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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ISABEL QUINTANILLA et al., Plaintiffs and Appellants, v. DANIEL S. DUNKELMAN et al., Defendants and Appellants.	B171789 (Los Angeles County Super. Ct. No. BC274884)

APPEAL from a judgment of the Superior Court of Los Angeles County, Madeleine Flier, Judge. Affirmed in part and reversed in part.

Law Offices of Howard A. Kapp and Howard A. Kapp for Plaintiffs and Appellants.

Thelen Reid & Priest, Curtis A. Cole and E. Todd Chayet; Schmid & Voiles and Patrick Mayer for Defendants and Appellants Daniel S. Dunkelman and Cedars Towers Surgical Medical Group.

Reback, McAndrews & Kjar, Robert C. Reback and Melanie Shornick for Defendant and Appellant Ricardo Navas.

PROCEDURAL HISTORY

Plaintiffs Isabel and Ramon A. Quintanilla[1] filed a second amended complaint against defendants Clinica Medica General,[2] Los Angeles Surgical Center,[3] Cedars Towers Surgical Medical Group (Cedars Towers), Ricardo Navas, M.D., and Daniel S. Dunkelman, M.D., alleging causes of action against defendants for negligent medical care including lack of informed consent, battery, and intentional infliction of emotional distress. The second amended complaint further alleged that Ramon sustained a loss of consortium. The jury returned a verdict in favor of Cedars Towers, Dr. Navas, and Dr. Dunkelman (collectively "defendants") on the causes of action for battery and intentional infliction of emotional distress. Defendants were found to have provided negligent care and treatment for Isabel. The jury further found in favor of Ramon for loss of consortium due to the negligence of defendants. The jury apportioned fault at 20 percent for Dr. Dunkelman, 40 percent for Dr. Navas, and 40 percent for Cedars Towers pursuant to a verdict form supplied by the trial court. Past damages for Isabel were fixed at $180,000, and $200,000 for future damages. Ramon was awarded $30,000 for past damages and $30,000 for future damages.

A judgment was entered dividing liability among the culpable defendants by the percentages of fault determined by the jury. As to Isabel, the total amount of damages was reduced from $380,000 to $250,000 pursuant to the Medical Injury Compensation Reform Act (Civ. Code, § 3333.2, hereinafter "MICRA"). The damages were allocated as follows: Dr. Dunkelman—$50,000; Dr. Navas—$100,000; and Cedars Towers—

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1 The Quintanillas are hereafter referred to individually as Isabel and Ramon or collectively as plaintiffs.

2 The jury found in favor of Clinica Medica General, and it is not a party to this appeal.

3 Los Angeles Surgical Center was dismissed mid-trial and is not a party to this appeal.

$100,000. As to Ramon, damages were apportioned in accordance with the jury verdict as follows: Dr. Dunkelman—$12,000; Dr. Navas—$24,000; and Cedars Towers—$24,000.

Costs were awarded in favor of plaintiffs and against defendants. Defendants have filed timely appeals. Plaintiffs also appeal.

Dr. Navas contends on appeal as follows: 1. Isabel signed a consent form which she had the ability to read and understand, and she was verbally given informed consent; 2. The procedures were not negligently performed on her; 3. The trial court erred in presenting the jury with an ambiguous general verdict form, rather than the special verdict form requested by all parties; and 4. The trial court erred in awarding costs under Code of Civil Procedure section 998, as plaintiffs failed to obtain a more favorable outcome.

Dr. Dunkelman contends on appeal as follows: 1. A physician who examines a patient cannot be held liable for the treating physician's subsequent failure to obtain informed consent; 2. The trial court erred in providing the jury with an ambiguous general verdict form that did not provide for a special finding of informed consent as distinct from medical malpractice; 3. The trial court prejudicially erred in prohibiting defendants' experts from testifying about standards of informed consent, while allowing plaintiffs' experts to provide such testimony favorable to plaintiffs; and 4. The trial court prejudicially erred in awarding costs under Code of Civil Procedure section 998, where plaintiffs received a judgment against Dr. Dunkelman for less than the amount requested in their statutory offer.

Cedars Towers contends on appeal as follows: 1. A signed consent form indicating the patient was informed of the procedures' risks and complications is conclusive evidence of informed consent; 2. The trial court prejudicially erred in presenting the jury with a verdict form that allowed the jury to find Cedars Towers independently liable and did not distinguish between medical malpractice and informed consent; 3. The trial court prejudicially erred in prohibiting defendants' experts from testifying about standards of informed consent, while allowing plaintiffs' experts to

provide such testimony favorable to plaintiffs; and 4. The trial court prejudicially erred in awarding costs under Code of Civil Procedure section 998, where plaintiffs received a judgment for less than the amount requested in their statutory offer.

Plaintiffs contend on appeal as follows: 1. The trial court's refusal of jury instructions on the substance of Business and Professions Code section 654.2 was error and prejudicial as to plaintiffs' intentional tort claims; 2. It was error for the trial court to refuse a proposed instruction that there is a fiduciary duty to obtain informed consent; 3. It was error to refuse to instruct that Dr. Dunkelman had a fiduciary duty to inform his patient that Dr. Navas was an employee and not merely an unrelated and independent colleague; 4. The trial court erred in refusing to allow Isabel to testify that she would have refused a procedure on her labia had it been suggested; 5. The erroneous refusal of a joint enterprise instruction may have impacted the jury's decision on the intentional torts; 6. The trial court erred in failing to direct the jury on the imputations of liability; 7. The trial court's refusal to instruct the jury that Dr. Dunkelman was required to inform the patient that Dr. Navas was effectively his employee denied plaintiffs the ability to argue that this referral violated Dr. Dunkelman's fiduciary duty to plaintiffs; 8. The trial court erred in failing to enter judgment against Cedars Towers in the amount of $250,000 for Isabel and $60,000 for Ramon; 9. The trial court erred in not entering judgment for prejudgment interest against Cedars Towers from the date of the $249,999.99 and $21,249.99 statutory offers; and 10. Plaintiffs have established prejudicial error affecting the intentional tort claims.

STATEMENT OF FACTS

A. The Parties to the Lawsuit

Isabel, age 32, came to the United States in 1971 at the age of ten months. She attended school through the tenth grade, taking classes in Spanish in the 7th and perhaps the 8th grade. Although fluent in Spanish, Isabel cannot read Spanish. She is fluent in

English. Isabel and her husband, Ramon, have two sons. Isabel and Ramon shared a normal sex life though the 1990's, engaging in sexual relations two to three times per week.

Dr. Daniel Dunkelman owns 100 percent of the stock and is chairman of the boards of the Los Angeles Surgical Center, Los Angeles Clinica Medica General, and Cedars Towers Surgical Medical Group. Dr. Dunkelman is a board-certified general surgeon who performs gynecological surgery. Dr. Dunkelman treated and evaluated Isabel in 2000 and 2001, eventually referring her for surgery to be performed by Dr. Navas.

Dr. Navas is a general surgeon who spent four to six months in residency in gynecology, but is not a gynecologist. He works for Cedars Towers.

B. Events Prior to the Surgery

1. Isabel's Testimony

Isabel sought treatment from Dr. Dunkelman in 2000 at the Clinica Medica General for gynecological problems, including vaginal bleeding and associated pain. Isabel and Dr. Dunkelman conversed in Spanish. Isabel thought Dr. Dunkelman was a gynecologist. She eventually had surgery in June 2001.

Three days before the surgery, Isabel was examined by Dr. Dunkelman. Isabel was suffering from a recurring problem of a pimple located on the right side of her vagina and excessive bleeding and related pain. Dr. Sid Kamrava had previously performed a procedure on a similar pimple, which provided prompt relief. Dr. Dunkelman did not answer Isabel's questions about the pimple other than to say he would take care of it, although he did not indicate when it would be treated. Isabel had expected the pimple to be treated in the office, as had been her experience with Dr. Kamrava. Isabel had never heard the word vulva in 2001 and did not know what it meant. Dr. Dunkelman did not use the word "lesion" in describing the pimple, nor did he give her any options or tell her of any risks with having surgery in that area.

Based upon Isabel's complaints, Dr. Dunkelman suggested surgery—which he referred to in Spanish as a "raspado," a word that translates into a cleaning or scraping. Although unfamiliar with the term, Isabel did not ask what "raspado" involved, because she trusted Dr. Dunkelman. She knew she was going to be treated with a "raspado" at the surgery center for her bleeding problem. She did not know if she would be put under anesthesia or how long the procedure would last. Isabel could not recall whether she had a "raspado" before 2001. Isabel did not know the meaning of the terms dilation and curettage (D&C).[4] Dr. Dunkelman did not advice Isabel orally or in writing concerning his financial relationship with the surgical center, nor did she have knowledge of the relationship.

Dr. Dunkelman did not inform Isabel that he recommended a procedure in which an instrument would be inserted through her abdomen into her stomach so doctors could see what was happening in there. Before filing the lawsuit, Isabel had never heard of a Bartholin's gland. The "raspado" was scheduled for three days after her last visit with Dr. Dunkelman. She received no pre-operation instructions about the "raspado." She believed the "raspado" would be performed by Dr. Dunkelman, because he was the person she went to see.

2. Dr. Dunkelman's Testimony

Dr. Dunkelman saw Isabel in March 2000 at the Clinica Medica General, at which time she complained of a variety of problems including pelvic pain, irregular menstrual cycles, recurrent urinary tract infections, dysmenorrheal, and metrorrhagia. His examination did not reveal any mass or lesion on her external genitalia, nor did her chart reflect any asymmetry of her right and left labia, and surgery was not indicated.

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[4] A dilation and curettage is a common procedure for diagnosis of uterine pathology, which provides information about the possible origin of bleeding and rules out a tumor or cancer, or any other pathology. It is used to stop vaginal bleeding, but is mostly for diagnosis, and is normally done under general anesthesia.

In April 2001, Isabel complained to Dr. Dunkelman of pelvic pain, vaginal itching, irregular and heavy menstrual cycles, and abdominal distention. Following an examination, Dr. Dunkelman recommended, under anesthesia, a D&C procedure, and a laparoscopy. His examination revealed a possible pelvic mass on the internal genitalia.

Isabel returned to Dr. Dunkelman later in April 2001, complaining of vaginal bleeding, pelvic pain, irregular menstrual cycles, dysmenorrheal, and metrorrhagia. They discussed doing a D&C and laparoscopy[5] to find the cause of her problems. Dr. Dunkelman did not find a pimple or lesion on her external genitalia.

