2d Civ. No. B 193092

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION FIVE

JACK L. SEGAL, M.D.,

Plaintiff and Appellant,

vs.

DUNCAN Q. McBRIDE, M.D. and REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants and Respondents.

Appeal from Los Angeles Superior Court SC 082862
Hon. Lisa Cole Hart

RESPONDENTS' BRIEF

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INTRODUCTION

This appeal involves a medical malpractice case in which the plaintiff-patient is also a medical doctor. The issue on appeal is whether the trial court erred in granting a directed verdict in favor of defendants on the issue of informed consent. Plaintiff's case is premised on the proposition that defendant failed to obtain plaintiff's informed consent to back surgery, because defendant did not inform him that defendant would be using a morphine paste at the surgery site to minimize post-surgical pain.

The trial court found that use of the paste was not a primary risk of plaintiff's surgery, and therefore, a duty to disclose could be established only by way of expert evidence. Plaintiff presented no expert testimony on the subject, claiming that it was unnecessary, a contention that he repeats on appeal. Case law, however, supports the trial court's ruling. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1190-1191 ("*Arato*"); *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244-245 ("*Cobbs*"); *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 849-850 ("*Jambazian*"); *Vandi v. Permanente Medical Group*, *Inc*. (1992) 7 Cal.App.4th 1064, 1071 ("*Vandi*"); *Morgenroth v. Pacific Medical Center, Inc*. (1976) 54 Cal.App.3d 521, 534-535 ("*Morgenroth*.")

As a fallback position, plaintiff argues that if expert testimony was needed on the issue of informed consent, he should have been allowed to testify as an expert. (AOB 19, 24-29.) Plaintiff's argument ignores his

failure to satisfy the threshold evidentiary requirements for testifying as an expert witness. If plaintiff wanted to testify as an expert, he should have so designated himself. (Code Civ. Proc., § 2034.210 et seq.) He not only failed to do so, he also offered no opposition to defendants' successful *in limine* motion to preclude plaintiff from giving expert testimony.

Lacking any sound basis, under California law, for overturning the trial court's evidentiary rulings and its proper entry of a directed verdict, plaintiff postulates the novel contention--not articulated in the trial court--that the normal rules governing informed consent should not apply to him. Instead, he claims, his status as a physician expanded defendants' duty of disclosure beyond what would have been required for a lay patient. Plaintiff purports to rely for this proposition on a Texas case. (*Jackson v. Axelrad* (2007) 221 S.W.3d 650.) However, his reliance is misplaced, because *Jackson*, in essence, held just the reverse. Rather than enhancing the duty imposed on the defendant doctor, based on the physician-patient's specialized knowledge, *Jackson* placed an *enhanced burden on the physician-plaintiff* to communicate effectively with his treating physician, a burden not placed on lay patients.

The conclusion actually reached in *Jackson* is consistent with California law. The contrary conclusions plaintiff seeks to draw from *Jackson* are untenable, because they would undermine the rationale of the

informed consent rule enunciated by the Supreme Court in *Cobbs.* (8 Cal.3d at p. 242.)

Beyond all these shortcoming in plaintiff's arguments, there is an even more fundamental flaw in his case: He failed to establish the threshold prerequisite for the duty to disclose--namely, the existence of a *known* risk. (*Cobbs, supra* 8 Cal.3d at p. 244.) The defense produced evidence that the defendant surgeon knew of no known risks associated with use of the paste. Plaintiff produced *no* evidence that defendants knew or should have known of such a risk. In the absence of evidence of a known risk--whether primary or secondary--there was no duty of disclosure.

STANDARD OF REVIEW

A. This Court Must Review The Trial Court's Decision De Novo.

Plaintiff correctly states that a directed verdict is appropriate "only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party," there is no substantial evidence sufficient to support a jury verdict in favor of the party opposing the directed verdict motion. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629–630; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 46; *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1384.)

Plaintiff further correctly states that this Court's task on appeal is to determine de novo whether the directed verdict in favor of defendants was proper, under the above-enunciated standard. (*Gelfo v. Lockheed Martin Corp., supra*, 140 Cal.App.4th at pp. 46-47; *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.)

B. Both The Record On Appeal That Plaintiff Has Presented, And His Appellant's Opening Brief, Are Structurally-- And Substantively -- Inadequate To Demonstrate Error Under The Standard Of Review Plaintiff Himself Asserts.

While the standard of review affords plaintiff the benefit of the favorable inferences that can reasonably be drawn from the evidence, it does not relieve him of the burden, common to the appellant in all appeals, of demonstrating error in the trial court's decision. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) In order to do that, plaintiff would have to cite evidence in the record that would be sufficient to support a jury verdict in his favor on the issue of informed consent, or demonstrate that the trial court erred in excluding evidence that might have been sufficient to do so. (See *Gelfo v. Lockheed Martin Corp., supra*, 140 Cal.App.4th at pp. 46-47; *Heller v. Pillsbury Madison & Sutro, supra*, 50 Cal.App.4th at p. 1384.) Plaintiff has done neither.

The only facts relating to informed consent in the truncated statement of facts contained in the Appellant's Opening Brief are that plaintiff was not informed that the morphine paste would be used in the surgery; that he was not told the ingredients of the paste; and that he would not have "submitted to the surgery" had he known the paste would be used. (AOB 2.)

