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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA
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5 Melvin Kornberg,

6 Plaintiff,

7 vs.

8 United States of America, et al.,

9 Defendants.
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Case No.: 12-cv-1961-JAD-PAL

**Order Denying Defendant's Motion for
Summary Judgment
[Doc. 39]**

11 Melvin Kornberg alleges that his chorda tympani nerve was cut during a stapedectomy
12 surgery at the VA hospital in San Diego, damaging his sense of taste. Kornberg claims the nerve
13 damage was a side effect he was never informed of before the surgery, and he asserts a single
14 negligence claim against the United States under the Federal Tort Claims Act (FTCA).¹

15 The government moves for summary judgment, arguing that Kornberg cannot prove medical
16 malpractice because he has no expert to testify that the standard of care was breached and,
17 regardless, the doctor performing the surgery did not breach the standard of care because this side
18 effect is a known risk of stapedectomy surgery.² Kornberg responds that his claim is one for failure
19 to obtain informed consent, not medical malpractice, which has different elements of proof. I accept
20 Kornberg's characterization of his claim, consider his argument as an abandonment of any intended
21 medical-malpractice theory, and deny summary judgment because the government has not
22 demonstrated that it is entitled to judgment as a matter of law on Kornberg's claim that his medical-
23 care providers failed to obtain his informed consent before performing his stapedectomy surgery.

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27 ¹ See Doc. 1 (complaint); Doc. 18 (stipulated dismissal of all but negligence claim).

28 ² Doc. 39.

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1 **B. The government has not established entitlement to summary judgment on Kornberg’s**
2 **failure-to-obtain-informed-consent claim.**

3 On the premise that Kornberg’s claim is a medical-malpractice claim in a negligence
4 disguise, not a failure-to-obtain-informed-consent claim with a stray medical-malpractice allegation,
5 the government offers these arguments for summary judgment: (1) Kornberg lacks the expert
6 testimony he needs to prove medical malpractice under California law, (2) even if Kornberg’s claim
7 sounds only in negligence, he needs expert testimony to prove his informed-consent claim,⁸ and (3)
8 Kornberg’s testimony that he was never told of the risks of surgery cannot create a genuine issue of
9 fact as a matter of law.⁹

10 **1. California law does not require expert testimony for Kornberg’s informed-consent**
11 **claim.**

12 FTCA actions like this one are governed by the substantive law in the state where the alleged
13 tort occurred—in this case, California.¹⁰ In California, “[a] claim based on lack of informed
14 consent—which sounds in negligence—arises when the doctor performs a procedure without first
15 adequately disclosing the risks and alternatives.”¹¹ “The fount of the doctrine of informed consent in
16 California” is *Cobbs v. Grant*, which “anchored much of the doctrine of informed consent in a
17 theory of negligence liability” and confirmed “the obligation of a treating physician ‘of reasonable
18 disclosure of the available choices with respect to proposed therapy and the dangers inherently and
19 potentially involved in each.’”¹² *Cobbs* fashioned a two-part test for informed-consent violations:

20 First, a physician must disclose to the patient the potential of death,
21 serious harm and other complications associated with a proposed
22 procedure. Expert testimony on the custom of the medical community

23 ⁸ Doc. 39.

24 ⁹ Doc. 45 at 4.

25 ¹⁰ 28 U.S.C. § 1346(b)(1); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th
26 Cir. 2001).

27 ¹¹ *Saxena v. Goffney*, 159 Cal. App. 4th 316, 324 (Cal. Ct. App. 2008).

28 ¹² *Arato v. Avedon*, 858 P.2d 598, 604–05 (Cal. 1993) (quoting *Cobbs v. Grant*, 502 P.2d 1,
 10 (Cal. 1972)).

1 is not necessary to establish this duty. Second, beyond the [] minimal
2 disclosure, a doctor must also reveal to his patient such additional
3 information as a skilled practitioner of good standing would provide
4 under similar circumstances. Therefore, **expert testimony is relevant
and admissible to determine the duty to disclose matters other
than the risk of death or serious harm and significant potential
complications.**¹³

5 The California Supreme Court “underline[d] the limited and essentially subsidiary role of expert
6 testimony in informed consent litigation” in *Arato v. Avedon*, noting the anticipated need for expert
7 testimony in only a “limited number” of these cases:

8 [A] rule that filters the scope of patient disclosure entirely through the
9 standards of the medical community “arrogates the decision of what to
10 disclose to the physician alone.” We explicitly rejected such an
11 absolute rule as inimical to the rationale and objectives of the
12 informed consent doctrine; we affirm that position. Nevertheless, . . .
13 there may be a limited number of occasions in the trial of informed
14 consent claims where the adequacy of disclosure in any given case
15 may turn on the standard of practice within the relevant medical
16 community. In such instances, expert testimony will usually be
17 appropriate.¹⁴