Dr. Dunkelman discussed the proposed procedures in Spanish with Isabel. He believed Isabel read and spoke perfectly. Dr. Dunkelman did a pelvic exam and wrote "vaginitis vulvitis," meaning congestion and inflammation of the vulvar area and vagina, but did not document any lesions. He told Isabel she needed the laparoscopy to check the origin of her pelvic pain. The D&C would be performed to locate the source of the bleeding. Isabel had several unremarkable ultrasounds that revealed no mass and were intended to confirm there was no pathology causing the pain in the lower abdomen and pelvis. The only suggestion of a mass was something Dr. Dunkelman felt, combined with an ultrasound, that showed a slightly inhomogeneous mass.

At an examination on June 26, 2001, three days prior to the surgery, Isabel complained of bleeding after her period, although she was not bleeding that day. She also complained of a right vulvar mass and gave him a history of that mass in the past. Isabel described pain in the lower abdominal area, pain in the pelvic area, pain with the menstrual cycles and continued bleeding, and a lesion in the cervical area. In his examination, Dr. Dunkelman found a pimple on the external genitalia, which he described as a "right vulvar mass" that had two previous episodes of infection. Isabel said she had recurrent infections in that area and surgeries before, one of which had been done by Dr. Dunkelman.

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[5] A laparoscopy refers to an abdominal pelvic scoping to diagnose or treat without opening up the patient. It is a surgical procedure performed under general anesthesia.

There are glands known as Bartholin's glands on both sides of the vagina at the 4:00 and 8:00 positions, which become cysts when full of liquid. The gland, located in the middle of the labia minora, provides lubrication of the vulvar area. Dr. Dunkelman has treated many Bartholin's cysts, which are quite common. Isabel said she had a cyst lanced in the past. Dr. Dunkelman did not see a Bartholin's cyst—he saw a very small solid mass in the middle of the vulvar area. Dr. Dunkelman's impression was that Isabel had an indurated mass, but that it could be a Bartholin's cyst. The mass needed to be removed to find the problem for diagnosis. He wrote on her chart that Isabel had a recurring infection of the Bartholin's cyst.

The best treatment of the cyst was to remove the solid mass or lesion and send it to pathology for diagnosis. Dr. Dunkelman told Isabel she could have the lesion removed or leave it. He explained the procedure could result in infection, pain, bleeding, or death. Dr. Dunkelman's expectation was that Isabel could return to sexual relations without pain in four to six weeks. Isabel decided to have the lesion removed.

Dr. Dunkelman did not expect Isabel's condition to change in the next few days. Isabel was in pain and wanted the operation that week, but Dr. Dunkelman was not available. The best day for her was Friday, and Dr. Dunkelman told Isabel that Dr. Navas was available that day. She agreed. Dr. Dunkelman directed Isabel to the Los Angeles Surgical Center rather than other available locations, because it was very convenient and she knew the location from a prior surgery. Dr. Dunkelman did not tell Isabel he owned all the stock to the Los Angeles Surgical Center. Dr. Dunkelman always informs his patients that he owns the Los Angeles Surgical Center.

Dr. Dunkelman referred Isabel to Dr. Navas. Dr. Dunkelman told Isabel that Dr. Navas worked for him and was his associate at Cedars Towers. Dr. Dunkelman spoke to Dr. Navas once before the surgery and two or three times after the surgery. Most likely, Dr. Dunkelman called Dr. Navas, although he has no record of the call. He most likely told Dr. Navas about the procedure, the symptoms, the complaints, physical findings, and the type of surgery. Dr. Dunkelman told Dr. Navas there was a small indurated lesion in the right vulvar area that was infected before and the lesion was to be removed.

Dr. Dunkelman expected Dr. Navas to examine Isabel before the procedure, which could be done better under general anesthesia. Dr. Navas told Dr. Dunkelman he found the right vulvar lesion and removed it. Dr. Navas said he found an indurated mass as described by Dr. Dunkelman on June 26. From the pathology, Dr. Dunkelman thought it was a benign lesion of the vulva.

No laboratory work was ordered the day before the surgery. Isabel was given a piece of paper with pre-operation orders.

English and Spanish language signs had been present on the walls at the Los Angeles Surgical center since it opened in 1996, stating patients are welcomed by Dr. Dunkelman, owner of the surgical center. The signs notify patients of their right to choose their own health provider. The signs were placed in a visible area based on the advice of an attorney.

Dr. Dunkelman last saw Isabel as a patient on July 10, 2001.

3. Silvina Sotelo

Ms. Sotelo, who speaks English and Spanish, is the office supervisor at the Los Angeles Surgical Center, having worked there since it opened in 1996 or 1997. The surgical center has a policy to contact patients to remind them of their appointments and to see if they understand the procedure they will be undergoing. Ms. Sotelo called Isabel, who said Dr. Dunkelman had explained the procedure to her. Isabel asked if Dr. Navas was going to do the procedure, and Ms. Sotelo replied "yes." Isabel said she was going to have a "raspado," but Ms. Sotelo also told her she was going to have a laparoscopy and excision of her vulvar mass. Isabel said Dr. Dunkelman explained that to her. The conversation was in Spanish.

Ms. Sotelo saw Dr. Navas meet with Isabel before the surgery in the pre-operation area. Ms. Sotelo spoke to Isabel after the surgery and gave Isabel a pad to use when Isabel said she had some bleeding. Ms. Sotelo gave Isabel post-operative instructions to

keep the wound clean and dry. Isabel was given medication and ordered to return for a follow-up appointment the following Tuesday.

C. The Surgery and Its Aftermath

1. Isabel's Testimony Regarding the Surgery

Isabel arrived at the Los Angeles Surgical Center at 6:00 a.m. on Friday, June 29, 2001. A female employee gave Isabel a stack of papers and told her where to sign and initial, which took five minutes. There was no place to sit and read the forms, and the person helping Isabel with the paperwork seemed to be in a hurry. Isabel was told to sign and initial a consent form written in Spanish, which she could not read. Isabel did not read the documents and did not ask the woman what she was signing. Isabel did not know the meaning of the words vulvar, lesion, or excision, nor did she understand the meaning of aspiration or laparoscopy. Isabel had never heard the terms laparoscopy or D&C. She signed the forms without getting an explanation. No one at the Los Angeles Surgical Center referred to the procedures as surgery.

After changing into a gown and waiting several hours, a nurse gave Isabel an I.V. Isabel was unaware she was going to be put under general anesthesia. Isabel did not see Dr. Dunkelman on the day of surgery, was not spoken to by a doctor before surgery, and had no recollection of meeting Dr. Navas.

After the operation, Isabel woke up experiencing vaginal pain. A woman entered the room and told Isabel to get dressed. Isabel became frightened when she took off the hospital gown and noticed she was bleeding heavily. Isabel was told this was normal and given a cotton pad to cover her vaginal area.

A few days later, Isabel noticed stitches on the lip of her vagina in an area where the pimple had been. The area hurt when rubbed, such as by contact with her underwear or wiping after going to the bathroom. Isabel was surprised to see stitches. She showed the area to her husband, who acted quiet and surprised.

Isabel decided to try to see Dr. Dunkelman on the Tuesday after the surgery, but he was not at the Clinica Medica General. Isabel told a female doctor she was not feeling well. She was examined in stirrups, but the doctor said there was nothing she could do for Isabel. Isabel was informed Dr. Dunkelman would likely be back the following Tuesday.

Isabel saw Dr. Dunkelman three weeks after the surgery. She did not ask to see Dr. Navas, because she did not know about him and, in fact, first heard his name when she gathered her medical records after the surgery. Dr. Dunkelman did not examine her and did not place her legs in the stirrups. He told her, when asked, that she could engage in sexual relations.

Isabel was not sure she had sexual intercourse with her husband again after the surgery in 2001. Intercourse was not painful before the surgery and took place two to three times per week. Isabel went into depression over the thought that she was a young woman who could not have intercourse with her husband. Her condition after the surgery impacted her ability to take care of her children, who are most important in her life. Isabel stopped driving the children to activities as she had done before the surgery. She has not had pain-free intercourse with her husband since the operation in June 2001. In 2002 and 2003, she had intercourse with her husband perhaps once a month, but it was painful, very fast, and she could not experience different positions as before. She had to alter her clothing so that it did not rub against her.

2. Ramon's Testimony

Up until 2001, Ramon's sex life with Isabel had a frequency of two to three times per week. Isabel spent more time with the children before the operation. Isabel showed Ramon the results from the surgery. She looked scared, upset, and confused, and Ramon was shocked. Ramon saw missing parts and something that was not normal. After the surgery, Isabel has pain on the right side of her vagina during intercourse. Sexual intercourse after the operation is limited to once or twice a month and is painful for

Isabel. Isabel's self-esteem is low, she feels depressed sometimes, and Ramon has seen her crying.

3. Dr. Navas's Testimony

Dr. Navas first heard of Isabel in June 2001, in a telephone conversation with Dr. Dunkelman. Dr. Dunkelman wanted Dr. Navas to perform a surgery because Dr. Dunkelman was not available. Isabel's chart does not document the phone call from Dr. Dunkelman.

Dr. Dunkelman told Dr. Navas that Isabel knew that Dr. Navas would perform the surgery. Dr. Dunkelman described Isabel's problems as including pelvic and back pain, heavy menstrual bleeding, and a lesion or mass in the labia or vulva that required excision. Dr. Dunkelman said Isabel had a procedure done on the mass once before, which sounded like a Bartholin's cyst where the aspirated fluid was withdrawn and indurated. Dr. Dunkelman and Dr. Navas had only one conversation about Isabel before the surgery.

Dr. Navas had a conversation with Isabel sometime between 6:30 a.m. and 7:00 a.m. on June 29, 2001, before she was put under general anesthesia. The conversation with her lasted about three minutes. Dr. Navas did not do a physical examination before general anesthesia. He did tell Isabel he was a surgeon, but he did not know if Isabel was aware that Dr. Navas was not a gynecologist.

Dr. Navas reviewed Isabel's laboratory values, her pre-operative office visit form, the informed consent form, and a pelvic ultrasound report. The laboratory values were from tests in March 2001, three months before the surgery. Isabel said she had been bleeding from the vagina for prolonged periods of time, which might have had an affect on her laboratory values.

Dr. Navas introduced himself to Isabel, said that he was Dr. Dunkelman's associate, that he understood Dr. Dunkelman had spoken to her about Dr. Navas doing the operation, and that she was going to have an exam under anesthesia. He asked her

several questions about the bleeding and the pain, and Isabel explained the problems to Dr. Navas. Isabel told Dr. Navas she had a sore area, describing it as either a nodule, a mass, or a lesion. Isabel said she had aspirations or lancing procedures performed once or twice in the past. Dr. Navas told her they would look at the area under anesthesia and remove the mass or lesion. They spoke about how much pain she would experience. Dr. Navas explained that the laparoscopy procedure involved a small incision, putting a needle inside her, blowing in gas, and looking around with a scope. They would look at her organs, aspirate cysts, and biopsy lesions to arrive at a diagnosis. Because Isabel had a previous laparoscopy and D&C, she was given short explanations of the procedures. The risks Dr. Navas discussed with Isabel were bleeding, scarring, and injury to the abdomen or the bowels.