The elements of the physician's duty to disclose were definitively set forth in *Cobbs, supra*. First and foremost among these is the existence of a "*known risk* of death or serious bodily harm" associated with the treatment or procedure to be employed. (8 Cal.3d*, supra*, at p. 244, emphasis added.) Missing from plaintiff's statement of facts is reference to any evidence that use of the paste presented a *known* risk that required disclosure. Nor is any such evidence referenced elsewhere in the Opening Brief--for the simple reason that none was presented at trial.

Secondarily, a physician must disclose "such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Cobbs, supra*, 8 Cal.3d at pp. 244-245.) Again, the Appellant's Opening Brief references no evidence that would support a finding that a skilled practitioner would have disclosed either the use of the paste or the ingredients of the paste. Thus, the Appellant's Opening Brief fails to make any showing of the existence of a duty of disclosure--let alone a breach of duty--with respect to the use of the paste or its ingredients.

Lacking evidence of duty or breach, appellant complains that he was not permitted to testify as to *why* he would not have submitted to surgery had he known about the paste. (AOB 2.) Plaintiff does not clearly articulate the purpose to be served by his explaining why he would have refused the surgery, and he vascillates between claiming that the testimony

would have been merely percipient (AOB 12), and claiming that the testimony would have been grounded on his medical expertise (AOB 13). Either way, he has failed to demonstrate that the court erred in excluding the testimony.

To the extent that he was offering percipient testimony to show a causal connection between the failure to disclose and the subsequent injury plaintiff alleged (*Cobbs, supra*, 8 Cal.3d at p. 245), he is putting the cart squarely before the horse. The personal reasons he might have had for refusing the surgery are legally irrelevant in the absence of a duty to disclose. (*Cobbs, supra*, at p. 244.)

To the extent that plaintiff was offering testimony based on his expertise (AOB 13, 24-29), the record plaintiff has produced on appeal is inadequate to demonstrate error in excluding the testimony. The record is devoid of evidence demonstrating that plaintiff satisfied the procedural prerequisites for giving expert testimony. (See Code Civ. Proc., § 2034.210 et seq.) Furthermore, the Clerk's Transcript reveals that the court granted an unopposed *in limine* defense motion to preclude plaintiff from giving expert testimony. (CT 114-115.) Plaintiff did not include that motion in the record on appeal, nor does his Opening Brief allege that the *in limine* motion was erroneously granted.

An appellant cannot impose on the reviewing court the obligation to search the record for error. That is the burden of the appellant. By failing to cite--or introduce--evidence of a known risk giving rise to a duty to disclose, or of a community standard of practice requiring disclosure, plaintiff has waived any claim of error. On their face, the deficiencies in plaintiff's record on appeal, and in his Opening Brief, warrant affirmance of the trial court's ruling. (*Guthrey v. State of California, supra*, 63 Cal.App.4th at pp. 1115-1116.)

However, to the extent that this Court nonetheless chooses to examine further into the merits of the trial court's ruling, and to address plaintiff's contention that a higher duty of disclosure should be applied in favor of a patient who is also a medical doctor than is afforded to a lay patient (AOB 16-24), defendants have provided the Statement of the Case and Statement of Facts, set forth below, for the Court's assistance, as well as the additional pleadings submitted in defendants' Notice of Lodging Discovery Documents And Request To Augment The Record On Appeal, which is being filed concurrently herewith.

STATEMENT OF THE CASE

Plaintiff, Jack Segal, M.D., brought a medical malpractice action against his neurosurgeon, Duncan Q. McBride, M.D., and against Dr.

McBride's employer, The Regents of the University of California (erroneously sued as Santa Monica UCLA Medical Center), alleging negligence in plaintiff's treatment. (CT 6, 8-9.)[1/] Defendants answered, denying the allegations and asserting various affirmative defenses. (CT 15.)[2/]

Plaintiff's Opening Brief raises issues questioning the necessity for, and the exclusion of, expert evidence. However, plaintiff has failed to include pertinent documents relevant to the admission of expert evidence in his record on appeal. Therefore, concurrently with the filing of this Respondent's Brief, defendants are filing a Notice of Lodging of Discovery Documents And Request To Augment The Record On Appeal (hereafter cited as "Aug. Req.") requesting, inter alia, that this Court augment the record on appeal to include the discovery documents relating to designation of experts. In accordance with statutory requirements, those documents were served by the parties, but not filed with the trial court; hence, the

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1/ The designation "CT" refers to the Clerk's Transcript on Appeal. The designation "RT" refers to the Reporter's Transcript on Appeal.

2/ The complaint also named Thomas L. Viskanta, P. A. as a defendant. The action against Viskanta was dismissed with prejudice prior to trial. (CT 6, 41.) All further references to "defendants" in the plural shall refer to Dr. McBride and the Regents. References to "defendant" in the singular shall refer to Dr. McBride.

request for augmentation. (Code Civ. Proc. §§ 2034.210, 2034.220, 2034.230, 2034.240, 2034.290; Cal. Rules of Court, rule 8.155.))

On August 31, 2005, defendants served plaintiff with a demand for exchange of expert witness information and production of expert reports. (Aug. Req., Exh. A.) On September 26, 2005, defendants served their notice of designation of expert witness information on plaintiff. The designation listed Dr. McBride as one of defendants' expert witnesses. (Aug. Req., Exh. B.) On September 27, 2005, plaintiff served his notice of designation of expert witnesses. It did *not* designate plaintiff as an expert witness. (Aug. Req., Exh. C.) On October 10, 2005, plaintiff served a supplemental designation of expert witnesses. Plaintiff was *not* designated as an expert witness in that designation either. (Aug. Req., Exh. D.)

