked for a security bond in the amount of \$20,000. Roman argues on appeal the motion should have been denied. The trial court did not order the requested security bond, therefore Roman's challenge to the request for the bond is moot.

D. *The Hearing*

Roman alleges the trial court abused its discretion by failing to hold a "proper" hearing when it declared him a vexatious litigant. Roman's argument is that Dr. Kim's counsel was given more than 10 minutes to argue his vexatious litigant motion whereas "when it came [to] Roman's turn, the trial court would not have it." The record reflects that, at the hearing on the motion, Roman asked the court to go through its tentative ruling to clarify which five cases formed the basis of the court's conclusion. The court replied that the ruling was "as clear as it needs to be" and would not allow Roman to be heard on the matter.

The relevant statute governing a hearing on a vexatious litigant motion provides the court shall "consider any evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion." (§ 391.2.) Here, the court allowed Roman to argue that he would prevail in the underlying litigation; the court agreed with Roman on this issue and accordingly denied Dr. Kim's request for a security bond. The court also considered Roman's opposition to the motion, which thoroughly challenged the sufficiency of the alleged prior adverse litigations for the purposes of declaring him a vexatious litigant.



And, the court's tentative ruling makes clear which five cases it deemed sufficient for the purposes of declaring Roman a vexatious litigant. Yet, the court did not allow Roman to challenge the prior litigation orally in open court.

As to the question whether this rendered the hearing unfair, we agree with Roman that the court should have allowed him to make an oral record on the issue at the hearing. However, we find any error harmless. Reversal is only warranted if there is no substantial evidence to imply findings a party is a vexatious litigant. (*Goodrich v. Sierra Vista Regional Medical Center, supra*, 246 Cal.App.4th at p. 1266.) As discussed below, we conclude there was substantial evidence supporting the court's determination Roman was a vexatious litigant.

E. *The Trial Court Properly Concluded Roman Had Five Actions Finally Determined Adversely to Him in the Seven Years Prior to the Filing of Dr. Kim's Motion*

In her renewed motion to declare Roman a vexatious litigant, Dr. Kim submitted evidence of 12 actions she alleged had been determined against Roman in the seven-year period preceding her motion. The trial court concluded nine of the 12 were adversely determined against Roman. On appeal, we conclude the following five actions were determined adversely to Roman in the applicable seven-year period, rendering him a vexatious litigant.

1. *Roman v. Jefferson at Hollywood LP*

We concluded in Roman's first appeal that this case had not been determined adversely to him because a writ of certiorari was pending in the United States Supreme Court as of the date of the trial court ruling on the vexatious litigant motion on April 11, 2013. Dr. Kim submitted evidence in her November 2015 motion

that the United States Supreme Court had since denied Roman's petition for writ of certiorari on May 13, 2013.

Roman argues the denial of his petition for writ of certiorari in the United States Supreme Court does not satisfy the requirements of the vexatious litigant statute under *Fink v. Shemtov*, *supra*, 180 Cal.App.4th 1160, because the writ was summarily denied.

Roman misconstrues the holding in *Fink*. There, the court concluded that summary denial of a writ petition “*does not necessarily* constitute a litigation that has been ‘finally determined adversely to the person’” within the meaning of section 391, subdivision (b)(1). (*Fink v. Shemtov*, *supra*, 180 Cal.App.4th at p. 1172, italics added.) Specifically, the court in *Fink* observed that summary denial of a pretrial writ petition on an issue that could also be reviewed on appeal from the judgment is not final within the meaning of the vexatious litigant statute. (*Ibid.*) On the other hand, where a writ petition is the only authorized mode of appellate review, summary denial of the petition is necessarily on the merits, and qualifies as a final judgment adversely determined to the petitioner. (*Ibid.*)

In *Roman v. Jefferson at Hollywood LP*, the Ninth Circuit Court of Appeals upheld the district court's determination that Roman failed to state a claim. (*Roman v. Jefferson at Hollywood LP* (9th Cir. 2012) 495 Fed.Appx. 804, 805.) The only way to obtain review of the Ninth Circuit's ruling was in the United States Supreme Court via petition for writ of certiorari, which was denied. (*Roman v. Jefferson at Hollywood LP* (2013) 2013 U.S. Lexis 3550.) Accordingly, the case was determined adversely to Roman and is properly included among the five

actions supporting the trial court's conclusion that Roman was a vexatious litigant.

Roman next contends the litigation was not determined adversely to him because he and the opposing party reached a settlement. Roman broadly asserts that if a settlement directly results from the litigation, that case cannot count against a party for the purposes of the vexatious litigant statutes. His reliance on *Villa v. Cole* (1992) 4 Cal.App.4th 1327 and *Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775 are misplaced at best. *Villa v. Cole* merely declared that a settlement is generally *not* deemed a favorable termination of the proceedings precisely because "the purpose of a settlement is to *avoid* a determination on the merits." (*Villa v. Cole*, at pp. 1335-1336.) *Tokerud v. Capitolbank Sacramento* agreed with the holding in *Villa v. Cole*. There, the court stated that where a dismissal is part of a negotiated settlement, the dismissal will *not* be deemed a termination favorable to the defendant. (*Tokerud v. Capitolbank Sacramento*, at pp. 779-780.) In other words, the fact that a settlement arose from an action, or some portion of it, does not automatically support the conclusion that the litigation was resolved favorably to the alleged vexatious litigant.