Dr. Navas performed an examination under anesthesia, finding a mass in the right labia, which he excised and sent to pathology for analysis. According to his operative notes, he removed a cystic lesion right under the skin of the labia and used two or three stitches to close up the area. An infected cyst could have been left alone, lanced, or removed. Dr. Navas only offered to remove it or leave it alone. Dr. Navas thought there was a small possibility Isabel had a Bartholin's cyst. The surgery was uneventful.

Dr. Navas spoke to Isabel after the operation, but she was a little sleepy and he would not expect her to remember the conversation. Dr. Navas expected that Isabel could have pain free intercourse four to six weeks after the surgery. Dr. Dunkelman was to see Isabel post operatively.

4. Claudia Frias

Ms. Frias is a registered nurse who began working at the Los Angeles Surgical Center in November 1998. Ms. Frias did not remember Isabel, but worked with a patient with Isabel's name on June 29, 2001. Patients at the Los Angeles Surgical Center filled out forms as directed by office staff.

Ms. Frias was involved in filling out the pre-operative nursing record after Isabel was brought to the pre-operation room. Ms. Frias filled out, signed, and witnessed Isabel's consent form at 6:03 a.m. She could not tell from Isabel's records whether or not Dr. Navas spoke to Isabel before the consent form was signed. The consent form contains writing referencing "examination under anesthesia, [D&C], laparoscopy, possible biopsy, possible aspiration, [and] excision of the vulvar lesion." Ms. Frias is a native Spanish speaker, but does not read Spanish because she was never taught the language. Ms. Frias did not remember if she saw Isabel sign the consent form. Ms. Frias signed the consent form because she was the one who filled it out. Normally, someone in the office would obtain the patient's signature.

Ms. Frias did not know if she asked Isabel if she understood the consent. Her practice was to review the form with the patient to see if the patient agreed. She assumed Isabel was Spanish speaking. The consent form was signed on the Spanish language side, with nothing written on the English language side.

D. Expert Testimony

1. Dr. Stephen Pine (Plaintiffs' Expert)

Dr. Stephen Pine, an obstetrician and gynecologist, testified as plaintiffs' expert witness on the standard of care. He has a full time practice and teaches part-time at the University of Southern California. Dr. Pine saw Isabel and reviewed Dr. Navas's report. He also read notes of the admission physical by Dr. Dunkelman, the operation and surgical reports, the report of the defense expert witness (Dr. Albert J. Phillips), and the admission paperwork from the Los Angeles Surgery Center. Dr. Pine concluded that Isabel had four procedures: an examination under anesthesia, a D&C, removal of tissue from her right vulva or vagina, and a laparoscopy. It appeared to Dr. Pine that Dr. Navas was doing the procedures Dr. Dunkelman thought were necessary. Dr. Pine found no mention in Isabel's history of pelvic pain and no documentation of pelvic masses so the

laparoscopy was not necessary. Dr. Pine was reluctant to criticize Dr. Dunkelman for the laparoscopy, since he was not present at the examination, but based on Isabel's chart, showing no current blood work, normal ultrasounds, and one pelvic exam showing enlarged ovaries, he saw no indication for the laparoscopy.

The standard practice to justify a laparoscopy calls for talking with the patient. A mention of pelvic pain does not warrant an operation. According to a diagram drawn by Dr. Dunkelman on June 26, 2001, Isabel had a problem in the right labia minora, in the mid-portion of the vulva. On June 26, 2001, Dr. Dunkelman found what he thought was a Bartholin's cyst infection; Dr. Pine disagreed with Dr. Dunkelman's opinion. The pathology report revealed it to be a sebaceous cyst. If a lesion is palpated (felt) and barring any intervening treatment, Dr. Pine would expect the lesion to be there three days later. One cannot palpate a Bartholin's gland that is not cystic, because the gland is not normally enlarged. An acute Bartholin's gland can be very red and tender, requiring treatment when it reaches the acute abscess stage. The treatment calls for opening the area with a scalpel and putting in a catheter or a small tube for draining. It needs to drain before sealing or the abscess will continue.

Dr. Pine believed Dr. Navas did not examine Isabel before putting her under general anesthesia, which did not comply with the standard of care. It is not ethical or proper to do surgery relying on another physician's findings. It is not responsible to subject a patient to surgery without examination by the surgeon, who makes his or her own determination. The standard of care requires that the patient know who the surgeon was going to be. Dr. Navas testified he had a three-minute conversation with the patient before surgery, which did not seem long enough to get the necessary information according to Dr. Pine, but it was possible.

The laboratory work was done on Isabel on March 30, 2001, three months before the surgery. As a result of her complaint of bleeding, Dr. Pine was of the opinion current blood levels should have been obtained before the operation. The pre-operative diagnosis was vulvar mass, but did not indicate the location of the mass. The operative report indicates there was excision, meaning removal.

The operative report stated that the patient complained of some back pain and a history of a right vulvar mass with recurrent infection as determined by bi-manual pelvic examination of pelvic mass. Isabel was advised to undergo excision of a mass that was not palpable, which confused Dr. Pine. Just as Dr. Pine could not testify that the laparoscopy was indicated without more history, he did not think Dr. Navas should have performed the laparoscopy because he did not examine Isabel except under anesthesia. Because Dr. Navas performed his examination after Isabel was under general anesthesia, he would not have been able to discuss with her whether to remove or do anything regarding the right vulvar mass, which is below the standard of care.

Dr. Pine believed Dr. Dunkelman thought Isabel had a Bartholin's cyst, but Dr. Navas removed a mass he did not palpate. Dr. Navas removed a pimple, a little sebaceous area of what could turn into a sebaceous cyst. It was below the standard of care for Dr. Navas to rely on Dr. Dunkelman's findings made 72 hours earlier. There was no reason to remove the pimple based on an examination while Isabel was asleep. In Dr. Pine's opinion, the proper operation under the circumstances was the D&C, which was performed. The laparoscopy and the excision of the right vulvar mass were not justified within the standard of care, although the laparoscopy was performed competently and Isabel suffered no harm from the procedure.

Dr. Pine examined Isabel and determined there was surgical removal of the labia minora on the right,[6] which was smaller than the same area on the left. Dr. Pine agreed with the defense expert witness that Isabel had a neuroma[7] in the area removed. Isabel had exquisite pain in the area on the right when examined. Isabel explained that the area was painful to touch and during intercourse, and she considered it ugly.

A consent form indicates that the patient understands exactly what procedures are going to be performed and constitutes authorization that the patient gives consent for the

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[6] Dr. Pine does not think Dr. Navas removed Isabel's right labia. Dr. Pine believed it was Dr. Kamrava who removed a great deal of the labia.

[7] A neuroma is an acute inflammation of the nerves.

procedures. The consent form was signed at 6:03 a.m. and witnessed by Ms. Frias. A progress note signed by Dr. Navas indicates informed consent was done at 7:00 a.m. It would have been sufficient for purposes of introduction if Dr. Dunkelman said Dr. Navas was going to do the surgery and Dr. Navas introduced himself before the operation. It is the physician's duty to explain the procedures.

The procedures listed on the consent form were examination under anesthesia, D&C, laparoscopy with possible biopsy and possible aspiration of the cystic fluid, and excision of the vulvar lesions Isabel told Dr. Pine she knew she was having surgery, but it was not described to her by the surgeon who performed the operation, and she did not understand the laparoscopy procedure.

Dr. Pine did not criticize the way in which Dr. Navas performed the surgical procedures. He did, however, find fault with the process that lead Isabel to the operating room and was of the opinion the procedures performed were unnecessary.

2. Dr. Enid Reed (Plaintiffs' Psychologist)

Dr. Reed is a psychologist and neuropsychologist who met with Isabel and her husband for evaluation. Dr. Reed did not give Isabel a psychological test because she did not expect valid results. Dr. Reed found Isabel to be suffering and having feelings of rage and grief. Dr. Reed assessed Isabel's ability to give informed consent. Dr. Reed concluded Isabel lacked the ability to question authority figures. Isabel believes what authority figures say is true and tends to follow their orders. Isabel told her that if a doctor tells a Hispanic to do something, the Hispanic believes it.

For her entire life, Isabel was a nonassertive person who accepted authority. Dr. Reed gave as an example the fact that Isabel never applied for a promotion at work at Costco. Dr. Reed was of the opinion Isabel did not read Spanish well. Isabel reads some words in Spanish without understanding their meaning. The pain Isabel has during intercourse has practically destroyed her. Isabel is depressed and afraid her husband will cheat on her. Isabel's mood swings, depression, and sleeping problems are classic signs

of posttraumatic stress disorder. Before the surgery, Isabel and her husband had a close relationship, but Ramon questions when Isabel will be better. Ramon is depressed and the children do not know what is wrong.

Isabel feels betrayed by the doctors, whom she trusted. She feels the doctors should be held accountable, but has not sought treatment for her psychological condition. In Dr. Reed's opinion, Isabel is not malingering.

3. Dr. Albert J. Phillips (Defense Expert)

Dr. Phillips is an obstetrician-gynecologist. Isabel had a history of heavy bleeding, which returned after an estrogen treatment. Dr. Phillips agreed with Dr. Pine that a D&C was a procedure within the standard of care in response to Isabel's bleeding problems. Dr. Phillips was also of the opinion that an exploratory laparoscopy was within the standard of care, because of Isabel's history of pelvic pain and heavy bleeding.

Dr. Phillips's opinion is that a sebaceous hyperplasia causing a painful and indurated mass in the right labia could be surgically excised within the standard of care. He did not see any indication before surgery of a sebaceous hyperplasia. Excision of the mass from Isabel was totally appropriate. The mass was removed by Dr. Navas in a manner consistent with the standard of care. Isabel had what Dr. Phillips believed was congenital labia asymmetry, in that the left labia was larger than the right labia minora.

Dr. Phillips was able to elicit pain in Isabel during an examination. He opined that Isabel formed a neuroma, which he described as a collection of nerves that incorporated into scar tissue. This occurred because of abnormal healing in the area, not because a procedure was done incorrectly. A neuroma in that area would cause pain during intercourse. The problem could be treated with a steroid injection, or through a procedure to cut out the tissue in hope that the new healing will not incorporate scar tissue or a neuroma.