On October 18, 2005, defendants filed a number of *in limine* motions to limit introduction of expert evidence in accordance with statutory rules governing discovery and admissibility of evidence. (CT 3, 76-77, 115.) Defendants *in limine* motion No. 8 sought to exclude opinion testimony by plaintiff on the issues of negligence and standard of care, citing plaintiff's failure to designate himself as an expert. (CT 3, 115; Aug. Req., Exh. E.) As reflected in the record (CT 1-3; 2RT 116), plaintiff filed no opposition to any of defendants' *in limine* motions, and all of them were granted. (CT 114-115.) Plaintiff designated some, but not all, of the *in limine* motions as

part of the record on appeal. Plaintiff did *not* designate defendants' *in limine* motion No. 8 as part of the record on appeal (CT 42-73, 190-191), although it is relevant to the issues plaintiff has raised in his Opening Brief. Defendants have therefore requested that this Court augment the record on appeal to include *in limine* motion No. 8. (Aug. Req., Exh. E.)

Plaintiff has included in the record on appeal his list of trial witnesses that was filed on May 19, 2006. That list identifies which of plaintiff's witnesses will be called as experts. The witness list named plaintiff as a witness, but did *not* designate him as an expert. (CT 107.)

In his opening statement to the jury, plaintiff's counsel framed two issues which formed the basis of his case: First, that defendant was negligent in using a morphine paste in the course of plaintiff's surgery; and second, that defendant used the paste without plaintiff's informed consent. (2RT 32.)

Plaintiff testified on his own behalf. He also called defendant as an adverse witness. (Evid. Code § 776; 3RT 177.) In addition, plaintiff presented testimony from three expert witnesses, none of whom testified as to standard of care in the use of the paste, nor as to whether defendant fulfilled his informed consent duties. After plaintiff rested, and following a conference in chambers, plaintiff withdrew his claim that defendant was negligent in using the morphine paste, but argued that there was sufficient

evidence to present to the jury on the issue of informed consent. (3RT 417, 419.) Defendants disagreed and moved for nonsuit or, in the alternative, directed verdict. (3RT 354, 422-424 , 434.)

At the hearing on the motion, plaintiff changed his mind and sought to reassert his claim that defendant was negligent in using the paste. He did not claim that the evidence that had been presented to the jury was sufficient to support a finding of negligence. Rather, he sought to reopen his case to introduce an article discussing problems in the use of morphine paste, and use the article to further cross-examine defendant. His offer of proof regarding the article was expressly limited to the issue of negligence in the use of the paste, not the issue of informed consent. (3RT 431, 435-437, 442.) Noting the barriers posed both by Evidence Code section 721, and by its rulings on defendants' *in limine* motions, the court determined that plaintiff had failed to establish any evidentiary basis for introducing the article, noting that defendant had not read and was not aware of the article, none of plaintiff's experts had testified about it, and plaintiff did not purport to have an expert who could testify that the article reflected the applicable standard of care as to use of the paste. (3RT 439-440, 444-446, 458-459, 462.)

The court further found, as is discussed below, that plaintiff had failed, as a matter of law, to produce any evidence sufficient to support his

claim of lack of informed consent. (3RT 452-457.)[3/] The court, therefore, granted a directed verdict in favor Dr. McBride and the Regents, as to both standard of care and informed consent, and entered judgment accordingly. (CT 124, 134-136; 3RT 463.) Plaintiff has appealed, challenging *only* the court's finding on the question of informed consent. (AOB 3.) As will be shown below, his claims have no merit.

3/ Details of the proceedings relating to the informed consent issue conducted at the directed verdict hearing are set forth in Argument I, B, at pp.25-28, *infra*.

STATEMENT OF FACTS

A. Plaintiff's Professional Background

Plaintiff is a medical doctor and professor of medicine at UCLA, based at Harbor UCLA Medical Center. His special area of interest is clinical pharmacology and the proper use of medications in spinal cord injury cases. (2RT 46-48.)

B. Plaintiff's Presurgical Medical History And The Informed Consent Discussion.

Plaintiff has suffered from back pain since the mid-1970's, and from degenerative back problems beginning in 1981. (2RT 102-103.) Starting in 1999, he was treated for those problems by Dr. Mayank Pathak who had been his resident, and with whom plaintiff had coauthored papers on spinal injuries. He also received injections from an anesthesiologist to relieve his pain. (2RT 50-52.) In the spring of 2003, while still under Dr. Pathak's care, plaintiff's condition worsened. He was in excruciating pain and was beginning to lose motor, strength and sensory functions. He had some numbness and tingling in his legs and some uncertainty in placing his feet. He knew that he would ultimately need spinal surgery, because he was losing his ability to perform the normal functions of his life and his profession. (2RT 48, 55-57.)

Plaintiff approached defendant, whom he had known as a colleague since 2000, and asked defendant to recommend a surgeon. Defendant offered to perform the surgery--the response that plaintiff had anticipated--and plaintiff decided that defendant should do the surgery. (2RT 48-49.)