18 The government has not demonstrated that this is one of those “limited” informed-consent
19 cases in which expert testimony is necessary. Kornberg claims he suffered damage to his chorda
20 tympani nerve during his middle-ear surgery. This alleged injury is precisely the type of “significant
21 potential complications” for which the California courts do not require expert testimony. As the
22 declaration of Dr. Andrew K. Patel in support of defendants’ motion for summary judgment attests,
23 “the damage claimed is a standard risk of middle ear surgery,. . . .” “a “relevant aspect[] of the
24 proposed stapedectomy surgery,” and “a known, accepted, and not uncommon complication of
25 stapes surgery.”¹⁵ Indeed, as he further attests, “injury to the chorda tympani, involving a change in
26 taste, is a known risk for this surgery” expressly identified on the consent form.¹⁶ Thus, the

24 ¹³ *Betterton v. Leichtling*, 101 Cal. App. 4th 749, 754–55 (Cal. Ct. App. 2002) (quoting
25 *Daum v. SpineCare Med. Grp., Inc.*, 52 Cal. App. 4th. 1285, 1301–02 (Cal. Ct. App. 1997) (internal
quotation marks omitted) (emphasis added).

26 ¹⁴ *Arato*, 858 P.2d at 611.

27 ¹⁵ Doc. 39-3 at 3.

28 ¹⁶ *Id.*

1 government has not demonstrated that this is the type of informed-consent case in which expert
2 testimony will be required.

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4 **2. Kornberg's testimony creates genuine issues of fact that prevent summary judgment.**

5 Finally, the government argues that summary judgment is required because Kornberg's
6 deposition testimony¹⁷ that he was never informed of the risks of surgery does not create a genuine
7 issue of fact. As the legal basis for this argument, the government cites *Villiarimo v. Aloha Island*
8 *Air, Inc.*¹⁸ and states that "[u]ncorroborated and self-serving testimony, without more, will not create
9 a genuine issue of material fact."¹⁹

10 The government overstates this rule. As the authority that the *Villiarimo* court relied
11 explains, judges have the discretion to exclude testimony "that is so undermined as to be
12 incredible,"²⁰ like when "a plaintiff's claim is supported solely by the plaintiff's own
13 self-serving testimony, unsupported by corroborating evidence, **and** undermined either by other
14 credible evidence, physical impossibility[,], or other persuasive evidence that the plaintiff has
15 deliberately committed perjury."²¹ Kornberg's testimony may be self-serving and it conflicts with

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17 ¹⁷ Kornberg's deposition excerpts are not authenticated, and the court has the discretion to
18 exclude this evidence on this basis alone. Fed. R. Civ. Proc. 56(c)(1); Fed. R. Evid. 901; *Orr v.*
19 *Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (noting that the court may only consider admissible
20 evidence on summary judgment and explaining the proper method for authenticating deposition
21 testimony on summary judgment). Because the government does not challenge the authenticity or
22 accuracy of the deposition transcript plaintiff attaches at Doc. 42-1, and the only thing lacking from
23 the exhibit is the court reporter's certificate, I find it has sufficient indicia of reliability for me to
24 consider it here.

25 **Plaintiff and his counsel are cautioned, however, that exhibits submitted on summary
26 judgment must be properly authenticated, and counsel should familiarize himself with the Orr
27 requirements if he plans to continue practicing in federal court. This court will not likely
28 afford such lenity in the future.**

24 ¹⁸ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

25 ¹⁹ Doc. 45 at 4.

26 ²⁰ *Johnson v. Washington Metro. Area Transit Auth.*, 883 F.2d 125, 128 (D.C. Cir. 1989),
27 overruling on other grounds recognized *Belton v. Washington Metro. Area Transit Auth.*, 20 F.3d
1197, 1200 (D.C. Cir. 1994)).

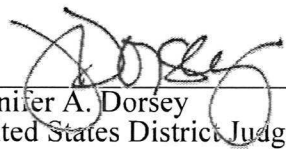
28 ²¹ *Id.* (emphasis added).

1 Dr. Patel's testimony, but I do not find that it is so undermined to be incredible. What it does at this
2 point is give me a different account of events. My "function at the summary judgment stage is not to
3 weigh the evidence and determine the truth of the matter but only to determine whether there is a
4 genuine issue for trial."²² I find genuine issues of fact prevent me from granting summary judgment
5 on Kornberg's sole remaining informed-consent claim.

6 **Conclusion**

7 Accordingly, IT IS HEREBY ORDERED that the defendants' motion for summary judgment
8 **[Doc. 39] is DENIED.**

9 DATED: May 27, 2015.

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12 Jennifer A. Dorsey
13 United States District Judge
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28 ²² *Johnson*, 883 F.2d at 128 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).