4. Dr. Barbara Moyer (Defense Psychologist)

Dr. Moyer holds a Ph.D. in clinical psychology, with a specialty in neuropsychology. Post-traumatic stress disorder is a set of symptoms in response to an extreme and potentially life threatening trauma. The syndrome is based upon an extreme event which is very much out of the realm of human experience. The reaction of Isabel to her surgery is not the type of experience which would support the syndrome. Isabel did not exhibit the symptoms of traumatic stress disorder to rule out malingering. Dr. Moyer was not given an opportunity to personally evaluate Isabel.

E. Testimony Regarding Isabel's Prior Treatments

Dr. Sid Kamrava is a medical doctor who is board certified in obstetrics and gynecology who treated Isabel beginning in May 1993. Dr. Kamrava saw Isabel as a patient in March and April 1999, when she complained of heavy bleeding. He did a D&C on Isabel in April 1999. She returned to his office on May 3, 1999, with an abscess of the Bartholin's gland, which he drained by making a tiny incision. A needle was used to withdraw fluids two days later from cysts left in the same area. A few weeks later, Isabel returned complaining of pelvic pain. Dr. Kamrava repaired her cystorectolele. He would not have done the procedures had Isabel not understood them.

On August 9, 1999, Isabel complained of swelling and pain on the left side of her genitalia. Dr. Kamrava incised and drained a vulvar abscess on the left side. In February 2000, Isabel complained of pain with urination, discharge, and pelvic pain. She had a vaginal infection with a small ovarian cyst, a small uterine fibroid, and pain.

In April 2002, Isabel complained of heavy bleeding and some vaginal discharge. She did not complain that the pain interfered with sexual relations with her husband and no tenderness was noted. Dr. Kamrava did not notice anything visually different in her external genitalia.

Dr. Kamrava saw Isabel again on March 12, 2003, at which time she complained of pain during intercourse and discharge. Isabel said they had cut her vulva. Dr. Kamrava's impression was that Isabel felt pain from a retroverted fibric uterus. Her mood was normal. He did not note that the left side of her external genitalia was larger than the right. Seventy percent of women are symmetrical, thirty percent are not.

After Dr. Kamrava was deposed, Isabel complained to him in June 2003 of pain on the right side of her genital area. The right labia had scar tissue tender to the patient and the lower part of her right labia minora was missing. Isabel's right labia was tender to palpation.

DISCUSSION

I

INFORMED CONSENT ISSUES

A. Dr. Navas's argument that Isabel signed a consent form detailing the procedures to be performed, thereby acknowledging her informed consent.

Dr. Navas argues that Isabel consented to the procedures performed upon her on June 29, 2001, as evidenced by the form she signed. In so arguing, Dr. Navas contends the record shows that Isabel did read Spanish, despite her contrary testimony. Dr. Navas further argues that Dr. Dunkelman and Dr. Navas verbally advised Isabel of the intended procedures, thereby constituting verbal informed consent.

Dr. Navas's argument is based on a view of the evidence impliedly rejected by the jury. While there is evidence in the record, which if believed by the jury would have supported a defense verdict, there also is abundant evidence to the contrary. Under the substantial evidence rule, Dr. Navas's argument that informed consent was given is without merit.

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the

prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

The doctrine of informed consent was explained as follows in *Arato v. Avedon* (1993) 5 Cal.4th 1172, 1182-1183 (*Arato*): "The fount of the doctrine of informed consent in California is our decision of some 20 years ago in *Cobbs v. Grant* [1972] 8 Cal.3d 229 [(*Cobbs*)], an opinion by a unanimous court that built on several out-of-state decisions significantly broadening the scope and character of the physician's duty of disclosure in obtaining the patient's consent to treatment.[] In *Cobbs* . . . , we not only anchored much of the doctrine of informed consent in a theory of negligence liability, but also laid down four 'postulates' as the foundation on which the physician's duty of disclosure rests.

"'The first [of these postulates,]' we wrote, 'is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.' [Citation.]

"'The third [postulate,]' we continued, 'is that the patient's consent to treatment, to be effective, must be an informed consent. And the fourth is that the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician

for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.' [Citation.] From these ethical imperatives, we derived the obligation of a treating physician 'of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each.'"

The record, viewed in the light most favorable to the judgment, supports a finding that Dr. Navas and Dr. Dunkelman did not satisfy their obligation "'of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each.'" (*Arato*, *supra*, 5 Cal.4th at p. 1183.) Isabel testified she was only told by Dr. Dunkelman about the D&C, but not about the laparoscopy or removal of a lesion. She further testified she never met Dr. Navas prior to the surgery, and he did not discuss the procedures with her. Isabel testified she was given Spanish-language forms to initial and sign, but she did not read Spanish and the forms were not interpreted for her. Isabel testified to her shock when she saw stitches after the procedures. There is no indication in the record that Isabel was advised of possible disfigurement, excessive long-term pain, or interference with her ability to have pain-free sexual intercourse. The jury's determination of a lack of informed consent is supported by substantial evidence.

B. <u>The existence of a signed consent form as conclusive proof of informed consent.</u>

Dr. Navas and Cedars Towers contend that a signed consent form constitutes conclusive proof of informed consent. Relying largely on contract principles, it is argued that one who signs an instrument (such as the consent form in the instant case) is bound by its terms. Cedars Towers argues that Isabel's uncorroborated testimony is insufficient to overcome the presumed validity of the written consent. Cedars Towers further argues that if a signed consent form is not given conclusive force, "plaintiffs will undoubtedly and routinely deny that they read or understood consent forms they signed in order to

pursue lawsuits against their doctors" and "the effect of disregarding the consent form would have significant impact on the practice of medicine."

The law is clear in California that the existence of informed consent is an issue of fact for the jury. The question has been described as "a peculiarly fact-bound assessment which juries are especially well-suited to make." (*Arato*, *supra*, 5 Cal.4th at p. 1186.) In administering the doctrine of informed consent, "'each patient presents a separate problem, . . . the patient's mental and emotional condition is important and in certain cases may be crucial, and . . . in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.'" (*Id.* at p. 1185.) It is the physician's duty "'to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed *operation* or *treatment.* [¶] Material information is information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended *medical procedure. . . .*'" (*Id.* at pp. 1188-1189, fn. 9.)

Plaintiffs' evidence in the instant case demonstrates why a signed consent is not entitled to conclusive proof of informed consent. As discussed above, Isabel presented evidence that the procedures performed upon her by Dr. Navas went beyond that discussed with Dr. Dunkelman, Dr. Navas never met with her before the surgery, she could not read the Spanish-language consent form, and she was effectively told to "sign here" and "initial there." The Spanish-language form was not translated into English at trial, making it impossible to determine if the form satisfies the requirements of *Cobbs*.

Defendants' reliance on *Danielson v. Roche* (1952) 109 Cal.App.2d 832 (*Danielson*) is misplaced. In *Danielson*, a physician diagnosed his patient as having appendicitis and salpingitis, and advised an immediate operation. The patient signed a form authorizing and consenting to the performance of "'all and singular any treatments or operation to or upon me which may now or during the contemplated services be deemed advisable or necessary.'" (*Id.* at p. 833.) During the surgery, the physician found infected fallopian tubes, which the surgeon removed. In the patient's medical

malpractice action for removing her fallopian tubes without her consent, the jury returned a verdict for the physician. "Such consent, or lack thereof, was thus tendered as one of the issues—and an important one—for the jury" (*id*. at p. 835), and "[t]he jury apparently treated the consent as embracing not only the appendectomy but whatever further operation might be considered necessary after the abdomen had been opened up and explored by the surgeon. . . . The verdict implies a finding that the consent included the operation in both its phases." (*Ibid*.) The decision in *Danielson* demonstrates that the adequacy of a written consent is a factual issue for the jury, and does not stand for the proposition that a signed form is conclusive proof that informed consent was given.

It is argued that Evidence Code section 622[8] renders recitals in the written consent signed by Isabel conclusively binding as to the issue of informed consent. Evidence Code section 622, formerly found in Code of Civil Procedure section 1962, subdivision 2, "codifies the common law doctrine of 'estoppel by contract.'" (*Plaza Freeway, Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 625-626, quoting *Estate of Wilson* (1976) 64 Cal.App.3d 786, 801.) Assuming that Evidence Code section 622 applies to a written medical consent form, the statute provides no relief to defendants because the Spanish language consent form was never translated into English at trial. In the absence of a proper translation of the document, we simply have no way of knowing the content of any recitals in the consent form or whether the form constitutes an instrument within the meaning of the Evidence Code section 622. Given the state of the record on appeal, we cannot conclude that Evidence Code section 622 provides a basis for reversal of the judgment.

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8 Evidence Code section 622 provides as follows: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

In any event, there is no authority to support the argument that Evidence Code section 622 applies in the context of informed consent.[9] Cedars Towers concedes "the word 'instrument,' as used in section 622, usually refers to a contract." While Evidence Code section 622 has been applied to documents other than contracts, such as a transfer of property (*Estate of Wilson, supra,* 64 Cal.App.3d at p. 801) and an estoppel certificate (*Plaza Freeway, Ltd. Partnership v. First Mountain Bank*, *supra*, 81 Cal.App.4th at pp. 628-629), the argument that recitals in an instrument conclusively establish informed consent is inconsistent with the rationale supporting the informed consent doctrine. The law of informed consent has "helped effect a revolution in attitudes among patients and physicians alike regarding the desirability of frank and open disclosure of relevant medical information." (*Arato, supra,* 5 Cal.4th at pp. 1184-1185.) Application of the conclusive presumption of Evidence Code section 622 to recitals in a waiver form would not foster the purposes behind the informed consent rule. Where, as here, there is substantial evidence that the patient was rushed through the admission process without a real opportunity to read the consent form, she was not able to read the language on the form, and she did not understand what procedures were going to performed upon her, we conclude that that conclusive presumption of Evidence Code section 622 is inapplicable.

Cedars Towers also argues that Isabel's uncorroborated testimony is insufficient to overcome the validity of a signed, written consent. The jury was properly instructed pursuant to BAJI No. 2.01 that "[t]he testimony of one witness worthy of belief is sufficient to prove any fact." BAJI No. 2.01 is a correct statement of law. (Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].)

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9 The authorities relied upon by Dr. Navas and Cedars Towers in support of the argument that exhibit 9 constitutes conclusive proof of consent are inapposite. For example, *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586 involved the enforceability of an arbitration agreement in a medical malpractice case. *Estate of Wilson, supra,* 64 Cal.App.3d 786 construed documents in a probate proceeding. Neither case involved proof of informed consent.