Before the surgery, plaintiff met with defendant and provided a medical history. Plaintiff described his condition as spinal stenosis, lumbosacral facet disease, degenerative joint disease, and chronic pain. The medical history form solicited information as to patient allergies. The only allergies plaintiff listed were to penicillin and surgical tape. (2RT 105-107.)

Plaintiff and defendant discussed "the issues that [plaintiff was] fully aware of, and [they] came to a joint agreement that if [plaintiff] didn't undergo the surgery that [he] would probably be in a wheelchair within a year and a half or two." Plaintiff believed that without surgery the likelihood was that "something drastic and permanent would happen" as a result of plaintiff's "ongoing neurological problems." (2RT 58.)

Defendant personally conducted the informed consent conversation with plaintiff before the June 2003 surgery. (3RT 241.) Defendant explained that he planned to use a microsurgical technique in plaintiff's lumbar area, hoping that it would produce results that would eliminate the need for more extensive surgery. From their conversations, plaintiff had an

understanding of the extent of the surgery to be performed. (2RT 53, 55, 60.)

Plaintiff was also aware that the surgery might not solve his problems, and, in fact, might increase them; that it might fail to relieve his pain to his satisfaction; and that it could cause pain. He understood that he could need prolonged hospitalization in a flat position; that he might require a reoperation or future surgery; that he could have nerve root injury with numbness; and could develop weakness as a result of the surgery. He was aware that bleeding, infection and drainage were standard risks of surgery. Plaintiff made the decision to have the operation because he felt the potential benefits of surgery outweighed the potential risks. (2RT 108-110; 3RT 243.)

Defendant noted in his records that he had ". . . 'explained the operation, risks, benefits and alternatives to Dr. Segal. He's very conversant in these matters.'" (3RT 240.) Defendant included this latter comment in the record because plaintiff was somewhat dismissive about defendant's recital of the risks, indicating he knew them and did not really want to listen. Plaintiff kept saying, "'I know. I know. I know. These kind of things happen. I know it's not a guarantee. I know bad things could happen.'" (3RT 240.) However, defendant believed it was important to provide full disclosure of surgical risks, despite plaintiff's status as a

physician, to make sure they had a mutual understanding of those risks. (3RT 241, 284.)

C. Plaintiff's Post-surgical Condition And Subsequent Surgeries

Upon awaking after surgery, plaintiff found that he had a great deal of pain relief and was feeling comfortable. He mentioned this to defendant when defendant made his rounds. At that time, defendant told plaintiff that he had placed a morphine paste right above the spinal cord prior to closing the surgical site. Plaintiff thought that the initial pain relief he was experiencing might have been due to use of the paste. (2RT 61-62.)

Plaintiff testified that his post-surgical pain relief lasted only about six hours. After that, plaintiff experienced rapid onset of excruciating pain. Plaintiff discussed this pain with defendant; however, plaintiff was not surprised by the pain. He had, in fact, anticipated it. (2RT 62-63.)[4/]

Plaintiff testified that his pain persisted for an extended period. In July 2003, plaintiff had an MRI that showed a collection of fluid pressing on his spinal cord. Defendant prescribed an antibiotic for him. The

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4/ Plaintiff's testimony regarding the onset of excruciating pain was contradicted by the daily hospital progress reports recording plaintiff's subjective comments post-surgery in which he expressed minimal discomfort both immediately upon awakening after surgery and during the remainder of his hospitalization. He would not have been discharged, if he was in excruciating pain. (3RT 250-254.)

problem was not resolved, and defendant performed a second surgery on plaintiff on July 22, 2003, to ascertain whether the cause of the problem was scar tissue, infection or the morphine paste. Defendant determined that plaintiff had developed scar tissue at the surgery site, and removed it. There was no infection. (2RT 77, 79; 3RT 187, 208, 262, 265, 267.)

Defendant did not use the morphine paste in the second surgery. Plaintiff's recovery from the second surgery was protracted, but it did provide him with "clear-cut improvement in the pain relief to a great extent." (2RT 83-84.) However, defendant's loss of bodily function continued after the second surgery and he severed his relationship with defendant. He had a third surgery, performed by another surgeon in December 2004, but the loss of body function became even more marked and persistent after that. (2RT 85-86, 88, 92-93, 99.)

D. Facts Relating To Use Of The Morphine Paste And To The Issue Of Informed Consent Regarding Its Use

1. The Parties' Testimony

It was defendant's custom and practice to use the morphine paste in his surgeries. It was "an accepted school of thought among neurosurgeons as of June 2003" to use the paste. (3RT 187-188, 276.) He had read medical literature on the practice of using the paste, and had engaged in a risk-benefit analysis in deciding to use the paste in his practice. The literature he consulted reported no higher rate of infection with use of the paste, and reported no case of a hyper-allergenic reaction to use of the paste. He regarded the risk of using it as "mighty low." He had used it hundreds of times with no adverse effects. (3RT 188-189, 191-193.) He used it to help patients recover from surgery faster, and so that they would require less narcotic medication, because use of narcotic medication carries risk of many serious complications. (3RT 245-247.)