In *Roman v. Jefferson at Hollywood LP*, the settlement agreement was reached in the state court action on September 19, 2013, after the United States Supreme Court denied Roman's petition for writ of certiorari on May 13, 2013. Whatever settlement may have been reached does not cure the fact that the federal litigation had already been decided against him on the merits.

## 2. *Roman v. BRE Properties, Inc.*

Roman unsuccessfully makes the same arguments with respect to *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040. In that case, the trial court granted defendants' motion for summary judgment. Division Seven affirmed the judgment on the merits and our Supreme Court summarily denied his petition for review. The only way to obtain review of a ruling by the California Court of Appeal in the California Supreme Court is via petition for review; summary denial of that petition is therefore a determination adverse to Roman and was properly included in the actions supporting the trial court's determination that Roman was a vexatious litigant.

Roman also alleges because he reached a settlement with BRE, the litigation was not decided adversely to him. The record reflects, however, the settlement resolved only the claims related to illegal voice recordings. The remaining claims, which were decided adversely to Roman, involved disability discrimination. Those claims were resolved unfavorably to Roman. Accordingly, the settlement reached on the illegal voice recording claim does not negate the adverse determination on the disability discrimination claims.

## 3. *Roman v. Kotoyan*

We also concluded in the first appeal that *Roman v. Kotoyan*, Super. Ct. L.A. County, 2009, No. BS118557, had been finally determined adversely to Roman. Dr. Kim included this case in her postremand vexatious litigant motion. In the instant appeal, Roman alleges the trial court erred by including this case because it became final more than seven years prior to February 19, 2016, which is the date the trial court issued its final ruling declaring him a vexatious litigant. However, the

point from which the seven-year period of section 391, subdivision (b)(1) is retroactively measured is the date the motion is filed. (*Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406, fn. 4; *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 220, 224.) Dr. Kim filed her motion declaring Roman a vexatious litigant on November 20, 2015, and *Roman v. Kotoyan* became final on February 9, 2009. We therefore conclude the trial court properly included this case among the five actions determined adversely to Roman in the seven years preceding the filing of Dr. Kim's motion.

#### 4. *Roman v. Fair Housing Council*

Roman makes the same argument with respect to *Roman v. Fair Housing Council*, BC393932, which was dismissed on December 22, 2008, after the trial court granted one defendant's special motion to strike pursuant to section 425.16 (anti-SLAPP) and another defendant's demurrer. Roman argues this case was adversely determined to him more than seven years prior to the final ruling on the vexatious litigant motion. As discussed above, however, the operative date is the date the vexatious litigant motion was filed. Here, Dr. Kim filed her motion on November 20, 2015, and the *Fair Housing Council* case was dismissed on December 22, 2008. Accordingly, this case was properly included among the actions determined adversely to Roman in the seven years prior to the filing of Dr. Kim's motion.<sup>7</sup>

---

<sup>7</sup> Roman alleges on appeal that while he filed this action in pro. per., an attorney substituted in at some point. Therefore, Roman contends, the case cannot count against him because he did not maintain it in pro. per. Not so. Section 391, subdivision (b)(1) defines a vexatious litigant as a person who: "[i]n the immediately preceding seven-year period has commenced,

### 5. *Roman v. Smithwick*

Roman challenges the use of *Roman v. Smithwick* (Nov. 22, 2013, B240736) (nonpub. opn.) on two grounds: (1) the jury ruled in favor of Roman; and (2) the appeal is not a “separate case” from the underlying jury trial. In *Smithwick*, Roman brought a lawsuit for injuries he sustained in a car accident with the defendant. The defendant stipulated she was negligent, but challenged the nature and extent of Roman’s injuries. The jury returned a verdict for Roman in the amount of \$14,352. Although Roman prevailed in this litigation, he nevertheless appealed, alleging: “(1) the jury’s verdict was not supported by substantial evidence; (2) the trial court erred in denying his new trial motion; (3) the court erred in granting Smithwick’s motion in limine to preclude Roman from claiming medical malpractice against Smithwick’s expert witness; (4) Roman should have been permitted to submit evidence relating to liability insurance; (5) Smithwick’s attorney committed misconduct in closing argument; (6) the trial judge’s so-called ‘mental impairment’ requires a retrial; and (7) the court erred when it taxed Roman’s expert witness costs.” Not only did we affirm the judgment, we awarded costs to the defendant and respondent.

---

prosecuted, *or* maintained in propria persona at least five litigations” (*italics added*) that have been finally determined adversely to the person. The plain reading of the statute counts the mere commencement of an action in pro. per. even if an attorney later participates in the maintenance of the action.

The vexatious litigant statutes do not apply solely to the trial courts. “Each writ petition and appeal constitutes ‘litigation.’” (*In re Kinney, supra*, 201 Cal.App.4th at p. 958.) Accordingly, “any civil action or proceeding” includes “any appeal or writ proceeding.” (*Fink v. Shemtov, supra*, 180 Cal.App.4th at p. 1170.) Accordingly, the fact that Roman prevailed in the trial court does not preclude the subsequent appeal, which was determined adversely to him, from being counted as one of the five actions determined adversely to Roman within the seven-year period. We affirm the court’s order declaring Roman a vexatious litigant.

#### **DISPOSITION**

The judgment and order are affirmed. Costs are awarded to respondents.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.