Cedars Towers further argues that studies show that allowing a patient to rebut the validity of a written consent would expose doctors to frivolous lawsuits, and if a patient's signed, written consent is not enforced, doctors will be exposed to unlimited liability on informed consent theories. Sound policy reasons support a rule allowing a patient to rebut a signed consent where, as here, a legitimate dispute exists between Isabel and defendants as to whether: she was ever told of all the procedures performed; she met the doctor who operated on her prior to the operation; the document was explained to her since she did not read Spanish; and the record contains no verbatim translation of the written consent. In accordance with *Cobbs, supra,* 8 Cal.3d at pages 244-245, *Arato, supra,* 5 Cal.4th at pages 1185-1186, and *Danielson, supra,* 109 Cal.App.2d at page 835, we hold that the validity of written consent in the instant case was a question of fact for the jury to decide based upon conflicting evidence.

C. Dr. Dunkelman's contention that a physician who examines a patient cannot be held liable for the treating physician's subsequent failure to obtain informed consent.

Dr. Dunkelman argues that he cannot be held responsible for Dr. Navas's failure to obtain informed consent, because he neither treated nor operated on Isabel. Dr. Dunkelman cites *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285 (*Daum*) in support of his argument that a referring physician is not liable for the treating physician's failure to obtain informed consent, although Dr. Dunkelman realizes the limited scope of *Daum* since it involved a statute pertaining to experimental devices, an issue not present in the instant case. We conclude, under the facts in this case, that Dr. Dunkelman was responsible for obtaining informed consent if Dr. Navas did not do so, and the failure of both physicians to fulfill their obligation rendered each liable.

In *Daum,* a patient with recurring back problems received a surgically implanted experimental device. Before the surgery, the patient was seen by an internist involved in the nonsurgical portion of the patient's treatment, and also by another physician, who was the designated investigator of the experimental device. In an action alleging lack of

informed consent that the device implanted in the patient was experimental, the trial court granted nonsuit in favor of the internist. The judgment granting nonsuit was affirmed on the basis that under federal law the designated investigator was responsible for disclosing the experimental nature of the device, but the duty to disclose did not extend to the internist under the relevant federal laws. (*Daum, supra,* 52 Cal.App.4th at pp. 1318-1319.)

Unlike the situation in *Daum*, there is no federal statute or other rule of law in the instant case allocating the obligation to obtain informed consent solely to Dr. Navas. Viewing the evidence in the light most favorable to the judgment, the role of Dr. Dunkelman was more than merely that of a referring physician. Dr. Dunkelman owned all of the stock in Cedars Towers, and Dr. Navas was employed by Cedars Towers. Dr. Dunkelman was the physician who met with Isabel, made the diagnosis, and discussed treatment with her. Dr. Dunkelman informed Dr. Navas in a phone conversation what procedures Dr. Navas was to perform on Isabel. Isabel was not aware Dr. Navas would perform the surgery, believing instead that Dr. Dunkelman was going to be the surgeon. According to Isabel, she did not meet Dr. Navas before being put under anesthesia and was not examined by him.

Given this factual record, the jury could reasonably conclude that Dr. Dunkelman shared responsibility for obtaining informed consent from Isabel. The issue was fairly presented to the jury through BAJI No. 3.77 ("When negligent or wrongful conduct of two or more persons or negligent or wrongful conduct and natural causes contribute concurrently as a cause of injury, the conduct of each is a cause of the injury regardless of the extent to which each contributes to the injury"). Informed consent could have been obtained from Dr. Dunkelman or Dr. Navas, either of which would have been legally sufficient. Because the record supports a finding that both doctors failed to obtain informed consent, the jury reasonably allocated fault to both Drs. Navas and Dunkelman.

II

THERE IS SUBSTANTIAL EVIDENCE THAT THE PROCEDURES WERE NEGLIGENTLY PERFORMED BY DR. NAVAS

Dr. Navas argues that the uncontroverted evidence establishes that he did not negligently perform the surgical procedures on Isabel. Dr. Navas argues that all "experts in the case testified that all of the procedures were performed within the standard of care."

Dr. Navas reads the record of the testimony of Dr. Pine too narrowly. Dr. Pine testified that four procedures were performed on Isabel: an examination under anesthesia; a D&C; removal of tissue on her right vulva or vagina; and a laparoscopy. The D&C was indicated and did not affect the area of pain.

According to Dr. Pine, there was no pathology on the March 30, 2001 ultrasound to indicate a laparoscopy was required. Dr. Pine was not sure why the laparoscopy was done, but believed it would be unfair to say why Dr. Dunkelman would do a laparoscopy depending upon the symptoms presented by the patient. Based on the chart, Dr. Pine saw no basis for the laparoscopy, although it was performed competently and without causing harm.

In Dr. Pine's opinion, Dr. Navas's failure to examine Isabel before she was placed under anesthesia did not comply with the standard of care. Surgery performed by Dr. Navas in reliance on Dr. Dunkelman's findings was not ethical and was not within the standard of care. A surgeon's failure to speak with his patient before surgery is also not within the standard of care. The standard of care required that Isabel know who was performing the surgery. Dr. Pine was of the opinion that it was below the standard of care for Dr. Navas to examine Isabel under anesthesia, because Dr. Navas and Isabel could not have had a conversation as to whether or not to remove the right vulvar mass.

Dr. Pine also found fault in the absence of recent laboratory work prior to surgery. The last laboratory work on Isabel was done three months before the surgery. Where, as here, there was a complaint of irregular menstrual cycles, depending on the amount of

bleeding, Dr. Pine believed a surgeon would want to know Isabel's blood levels before putting her under anesthesia and performing surgery. Dr. Pine believed Isabel's blood levels were unknown at the time of surgery. A three-minute conversation with a patient, as Dr. Navas said he had with Isabel, was possibly sufficient to obtain informed consent, but it did not seem reasonable.

Dr. Pine noted that three days before the surgery, Dr. Dunkelman described what he thought was a Bartholin's cyst. According to Dr. Navas's notes, no lesion was palpated at the time of the surgery. Dr. Pine expressed the opinion that Dr. Navas operated based upon what Dr. Dunkelman found 72 hours earlier, not based upon what should have been observed to justify removal of a vulvar mass, and this procedure was below the standard of care. In Dr. Pine's opinion, the proper operation for Isabel was the D&C for irregular bleeding, and the other procedures were not justified within the standard of care.

Additionally, what Dr. Dunkelman thought was a Bartholin's cyst was actually a sebaceous cyst according to the pathology, which was inconsistent with a Bartholin's cyst. The sebaceous hyperplasia, if not palpable, had no clinical significance. The standard of practice does not allow for removal of tissue which was a sebaceous hyperplasia.

As catalogued above, Dr. Pine's testimony referenced multiple instances of treatment by Dr. Navas, which did not meet the standard of care. That there may be other interpretations of the evidence is of no moment on appeal—under the substantial evidence rule, we view the evidence in the light most favorable to the judgment and, having done so, reject Dr. Navas's argument.

III

THE VERDICT FORMS WERE PREJUDICALLY DEFECTIVE

Defendants each contend the verdict form used by the trial court was defective. Defendants argue it was reversible error for the trial court to use a general verdict form

which did not distinguish between medical negligence and informed consent. Dr. Dunkelman and Cedars Towers contend there is no substantial evidence of either medical negligence or lack of informed consent. Dr. Navas argues that case law requires a special verdict in medical malpractice cases where there is a possibility future damages will exceed $50,000. Cedars Towers argues the verdict form erroneously allowed the jury to find Cedars Towers independently liable. Cedars Towers contends the verdict is so defective that it cannot be reformed. Finally, Cedars contends that if the verdict is upheld, the special findings control over the general verdict.

Plaintiffs contend defendants waived any defect in the verdict by requesting that the verdict apportion fault among defendants. Plaintiffs further argue, in their own appeal, that liability should be recalculated by deleting the 40 percent liability of Cedars Towers and reapportioning the liability at two-thirds for Dr. Navas and one-third to Dr. Dunkelman.

A. Genesis of the Verdict Form

The issue of what type of verdict form would be given to the jury was the subject of ongoing discussion between the parties and the trial court. Before the evidence phase of trial was concluded, the trial court stated it would give a "general [verdict] with findings. I'm not going to give a special [verdict]. I don't see the necessity. Plaintiffs' counsel argued that a special verdict was required by MICRA, and counsel for Dr. Dunkelman agreed. Counsel for Dr. Navas said there could either be a special verdict (BAJI No.16.01) or a general verdict with special interrogatories.

In rejecting a special verdict form, the trial court said, "I've never given one in a med mal case," expressing the view that "[e]ach defendant would be treated separately, so what is it that would be set out then?" Plaintiffs' counsel said he had spent a lot of time preparing a special verdict and the trial court might want to look at his effort. "And there's in there as to apportionment among defendants that they might want to have

removed. But I put it in there because I know there's different insurance carriers involved. So it might be important for that reason. I don't know, that's up to them."

Entwined with the issue of the validity of the verdict form was the question of jury instructions on agency and respondeat superior. Plaintiffs' attorney requested instructions directing the jury as to who was an agent in the case. The trial court said, "I don't know why you have to go into that." The trial court noted there was an instruction stating a corporation can only act through its employees or officials.

As the end of trial approached, plaintiffs' counsel said "it is the consensus among counsel that we should stay with the form," presumably referring to a special verdict form, although the reference is unclear. The trial court apparently was working on a general verdict with special interrogatories, which plaintiffs' counsel suggested had become "a special verdict," but the trial court replied, "No, it isn't." The trial court stated, "Basically, all I wanted to know is do they find negligence. . . . [¶] If you find for the plaintiff[s] and against one of the defendants for negligence, and if so, how much?"

An additional discussion of the verdict form occurred on the record, although the context is unclear. In proceedings which the reporter's transcript indicate took place in the presence of the jury, the trial court stated in reference to the verdicts, "There are objections. The attorneys looked at the verdict and . . . although they don't agree . . . that kind of verdict should go in, what was written was okay with them. [¶] . . . [¶] Or they might have had a different verdict."

The next morning, counsel for plaintiffs asked to make a record of his objection to the trial court's handling of issues of punitive damages. Counsel for Cedars Towers said, "I would just like to note that we did request that there be a special verdict and the court has directed us to have a general verdict. [¶] I believe that my objection is stated for the record, but we did vote for the general verdict which then did[.]" The end of counsel's statement is not in the record. Plaintiffs' counsel told the trial court, "Going back to the verdict form that I argued from, I should indicate that counsel did not have any objection to that form. The court preferred to go with a general -- with a different general verdict form. [¶] . . . [¶] It's just that all the questions now have changed and there was some

discussion when my argument was going on." Plaintiffs' counsel continued, "I don't believe that the verdict form should have included any questions of agency. I think that the court should have directed the agency question as requested in my jury instructions which the court has refused." The trial court stated the jury was instructed on agency, but plaintiffs' counsel said he wanted a directed verdict on agency. Ultimately, the trial court stood by its decision to use a general verdict form with special interrogatories.