Defendant testified that plaintiff's post-surgical scar tissue had developed in the area in which defendant had applied the paste. He could not say that there was a direct cause and effect between use of the paste and formation of the scar tissue. He had seen such tissue form on patients on whom he had *not* used the paste. He had never before seen formation of the type of scar tissue plaintiff exhibited in patients on whom he had used the

paste. No issues relating to formation of scar tissue appeared in the medical literature defendant had consulted relating to the paste. However, since the scar tissue was at the site of the paste, defendant could not rule it out as a cause of the scar tissue. (3RT 187, 205-206, 266, 292.)

Plaintiff testified that defendant did not discuss use of the paste with him prior to the surgery, and that plaintiff was unaware defendant was planning to use it. (2RT 61-62.)[5/] Defendant did not tell plaintiff anything about the morbidity rates associated with use of the paste. Plaintiff was asked by his counsel whether he was aware of the morbidity rates associated with use of the paste, but the court sustained a defense objection that the question called for expert testimony. (2RT 167.)

Plaintiff initially testified that defendant *never* told him the ingredients of the morphine paste, but that plaintiff was aware of the ingredients by the time of trial. Based on this testimony, plaintiff was precluded from testifying regarding the ingredients, after defendant objected that the question called for expert testimony. (2RT 61.)

Plaintiff subsequently testified that his pain remained "intractable" for an extended period following the surgery, and plaintiff consulted with

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5/ Plaintiff did not claim that he asked defendant any questions about the medications defendant would be using in his surgery, or that he asked any questions at all during the informed consent conversation.

defendant regarding the reasons his recovery was not proceeding as plaintiff had expected. At that time, they discussed defendant's use of the morphine paste and defendant told him the ingredients of the paste. Following this testimony, plaintiff was allowed to enumerate the ingredients of the paste which, in addition to morphine, included "a cortisone-like material, a steroid material, . . . a substance called avitene and another substance called amicar." Plaintiff was precluded from explaining what avitene is or what its components are, after defendant objected that the questions called for expert testimony. (2RT 64, 66.)

Outside the presence of the jury, the court asked the relevance of the components of avitene. Plaintiff's counsel stated that avitene is a bovine collagen and that plaintiff would have objected to its use. Counsel explained that plaintiff suffers from allergies, and although he had no specific allergy to avitene, he would not have wanted an unnecessary substance used at the surgery site, because of the risk of infection. The court noted that there had been no infection at the surgery site. (2RT 72.) The court ruled that plaintiff could testify on the limited point that after the surgery, he became aware that there was a component in avitene that caused him "some concern." Thereafter plaintiff testified that he would not have consented to use of the paste, had he known of its components. He was not

permitted to further explain why he would have refused consent. (2RT 74-76.)

Defendant also testified to the components of the paste. (3RT 203.) He further testified that the standard of care does not require disclosure of use of the paste or of its component elements. (3RT 244.)[6/]

2. Plaintiff's Expert Witnesses

Dr. Pathak, plaintiff's treating neurologist, testified to plaintiff's neurological medical history from 1999 forward. (3RT 209 et seq.) Plaintiff's condition had become degenerative more than a year prior to the first surgery. (3RT 321.) The third surgery plaintiff had, in 2004, was due entirely to the natural progression of the disease; it had nothing to do with plaintiff's treatment by defendant. (3RT 337.)

Dr. Pathak attributed the fluid accumulation and inflammation that manifested itself following plaintiff's first surgery to that surgery. (3RT

6/ Defendant testified that he nonetheless informed plaintiff, pre-surgery, that he would place a layer of morphine based paste on plaintiff's nerves so that he would awake without pain, and that plaintiff did not ask him any questions about the paste. (3RT 244.) The court properly ignored this factual dispute in ruling on the motion for directed verdict. (*Gelfo v. Lockheed Martin Corp., supra*, 140 Cal.App.4th at p. 46.) Rather, it viewed the sufficiency of the evidence in the light most favorable to plaintiff. Its ruling was predicated on the purely legal questions of whether plaintiff had produced any substantial evidence that could support a jury finding that defendant had a duty to inform him of the use of the paste, and whether proof of a duty to disclose that information depended upon the standard of practice and, therefore, required expert testimony. (3RT 452-457.)

343.) However, Dr. Pathak had no opinions on whether defendant's treatment of plaintiff met the standard of care. (3RT 320.) He offered no testimony regarding informed consent.

Dr. Lloyd Dayes, a Board certified neurological surgeon, testified exclusively on the issue of causation. (2RT 135, 137.) It was Dr. Dayes' opinion that use of the paste caused the scarring and inflammation visible on plaintiff's post-surgical MRI, and that it was more likely than not that this physical reaction necessitated the second surgery. (2RT 147, 153.) Dr. Dayes offered no evidence on standard of care with respect to use of the paste, nor as to informed consent practices relating to use of the paste.

John Thompson, a doctor of clinical pharmacology, also testified only as to causation. In his opinion, it was probable that the problem plaintiff developed following the first surgery was a hypersensitivity reaction to the avitene. (3RT 405-406.) He had no expertise, and offered no opinions, as to standard of care in the use of the paste, or as to informed consent. (3RT 388-389, 392, 394, 400.) *Plaintiff's counsel acknowledged that he had no expert witness on the issue of informed consent, asserting that expert testimony was not necessary*. (2RT 174.)

LEGAL DISCUSSION

I. THE TRIAL COURT PROPERLY STATED AND APPLIED THE PRINCIPLES GOVERNING INFORMED CONSENT IN CALIFORNIA.

A. The Scope Of The Physician's Duty To Disclose

Cobbs, supra, definitively delineated the scope of disclosure required of physicians, setting forth two distinct types of required disclosure, subject to different standards of proof. First:

> [W]hen a given procedure inherently involves a *known* risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, *and to explain in lay terms* the complications that might possibly occur.

Second:

> *Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances*.

(8 Cal.3d at pp. 244-245, emphasis added.) The duty of disclosure does *not* require "a lengthy polysyllabic discourse on all possible complications." There is no duty to discuss relatively minor risks which are of very low incidence. A physician is required to ascertain the patient's history of adverse reaction to medication, "*but no warning beyond such inquiries is required as to the remote possibility of death or serious bodily harm.*" (8 Cal.3d at p. 244, emphasis added.)

In *Arato, supra*, the Supreme Court reaffirmed the distinction between the two types of dislosure discussed in *Cobbs*, reiterating that for disclosures beyond what *Cobbs* denominated the "minimal disclosure" requirement, the duty to disclose is governed by the standard of practice in

the community. (5 Cal.4th at pp. 1190-1191.) *Arato* also affirmed that expert evidence is required to establish the disclosure practices of skilled practitioners of good standing under similar circumstances, citing, inter alia, *Vandi*, *supra*, 7 Cal.App.4th at p. 1071, and *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535. (*Arato, supra*, 5 Cal.4th at p. 1191.)

B. The Trial Court Properly Concluded That Disclosure Of Use Of The Morphine Paste Was The Type Of "Additional Information" That Was Governed By The Standard Of Practice In The Community, Which Could Be Established Only By Expert Testimony.

In opposition to defendants' expessed intention of moving for directed verdict, plaintiff's counsel framed the specific issue he wished to present to the jury. He contended that the duty of informed consent in this case required defendant to inform plaintiff not only that he was going to use the paste, but that it was going to be prepared by the scrub nurse in the surgery room, and that one of its components was a bovine collagen protein. The court advised counsel that his position was "very problematic" and offered counsel the opportunity to submit further authority on the issue. (3RT 422-224.)

At the hearing on the directed verdict motion, defense counsel, citing *Cobbs*, argued that the issue plaintiff had framed turned on facts not known to the average lay person and that expert evidence was therefore necessry to prove a duty to disclose. (3RT 433-434.) The court, after indicating that it

was inclined to agree with defense counsel's analysis, asked plaintiff's counsel if it was still his position that defendant's informed consent duty required disclosure that defendant would be using a paste that would be prepared by the scrub nurse in the surgery room, and that included a bovine collagen. Plaintiff's counsel reaffirmed that formulation with the added requirement of disclosure that the paste was nonessential. (3R 434-435.)

The court asked plaintiff's counsel if he would have any further evidence to offer on the issue of informed consent, if he were given the opportunity to reopen his case. Plaintiff's counsel stated that the only additional evidence he would present would be to recall plaintiff to testify as to the reasons he would not have consented to use of the paste--namely, that use of the paste was nonessential, that it provided analgesic relief for six hours, and that he would not have permitted the substances which made up the paste to be put in his body, "running the risk of infection or other reactions compared and contrasted with six hours of pain relief." (3RT 449-450.) This offer of proof related only to the personal decision plaintiff would have made, had there been disclosure. It did not address the need for expert testimony on the standard of practice of skilled practitioners with respect to disclosure of the use of the paste, let alone disclosure of its components and mode of preparation. (*Arato, supra*, 5 Cal.4th at p. 1191; *Cobbs, supra*, 8 Cal.3d at pp. 244-245; *Vandi v. Permanente Medical*

Group, supra, 7 Cal.App.4th at p. 1071; *Morgenroth v. Pacific Medical Center, Inc., supra*, 54 Cal.App.3d at pp. 534-535.)

The Court concluded that plaintiff's formulation of the scope of the duty of disclosure presented a "fairly esoteric issue," and that it was not information that "a reasonable person would need in deciding whether or not to undergo the surgery." Therefore, "the second prong of the *Cobbs* test" applied, and any duty to disclose turned on "whether other skilled professionals would disclose the information under similar circumstances." (3RT 456-457.) Clearly, the court could reach no other conclusion as to which prong of *Cobbs* applied.[7/]

Since plaintiff presented no expert testimony on the issue of informed consent, the court concluded that there was *no* evidence, let alone substantial evidence, that could support a jury finding of lack of informed consent. In reaching this conclusion, the court gave plaintiff's evidence and offer of proof the mandatory deference to which they were entitled, "indulging every reasonable inference of the evidence that's been presented" in plaintiff's favor, including such inferences as could be drawn

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7/ For convenience sake, this Respondents' Brief will continue to use the court's term "second prong" to refer to *Cobbs*' skilled practitioner standard for the disclosure of "additional information" beyond the "minimal disclosure" requirement. (8 Cal.3d at pp. 244-245.)

from plaintiff's offer of proof as to the reasons why he would have refused the treatment. (3RT 449, 451, 456-457.)

Plaintiff raised no challenge at the hearing to the court's conclusion that the second prong of the *Cobbs* test applies; nor does he do so in his Opening Brief. Rather, he disputes the court's further finding that expert evidence was necessary to establish lack of informed consent under the second prong of the *Cobbs* test. (AOB 4-16.) As will shown below, his contentions are wholly without merit.