B. <u>The Verdict Form</u>

Using the form provided by the trial court, the jury returned the following verdicts:

"1. Were any of the below designated defendants negligent in the care and treatment of plaintiff Isabel Quintanilla?

Daniel Dunkelman, M.D. Yes _X_ No ____
Ricardo Navas, M.D. Yes _X_ No ____
Clinica Medica General Yes ____ No _X_
Cedars Towers Medical
Surgical Group Yes _X_ No ____

"2. As to any defendant for which the answer to Question No. 1 was yes, was that negligence a cause of injury, damage, loss or harm to plaintiff Isabel Quintanilla?

Daniel Dunkelman, M.D. Yes _X_ No ____
Ricardo Navas, M.D. Yes _X_ No ____
Clinica Medica General Yes ____ No _X_
Cedars Towers Medical
Surgical Group Yes _X_ No ____

"3. If you answered question 1 and/or 2 yes as to the negligence cause of action and as to any defendant, did the negligence cause Plaintiff Ramon Quintanilla to suffer loss of consortium as defined in these instructions?

Daniel Dunkelman, M.D. Yes _X_ No ____
Ricardo Navas, M.D. Yes _X_ No ____

Clinica Medica General Yes ___ No _X_

Cedars Towers Medical

Surgical Group Yes _X_ No ____

"Assuming 100 [percent] represents the total fault that was the cause of plaintiffs' injury, what percentage, if any, of this 100 [percent] is due to the fault of the below designated defendants?

Daniel Dunkelman, M.D. _20_ %

Ricardo Navas, M.D. _40_ %

Clinica Medica General _0_ %

Cedars Towers Medical

Surgical Group _40_ %

100 %"

The jury awarded Isabel $180,000 for past damages and $200,000 for future damages. Ramon was awarded $30,000 for past damages and an additional $30,000 for future damages. None of the parties to the litigation objected at the time the verdict was read, and none asked the trial court to reconvene the jury before the jury was officially discharged.

C. Classification of the Verdict Form: A General Verdict with Special Interrogatories

"The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) Because the jury did not

make findings of fact, but instead made a general pronouncement on the issue of negligence, the trial court correctly characterized the verdict as a general verdict.

The law also recognizes a general verdict with special interrogatories. Code of Civil Procedure section 625 provides in part as follows: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." "The purpose of special interrogatories is to test the validity of the general verdict by determining whether all facts essential to the verdict were established to the satisfaction of the jury." (*Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 403; see *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1156-1157 (*Tavaglione*); *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541.)

"The 'general verdict rule' . . . provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible defects in the remaining counts. [Citation.] The rule is based on the assumption 'that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error,' an assumption that may be proven incorrect by the special verdict or response to special interrogatories. [Citation.]" (*Tavaglione*, *supra*, 4 Cal.4th at p. 1157.)

D. <u>Special Verdict Not Required</u>

Citing *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141 (*Gorman*), Dr. Navas argues that the trial court was required in a medical malpractice action to submit a special verdict to the jury. Dr. Navas and Cedars Towers both argue that *Cobbs* mandated the use of a special verdict to allow the jury to distinguish between medical negligence and informed consent.

Dr. Navas is mistaken to the extent he contends that *Gorman* requires, as a matter of law, that a special verdict be given by the trial court in medical malpractice cases. The portion of the discussion in *Gorman*, pertaining to special verdicts, was limited to the issue of future damages in excess of $50,000. In this regard, *Gorman* held: "We believe that, in cases such as this one, where there exists a possibility that future damages will exceed $50,000, the preferred practice is to permit the use of a special verdict form such as that requested by defendant. Because we find nothing in the record to suggest any reason why the trial court refused such a special verdict form, we conclude the court abused its discretion in depriving defendant of the opportunity to obtain the jury's verdict as to the gross amount of future medical, hospital, surgical and rehabilitation damages sustained by plaintiff." (*Gorman, supra,* 218 Cal.App.3d at p. 150.) Thus, *Gorman* does not stand for the proposition that it is reversible error to use a general verdict form in a medical malpractice case on the issue of whether medical negligence or lack of informed consent were proven by a plaintiff. Instead, *Gorman* indicates the preferred practice is to use a special verdict where there is a possibility future damages will exceed $50,000. Because defendants make no argument regarding the jury's calculation of future damages, we conclude *Gorman* does not provide a basis for reversal.[10]

Dr. Navas's and Cedars Towers's reliance on *Cobbs* is also misplaced. In *Cobbs*, the plaintiff pursued causes of action for negligence and lack of informed consent. The jury returned a general verdict which did not differentiate between negligence and informed consent. The California Supreme Court determined there was no substantial

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10 The error in *Gorman* was found to be harmless. "Nevertheless, we are convinced this error in instruction does not require reversal for a new trial on the issue of damages. As discussed below, we believe that, where the jury returns only a present value verdict, a trial court can consider the trial testimony and, if necessary, supplement that evidence with postverdict testimony in order to determine the gross damages and in turn to fashion a schedule of periodic payments based thereon. We find nothing in such a procedure which denies either party its constitutional right to jury trial so long as the resulting judgment falls within the parameters of the verdict and the integrity of the fact finder's determination is maintained." (*Gorman, supra,* 218 Cal.App.3d at p. 150.)

evidence of negligence. In addressing the issue of prejudice, the court noted, "Inasmuch as there was a general verdict, we cannot know whether the jury found defendant liable on the theory his decision to undertake, or the performance of, the operation was negligent, or whether it found him liable under the alternative theory: failure to obtain plaintiff's informed consent for surgery. . . . Since it is impossible to determine on which theory the jury verdict rested, we conclude it is reasonably probable there has been a miscarriage of justice. We therefore reverse the judgment." (*Cobbs, supra*, 8 Cal.3d at p. 238.)

Cobbs does not hold that a special verdict is required in medical malpractice cases presenting issues of liability on theories of medical negligence and informed consent, although *Cobbs* does demonstrate the inherent risk in using a general verdict where it turns out that one of theories is not supported by substantial evidence. In any event, the problem presented in *Cobbs* in not present in the instant case. The jury returned a general verdict on negligence, which includes lack of informed consent (*Cobbs, supra,* 8 Cal.3d at pp. 239-241), and as we have discussed, *infra* at pages 22-24 and pages 29-31 of this opinion, the record contains substantial evidence of both negligence and lack of informed consent on the part of Drs. Dunkelman and Navas. *Cobbs* does not require reversal of the judgment because both theories of liability are supported by substantial evidence.

F. <u>The Flaw in the Verdict</u>

Cedars Towers argues that the verdict and judgment were fatally flawed in that it was found negligent and responsible for 40 percent of the damages, despite the agreement of all parties that Cedars Towers had no independent negligence and was only liable under the doctrine of respondeat superior. Plaintiffs contend the verdict can be reformed to apportion liability between Drs. Dunkelman and Navas, and treat Cedars Towers as 100 percent responsible for the entire amount on the theory of respondeat superior. We agree with Cedars Towers that the form of verdict was fatally defective, and further conclude the verdict cannot be reformed or interpreted to provide for liability beyond that

determined by the jury. Because of the defects in the verdict, we conclude that portion of the judgment that apportions damages among defendants must be reversed.

The allocation of 40 percent of the liability for negligence to Cedars Towers demonstrates the flaw in the verdict and judgment. All parties agree that Cedars Towers's liability was based upon respondeat superior, and not upon any free-standing negligence by Cedars Towers.[11] The doctrine of respondeat superior imposes liability "irrespective of proof of the employer's fault." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967; see *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 83-85 (*Miller*).) Liability is imposed on the employer as "'a rule of policy, a deliberate allocation of a risk. . . .' [Citation.]" (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959.) The "modern and proper basis of vicarious liability of the master is not his [or her] control or fault but the risks incident to [the] enterprise." (*Id.* at p. 960.) An innocent principal or employer is vicariously liable for the torts of it agent or employee committed while acting within the scope of the employment. (*Miller*, *supra*, 9 Cal.App.4th at pp. 83-85.)

Because any liability of Cedars Towers was vicarious, the trial court committed error by including Cedars Towers in the liability section of the verdict form. A corporation acts only through its employees. A corporation may be held accountable for a tort when an employee engages in tortious conduct. (See *Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1422-1424; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347-1348.) The jury's determination that Cedars Towers had 40 percent liability is, as a matter of law, not supported by substantial

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11 For example, counsel for plaintiffs told the trial court, "Right, and the record reflects, as both counsels have stipulated in their paperwork, there is no evidence, whatsoever, before this jury that anyone other than [Dr.] Dunkelman or [Dr.] Navas contributed in any way, shape or form to the negligent injury my client sustained." Cedars Towers argues in its opening brief, "Specifically, the parties recognized that the trial court erred by presenting the jury with a verdict form that allowed for a finding of independent liability on Cedars' part despite the absence of any evidence."

evidence. We next turn to the issue of interpretation of the verdict, in order to determine if the verdict can be salvaged.

G. <u>The Verdict Cannot Be Saved By Interpretation</u>

"'If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict.' [Citations.] But where no objection is made before the jury is discharged, it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages. [Citations.]" (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457, fn. omitted (*Woodcock*).)

A series of posttrial motions centered around what to do with the verdict imposing fault on Cedars Towers. In one hearing, the trial court indicated it would only sign a judgment mirroring the jury's findings. Counsel for plaintiffs argued: "Right, and the record reflects, as both counsels have stipulated in their paperwork, there is no evidence, whatsoever, before this jury that anyone other than [Dr.] Dunkelman or [Dr.] Navas contributed in any way, shape, or form to the negligent injury my client sustained." The trial court stated the "verdict of the jury was very clear" and a judgment was entered in accordance with the verdict, reducing the damages to $250,000 pursuant to MICRA, and allocating the percentages accordingly among the three defendants found liable.

A further hearing to correct the verdict was held before Judge Joanne B. O'Donnell, after the trial judge had been appointed an associate justice of this court. Counsel for plaintiffs said, "We do agree that there's a problem in the verdict form which, unfortunately, your predecessor . . . we all agree made a mistake by putting the

employer in the same list as the employees." Plaintiffs' counsel argued "the court has an obligation . . . to adjust the verdict to reflect what the jury really intended. To correct the verdict to reflect the law of this case. Two-thirds/one-third. [¶] . . . And that's joint and several with the employer, but several as to the doctors. Between the doctors, they're not responsible for each other's conduct." After extended argument, Judge O'Donnell ruled that the verdict and judgment would stand without alteration by the trial court.