II. PLAINTIFF'S FIRST LEGAL CONTENTION FAILS TO CONFORM TO THE RULES OF COURT; MISAPPLIES THE AUTHORITY IT CITES; AND IGNORES CASE LAW DIRECTLY HOLDING THAT EXPERT EVIDENCE IS NECESSARY TO PROVE THE SECOND PRONG OF THE *COBBS* TEST.

A. The Heading Of Plaintiff's Initial Contention States No Cogent Proposition Relevant To The Argument Which Follows It, Nor To The Specific Issues On Appeal. Consequently The Argument Should Be Disregarded In its Entirety.

The Rules of Court require an appellant to "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority . . . ." (Cal. Rules of Court rule 8.204(a)(2)(B).) "The failure to head an argument as required by California Rules of Court, [former] rule 15(a), constitutes a

waiver." (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 586, fn. 28.)

The subheading of plaintiff's initial "argument" with respect to informed consent states: "California's Public Policy on Informed Consent: It is a jury question." (AOB 4) This is a meaningless assertion that begs the question of just what it is that the jury is to decide and what type of evidence is necessary to satisfy the standard of proof the jury must apply. In its broad sweep, the assertion implies that a mere allegation of lack of informed consent, unsupported by *any* evidence, must nonetheless be submitted to the jury--a clearly erroneous proposition. (*Jambazian, supra*, 25 Cal.App.4th at p. 850 [summary judgment proper in absence of required expert testimony as to standard in community for disclosure of "additional information"]; *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535 [nonsuit proper in absence of expert evidence on disclosure of "additional information"].)

Plaintiff further muddies his "argument" by altering the text of *Seneris v. Haas* (1955) 45 Cal.2d 811, 825, and citing it as authority on the issue of informed consent. (AOB 4.) The case is inapposite. It is actually a res ipsa loquitur case having nothing whatever to do with informed consent.

Plaintiff next relies on *Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 805, for the proposition that the issue of informed consent need not be based on medical testimony. (AOB 5.) However, *Berkey* predated *Cobbs*. It cannot constitute authority on the nature of the evidence required to prove the existence of a duty under the second prong of the *Cobbs* test. That test did not exist at the time *Berkey* was decided.

The lack of cogency or relevance in plaintiff's first subheading, and the irrelevance of his foundational authority, warrant this Court's disregarding the entire argument. (Cal. Rules of Court, rule 8.204(a)(2)(B); *Opdyk v. California Horse Racing Bd.*, *supra*, 34 Cal.App.4th at pp. 1830-1831, fn. 4; *Lesteer v. Lennane*, *supra*, 84 Cal.App.4th at p. 586, fn. 28.)

B. The Remainder Of Plaintiff's First Argument Misapplies The Cases It Cites And Ignores Black Letter Law That Directly Refutes The Argument Plaintiff Makes.

The remainder of plaintiff's first "argument," is equally flawed. Plaintiff makes the unsubstantiated assertion that no expert testimony is required to establish a duty of disclosure as to *either* "first tier" or "second tier" risks, mistakenly claiming this is an issue of first impression. (AOB 5.) In doing so, he ignores the *evidentiary* significance of the distinction drawn by *Cobbs*--and reiterated by *Arato*--between the minimal disclosures that are mandatory irrespective of community standards (an explanation, in lay terms, of the inherent *known* risks of death, serious

bodily harm, and potential complications of a proposed treatment), and the "second prong" disclosure of "additional information," as to which the duty to disclose depends upon the practices of skilled practitioners in the community. (*Arato, supra*, 5 Cal.4th at p. 1191; *Cobbs, supra*, 8 Cal.3d at pp. 244-245.)

At the time Cobbs was decided, established black letter law had long held:

> The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony (Citations), unless the conduct required by the particular circumstances is within the common knowledge of the layman.

(*Sinz v. Owens* (1949) 33 Cal.2d 749, 753.)

Cobbs carved out a limited exception to the prevailing standard of care rule with respect to informed consent *as to the "minimal disclosure*" requirements. However, it explicitly grounded the duty to disclose "additional information" on the practices of skilled practitioners in the community. (*Cobbs, supra*, 8 Cal.3d at pp. 244-245.) It is inconceivable that the Supreme Court would have established the "skilled practitioner" standard of disclosure for "additional information" without also intending that proof of such practices be established by expert evidence, in

accordance with the established rule stated in *Sinz v. Owens, supra*, 33 Cal.2d at p. 753, a case which *Cobbs* actually cited. (8 Cal.3d at p. 236.)

Subsequent case law bears that out. *Morgenroth*, *supra*, is directly in point. There, as here, the plaintiff contended that *Cobbs* did not require him to present expert testimony as to a duty to disclose "additional information." The trial court rejected the contention and entered a nonsuit in favor of the defendant. In affirming, the Court of Appeal held that expert evidence *is* required, stating that it could not "see any other rational interpretation of" *Cobbs'* use of the language "[such] '*additional information as a skilled practitioner of good standing would provide under similar circumstances*.'" (54 Cal.App.3d at pp. 531, 534-535, emphasis added in orig.)

Similarly, *Vandi, supra*, 7 Cal.App.4th at pp. 1071-1072, held that the trial court properly refused to submit the issue of informed consent to the jury in the absence of expert testimony as to disclosure of "additional information."