As noted above, however, the verdict cannot stand to the extent it found 40 percent liability for negligence on the part of a nontortfeasor (Cedars Towers). This leaves the issue of the remedy, if any, for the faulty verdict. There is no way, in our opinion, to save the verdict by interpretation. We cannot simply upwardly adjust the liability of Drs. Dunkelman and Navas, as suggested by plaintiffs, to reflect a one-third/two-thirds respective division of liability. There is no way to logically explain how the jury fixed liability upon Cedars Towers at 40 percent, a finding totally devoid of evidentiary support. Moreover, the judgment in its present form does not hold Cedars Towers accountable for the full amount of damages under the theory of respondeat superior. (See *Miller, supra*, 9 Cal.App.4th at p. 82 [employer remains fully responsible for torts of its agent after Proposition 51].)

In *Woodcock, supra*, 69 Cal.2d at pages 457-459, the court held that an ambiguous verdict should be interpreted in light of the jury instructions given, to determine the meaning of the jury's decision. The trial court in the instant case instructed the jury on the following principles: concurrent causes of injury; agency; and that Cedars Towers as a corporation could act only through its employees, and the act of an employee was the act of the corporation. The jury was not given clear direction that Cedars Towers was not negligent and could only be held responsible as a principal. To the contrary, the verdict form directed the jury to consider Cedars Towers as a separate potential tortfeasor. The instructions of the trial court provide no basis to interpret the verdict in a way to give meaning to a jury finding not supported by substantial evidence or the law.

There is no dispute that Cedars Towers was not responsible for 40 percent of the negligence, since Cedars Towers can only act through its employees who were found to

be 60 percent liable to plaintiffs. The jury verdict apportioning 40 percent to a corporation that had no independent negligence, where its employees were 60 percent liable, cannot stand. (See *Shaw v. Hughes Aircraft Co.*, *supra*, 83 Cal.App.4th at pp. 1347-1348 [where jury in defamation action found in favor or defendant-employee, judgment against corporation which could only be vicariously liable must be reversed]; *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182-1186 [jury's finding of negligent design of an automobile, but contrary finding that the design was not defective, was hopelessly irreconcilable and could not be saved by interpretation].)

Upon retrial, the trier of fact shall determine the percentages of liability of Drs. Dunkelman and Navas. Once those percentages have been determined, judgment shall be entered against the physicians in accordance with their respective liability. The trial court shall also take steps to ensure that the judgment reflects Cedars Towers's responsibility for the damage awards against the individual doctors under respondeat superior.

H. Failure to Object to the Defect in the Verdict

Plaintiffs' argue that Cedars Towers waived any defect in the verdict form by failing to object. We have three observations: first, counsel for Cedars Towers did not request the general verdict form used by the trial court, and in fact requested a special verdict; second, the trial court was insistent that the general verdict form be used; and third, Cedars Towers had no reason to object to the verdicts, as they were not prejudicial to Cedars Towers's interest. The parties prejudiced by the verdicts were plaintiffs, who did not object to the verdicts. Given this record, we reject plaintiffs' argument that Cedars Towers waived the right to challenge the judgment based upon the verdict form.

In any event, the California Supreme Court has held that where a portion of a general verdict with special interrogatories is not supported by substantial evidence, that portion of the judgment may be set aside on appeal in the absence of an objection to the verdict. (*Tavaglione*, *supra*, 4 Cal.4th at pp. 1157-1158.) All parties agree there is no

substantial evidence to support a finding of negligence against Cedars Towers. The failure of Cedars Towers to object did not waive its right to challenge the verdict on appeal.

IV

THE CONTENTION OF DR. DUNKELMAN AND CEDARS TOWERS THAT THE TRIAL COURT UNFAIRLY PRECLUDED DEFENSE EXPERT TESTIMONY ON INFORMED CONSENT ISSUES

Dr. Dunkelman and Cedars Towers both argue the trial court committed prejudicial error by allowing plaintiffs' expert witness to testify on informed consent issues after granting plaintiffs' in limine motion to bar defendants' expert from testifying as to the standard of care for informed consent. It is contended that the trial was rendered unfair by the disparate rulings on the issue of expert testimony on informed consent.

In connection with an in limine motion filed by Clinica Medica General, the trial court ruled as follows: "Motion in limine number 5, to preclude expert testimony on the standards of practice regarding consent or informed consent; and I'm granting that at this time without prejudice. I'm granting it. I know that there is a dispute in this area, and I just want to wait and hear the testimony. But, again, it's without prejudice. [¶] And that means whenever it's granted without prejudice, it's not to be mentioned in front of the jury without first approaching."

The record is clear that the trial court's ruling was without prejudice. We have examined the briefs of Dr. Dunkelman and Cedars Towers, and neither brief makes reference to a request to allow a defense expert to testify to the standard of care for informed consent, nor do the briefs indicate an offer of proof was made as to the content of any proposed expert testimony on the subject. Under these circumstances, Evidence Code section 354[12] bars relief.

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12 Evidence code section 354 provides as follows: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the

In *People v. Anderson* (2001) 25 Cal.4th 543, defense counsel suggested that a witness's husband might be called to impeach his wife's testimony. The witness's husband told the court that if called as a witness, he would invoke a spousal privilege because he did not want to testify against his wife. The trial court ruled in limine that if the marital privilege were invoked, it would uphold the privilege under Evidence Code section 970. However, the court agreed that if the defense later decided to call the husband, counsel could preserve the record by obtaining a ruling and entering a formal objection at that time. The defense did not thereafter attempt to call the witness's husband. In refusing to address the issue of whether the trial court properly ruled on the issue of privilege, the court made the following pertinent observations:

"However, we need not address the merits of these arguments, because defendant failed to preserve the issue for appeal. In general, a judgment may not be reversed for the erroneous exclusion of evidence unless 'the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.' [Citations.] This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.] [¶] . . . [¶] . . . In its in limine ruling, the trial court acknowledged that fair-trial concerns might outweigh the privilege, and the court expressly agreed to a mechanism by which defendant could later call the witness, have the privilege invoked, and obtain a ruling. [¶] Under these circumstances, defendant failed to make a record that permits a finding he was prejudiced by the loss of [the witness's husband's] testimony." (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 580-581.)

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erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination."

As in *Anderson*, Dr. Dunkelman and Cedars Towers made no offer of proof as to the content of any excluded testimony. The in limine ruling of the trial court was expressly made without prejudice and with the recognition that a different ruling might be appropriate after the introduction of testimony. The absence of an offer of proof is fatal to the claim under Evidence Code section 354 and the reasoning in *Anderson*.

V

THE ORDERS GRANTING COSTS TO PLAINTIFFS MUST BE REVERSED PENDING DETERMINATION OF THE RESPECTIVE LIABILITY OF DEFENDANTS

Defendants each argue that the trial court erred in awarding costs to plaintiffs.

Dr. Navas argues he was served by plaintiffs with a Code of Civil Procedure section 998 offer in the amount of $249,999.99, but his share of liability was $100,000 (after the reduction due to MICRA), thus plaintiffs were not entitled to expert witness fees as costs. Dr. Navas further contends that plaintiffs' cost bill was defective because it was filed prematurely and was not verified. Finally, Dr. Navas argues the trial court erroneously deemed his motion to tax costs as untimely even though it was filed within 15 days after notice of entry of judgment under Rules of Court, rule 870 (a)(1).

Dr. Dunkelman argues plaintiffs offered to settle before trial for $249,999.99. After trial, plaintiffs were awarded $62,000 against Dr. Dunkelman. Dr. Dunkelman therefore argues there was no basis for awarding costs under Code of Civil Procedure section 998.

Cedars Towers argues plaintiffs made $249,999.99 offers to each defendant, and plaintiffs failed to obtain a more favorable award from any defendant under the reasoning of *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579. Cedars Towers further argues that 60 percent of the judgment (presumably that against Drs. Navas and Dunkelman), even before the reduction under MICRA, would not have exceeded the $249,999.99 offer made by plaintiffs.

In part III of this opinion, we reverse the damages portion of the judgment, which also requires reversal of the order granting costs to plaintiffs. "An order awarding such fees 'falls with a reversal of the judgment on which it is based.'" (*California Grocers Assn., Inc. v. Bank of America* (1994) 22 Cal.App.4th 205, 220; see also *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 922 ["Because we reverse the judgment awarding punitive damages, the post-judgment order awarding attorney's fees must also be reversed"]; *Kellogg v. Asbestos Corp. Ltd*. (1996) 41 Cal.App.4th 1397, 1407-1409 [where damage award is reversed on appeal, award of costs is also reversed].)

The reversal of the costs awards is without prejudice. If plaintiffs are entitled to costs after resolution of the instant case, plaintiffs' costs may take into account costs from the first trial. (*Visher v. Webster* (1859) 13 Cal. 58, 60 [where judgment for plaintiff is reversed after trial, and plaintiff is successful on retrial, an award of costs properly includes costs from the original trial].)

VI

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON PLAINTIFFS' REQUEST ON BUSINESS AND PROFESSIONS CODE SECTION 654.2 WAS NOT ERROR AND WAS NOT PREJUDICIAL

Plaintiffs argue the trial court committed reversible error by refusing to instruct on the relevance of Business and Professions Code section 654.2.[13] Plaintiffs contend Dr.

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13 Business and Professions Code section 654.2 provides in pertinent part as follows:

"(a) It is unlawful for any person licensed under this division or under any initiative act referred to in this division to charge, bill, or otherwise solicit payment from a patient on behalf of, or refer a patient to, an organization in which the licensee, or the licensee's immediate family, has a significant beneficial interest, unless the licensee first discloses in writing to the patient, that there is such an interest and advises the patient that the patient may choose any organization for the purpose of obtaining the services ordered or requested by the licensee."

Dunkelman's self-dealing by referring Isabel to a surgical center in which Dr. Dunkelman owned 100 percent of the stock, and the use of the laboratory financially related to Dr. Dunkelman, was relevant to the issue of informed consent under *Moore v. Regents of University of California* (1990) 51 Cal.3d 120 (*Moore*). Plaintiffs further argue the lack of disclosure pursuant to Business and Professions Code section 654.2 is relevant to the issue of consent.

Plaintiffs' proposed instructions were refused by the trial court, although the parties agree the reason for the refusal is not contained in the appellate record.[14] The first of the instructions was plainly argumentative, containing language that "Dr. Dunkelman's testimony has established that he did not comply with that law." Such clearly argumentative language had no place in jury instructions. "While a litigant has a right to have the jury *properly* instructed on its theory of the case [citation] the instructions proffered on that theory must accurately state the law and must not be argumentative in overemphasizing or stressing selective items of evidence." (*Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 869.)

The second instruction was factually and legally inaccurate. It was factually inaccurate in stating that the Los Angeles Surgery Center was "a facility he [Dr. Dunkelman] owned," because as the trial court repeatedly told plaintiffs' counsel, Dr. Dunkelman did not own the center, he owned 100 percent of the stock of the corporation. More importantly, the instruction was legally flawed because it told the jury it could consider the lack of disclosure that Dr. Dunkelman owned the Los Angeles Surgical Center "in determining the issues of *actual consent* and informed consent . . . ." (Emphasis added.) As discussed more fully below, Business and Professions Code section 654.2 does not apply to actual consent, and the instruction therefore would have been a misstatement of law.

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14 The first of the rejected instructions includes the handwritten notation, "arg fact specific." The source and meaning of the notation is unclear.

The primary authority relied upon by plaintiffs, *Moore*, makes clear that a physician's failure to disclose his or her financial interest is relevant to informed consent, but does not support a finding that lack of disclosure also goes to actual consent. "Accordingly, we hold that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment." (*Moore*, *supra*, 51 Cal. 3d at pp. 131-132, fn. omitted.)

We further hold that any error in refusing the instruction was nonprejudicial. The instruction was legally inapplicable to actual consent and was relevant only to informed consent, which is a form of negligence under *Cobbs*. Because plaintiffs prevailed on the one issue the instruction properly addressed—that of negligence based on informed consent—we may confidently conclude plaintiffs would not have benefited from the instruction. Instructional error, if any, was completely harmless in light of the jury verdict of negligence against Dr. Dunkelman. (Cal. Const., art. VI, § 13.)

VII

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING PLAINTIFF'S INSTRUCTIONS ON FIDUCIARY DUTY

Plaintiffs requested instructions informing the jury that Dr. Dunkelman was required by law to inform Isabel that Dr. Navas was Dr. Dunkelman's employee and a general surgeon, and that his failure to do so may be considered "in determining the issues of actual consent and informed consent." Citing *Moore*, plaintiffs argue Dr. Dunkelman had a fiduciary duty to advise Isabel that Dr. Navas was not merely an "associate," but was instead an employee of Dr. Dunkelman.

To the extent the instructions define Dr. Navas as an employee of Dr. Dunkelman, the instructions were factually inaccurate and properly denied on that basis. Dr.

Dunkelman owned the stock in Cedars Towers, and it was that entity, not Dr. Dunkelman, who employed Dr. Navas.

Plaintiffs' reliance on *Moore* is in any event misplaced, as plaintiffs did not plead a cause of action for breach of fiduciary duty, unlike the plaintiff in *Moore*. We further observe that breach of fiduciary duty is an equitable claim not subject to the right to a jury trial. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122; *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1553-1556.) Finally, plaintiffs' reliance on the fiduciary duty language in *Moore* misstates the holding: the fiduciary duty discussion in *Moore*, *supra*, 51 Cal.3d at page 131 pertained to the issue of informed consent, not actual consent. Plaintiffs have cited no authority that the issue of fiduciary duty relates to actual consent in a case in which breach of fiduciary duty is not pled as a cause of action.

Finally, it is not reasonably probable that a result more favorable to plaintiffs would have occurred if the instructions had been given. The instructions, at best, went to the issue of informed consent, which was resolved in plaintiffs' favor by the jury in finding Dr. Dunkelman negligent. (Cal. Const., art. VI, § 13.)

VIII

ANY ERROR IN NOT ALLOWING ISABEL TO TESTIFY AS TO WHETHER SHE WOULD HAVE CONSENTED TO THE PROCEDURES IF FULLY INFORMED IS NONPREJUDICIAL

Relying upon *Cobbs*, plaintiffs argue the trial court erroneously sustained an objection to the following question asked of Isabel: "Q: Oh, I did mean to ask you something I had forgotten yesterday. If Dr. Dunkelman had offered you [the] opportunity of removing the pimple that was seen that you discussed with him on June 26, 2001, would you have given him permission . . . to remove it?" Objections on the grounds of relevance and speculation were sustained by the trial court.

Plaintiffs rely on the following passage in *Cobbs*, *supra*, 8 Cal.3d at page 245: "We point out, for guidance on retrial, an additional problem which suggests itself.

There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given. Here the record discloses no testimony that had plaintiff been informed of the risks of surgery he would not have consented to the operation. [Citations.] [¶] The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils."

While interpretation of the two paragraphs in *Cobbs* is subject to debate, what is clear is that the issue discussed is informed consent. Plaintiffs prevailed on this issue at trial by receiving favorable verdicts on the negligence cause of action, rendering error, if any, nonprejudicial. Plaintiffs' attempt to stretch the *Cobbs* language into the arena of intentional torts finds no support in *Cobbs* or any other authority cited by plaintiffs.

IX

THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' PROPOSED INSTRUCTIONS ON THE CONCEPT OF JOINT ENTERPRISE

Plaintiffs next argue the trial court committed reversible error in refusing the following instruction on unity of interest: "If you find among the defendants Daniel Dunkelman, Cedars Tower[s] Surgical Medical Group, and/or Clinica Medica General that (1) there was such a unity of interest and ownership that their separate personalities were merged as to form, in reality, a single enterprise; and (2) an unfair result to plaintiffs would occur if the acts in question are not treated as those of one of these defendants alone, then you will find that said defendants constituted a single enterprise."

The trial court did not err in refusing the instruction. The cases relied upon by plaintiffs make clear that the concept of single enterprise applies between corporations. (*Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1219 ["Two conditions are generally required for application of the doctrine to two related corporations"]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.4th 1220, 1249 ["However, under the single-enterprise rule, liability can be found between sister companies"].) The instruction improperly attempts to apply the single-enterprise concept to Dr. Dunkelman as an individual, and to that extent it was a misstatement of law and properly refused.

The instruction was also properly rejected because the single-enterprise theory was not pled in the complaint. "In order that the acts and obligations of a corporation be legally recognized as those of a particular person, and vice versa, the complaint must allege and it must be shown by the evidence, that the organization of the corporation is in some manner fraudulent or prompted by dishonesty, or that the corporation committed or intended to commit a fraud, or that injustice will be done if the corporate entity is not disregarded." (*Judelson v. American Metal Bearing Co.* (1948) 89 Cal.App.2d 256, 263.)

Finally, we conclude the error is nonprejudicial in that the matter is being remanded to the trial court for a determination of liability on the part of Cedars Towers under respondeat superior.

X

FAILURE TO SECURE A JURY FINDING ON RESPONDEAT SUPERIOR OR DIRECT A VERDICT TO THAT EFFECT

Plaintiffs next argue that the trial court erred in refusing plaintiffs' request to direct a verdict that Cedars Towers was vicariously liable for the torts of its employees, Drs. Dunkelman and Navas. Plaintiffs point out that the jury's apportionment of damages to Cedars Towers demonstrates its confusion.

As discussed in part III, subsection F of this opinion, plaintiffs are correct that the record demonstrates that liability should have been imputed to Cedars Towers for the negligence of Dr. Dunkelman and Dr. Navas. The error will be remedied by the reversal of the judgment and further proceedings in the trial court consistent with this opinion.

XI

THE CONTENTION THAT THE TRIAL COURT IMPROPERLY ALLOWED QUESTIONS TO ISABEL REGARDING PRIOR SIMILAR PROCEDURES

Without citation of authority or citation to objections in the record, plaintiffs argue the trial court erred in allowing defendants to question Isabel regarding prior medical procedures. The failure to cite authority constitutes a waiver of the issue on appeal. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

XII

PLAINTIFFS' REQUEST TO ENTER JUDGMENT AGAINST CEDARS TOWERS IN THE AMOUNT OF $250,000 IN FAVOR OF ISABEL AND $60,000 IN FAVOR OF RAMON

For the reasons stated in part III, subsection G of this opinion, we reject plaintiffs' arguments that defendants waived any defect in the verdict or that we, as an appellate court, have the power to reapportion damages to one-third for Dr. Dunkelman and two-thirds for Dr. Navas when the jury did not so find. Determination of liability, in the context of this case, is a matter for the trial court.

XIII

PLAINTIFFS' REQUEST FOR PREJUDGMENT INTEREST AGAINST CEDARS TOWERS FROM THE DATE OF THE STATUTORY OFFERS

Plaintiffs argue they are entitled to prejudgment interest against Cedars Towers, on the basis that plaintiffs are entitled to a $250,000 judgment against Cedars Towers. At this point, plaintiffs do not possess the judgment they purport to rely upon. The issue of prejudgment interest may properly be addressed in the trial court at the appropriate time after resolution of the action following our limited reversal.

XIV

PLAINTIFFS' CLAIM OF PREJUDICIAL ERROR REGARDING THE INTENTIONAL TORTS RESOLVED IN FAVOR OF DEFENDANTS AT TRIAL

Plaintiffs argue they have established prejudicial error regarding the intentional tort causes of action resolved in defendants' favor at trial. We have addressed each issue separately and found no reversible error. We also find that the cumulative effect of any purported errors was not prejudicial regarding the intentional torts.

DISPOSITION

The judgment finding Drs. Dunkelman and Navas liable for negligence as to plaintiff Isabel Quintanilla and liable for loss of consortium to plaintiff Ramon Quintanilla is affirmed. The judgment fixing total liability between Dr. Dunkelman and Dr. Navas at $250,000 in favor of plaintiff Isabel Quintanilla and $60,000 in favor of plaintiff Ramon Quintanilla is affirmed. The judgment is reversed to the extent it apportions damages between Dr. Dunkelman, Dr. Navas, and Cedars Towers. The judgment finding Cedars Towers negligent as to Isabel Quintanilla and liable for loss of consortium to Ramon Quintanilla is reversed. The trial court is to conduct further proceedings consistent with this opinion to determine the division of fault for negligence

and loss of consortium between Dr. Dunkelman and Dr. Navas, and the responsibility, if any, of Cedars Towers for the conduct of Dr. Dunkelman and Dr. Navas. All orders granting and denying costs and prejudgment interest are reversed without prejudice to reconsideration once the underlying lawsuit is resolved on the merits. Plaintiffs' motion for sanctions for filing a frivolous appeal is denied. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.

Filed 10/6/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ISABEL QUINTANILLA et al., Plaintiffs and Appellants, v. DANIEL S. DUNKELMAN et al., Defendants and Appellants.	B171789 (Los Angeles County Super. Ct. No. BC274884) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on September 12, 2005, was not certified for publication in the Official Reports. Upon application of appellants and for good cause appearing, it is ordered that the opinion shall be partially published in the Official Reports.

Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II thru XIV of the discussion.

KRIEGLER, J. TURNER, P. J. MOSK, J.