This Court reached a similar conclusion in *Jambazian*, holding that summary judgment was proper in the absence of required expert testimony as to the existence of a medical condition that might have given rise to a duty to disclose. (25 Cal.App.4th at p. 850.) Plaintiff attempts to rely on *Jambazian* for the contrary proposition, but he quotes an inapposite portion

of the opinion, and ignores the specific facts and ruling in the case with respect to the need for expert evidence. (AOB 6-7.)

Plaintiff also argues that *Arato* stands for the proposition that expert evidence as to second prong disclosures is "merely relevant," not essential. (AOB 5.) The argument ignores the factual posture of *Arato* and the specific issue before the Court. The defendant in *Arato* had been permitted to introduce expert evidence as to the standard of practice regarding the disclosure of second prong "additional information." (5 Cal.4th at p. 1190.) The plaintiffs were complaining, on appeal, that admission of expert opinion was error, relying--much as plaintiff herein does--on the statement in *Cobbs, supra*, 8 Cal.3d at p. 243, that weighing the risks of therapy "against the individual subjective fears and hopes of the patient is not an expert skill."

In rejecting the plaintiffs' argument, and affirming the admissibility of the expert evidence, *Arato* stated that the plaintiffs had failed to distinguish between the two types of physician disclosure discussed in *Cobbs.* The *Arato* Court declared:

> [*Cobbs*'] reference to the standard of professional practice as the benchmark for measuring the scope of disclosure beyond that implicated by the risks of death or serious harm and the potential for complications, has become an integral part of the legal standard in California for measuring the adequacy of a physician's disclosure in informed consent cases.

(5 Cal.4th at pp. 1190-1191.)

Arato cited as authority for this proposition *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535, and *Vandi*, *supra*, 7 Cal.App.4th at p. 1071, both of which held that expert evidence was *necessary* to establish the standard of practice. (5 Cal.4th at p. 1191.) Thus, *Arato* cannot be construed to support plaintiff's contention that expert evidence is merely relevant, but not necessary. (AOB pp. 5-6.)

Contrary to plaintiff's contention that the appeal presents an issue of first impression as to whether expert evidence is required to prove a second prong duty of disclosure (AOB 5), the law on this point must be considered settled, not only by the Supreme Court's choice of the "skilled practitioner" standard with respect to disclosure of "additional information" (*Cobbs, supra*, 8 Cal.3d at pp. 244-245), but by the uniform interpretation of the significance of that standard by subsequent authority. (*Arato, supra*, 5 Cal.4th at pp. 1190-1191; *Jambazian, supra*, 25 Cal.App.4th at p. 850; *Vandi, supra*, 7 Cal.App.4th at pp. 1071-1072; *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535.)

III. CONTRARY TO PLAINTIFF'S SECOND ARGUMENT, THE TRIAL COURT CORRECTLY APPLIED "THE LAW OF ADDITIONAL DISCLOSURES."

A. Testimony By Plaintiff As To Why He Would Not Have Consented To Use Of The Paste Was Relevant On The Issue Of Causality, But Not On The Issue Of Whether The Standard Of Practice Gave Rise To A Duty To Disclose.

The gist of plaintiff's second argument (AOB 9-16) is that the trial court erred in refusing to let him testify as to why he would not have consented to use of the morphine paste. Plaintiff argues that *Cobbs, supra*, 8 Ca.3d at p. 245, focuses on the materiality of disclosure to the patient and that it specifically states that the plaintiff may testify on this issue. (AOB 9-10.) Plaintiff's argument confuses two separate issues decided by *Cobbs*. The first was the scope of the physician's duty to disclose; the second was the requirement that there be a causal connection between a failure to disclose *required* information and an injury to the plaintiff. As to the latter issue, the Court held that "[s]uch causal connection arises only if it is established that had the revelation been made consent to treatment would not have been given." (8 Cal.3d at p. 245.) *It was with respect to the causality issue that the Supreme Court held the plaintiff's testimony was relevant--not as to the existence of a risk or the standard of practice*. Even as to causality, the Court limited the significance of the plaintiff's testimony, stating that the issue went beyond the plaintiff's credibility. As the Court explained:

> 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. (Citation.)

(*Cobbs*, *supra*, 8 Cal.3d at p. 245.)

B. To The Extent, If Any, That The Court Improperly Curtailed Plaintiff's Explanation Of Why He Would Have Refused Consent, Any Error Was Harmless In The Absence Of Any Evidence Of A Duty To Disclose.

The balance of plaintiff's second argument (AOB 10-16) consists of a selection of snippets from the trial proceedings. These are taken out of context, are not referenced in plaintiff's statement of facts, and fail to accurately reflect the complete set of facts, including plaintiff's offers of proof, which the court considered in ruling on the motion for directed verdict. (3RT 457.) To the extent that plaintiff is complaining that the record does not reveal all of the reasons he would have testified to, regarding why he would not have consented to use of the paste (AOB 10, 13), the fault is his own: He was asked for his offer of proof both at trial and at the hearing on the directed verdict motion. (2RT 72, 3RT 434-435, 449-450), and the court assumed that the proffered testimony had been given, for purposes of determining the sufficiency of the evidence and

adjudicating the directed verdict motion (3RT 457). Plaintiff cannot be heard to complain, if his offer of proof was inadequate.

More significantly, as the Appellant's Opening Brief indicates, the transcript references relate to evidentiary rulings relevant to the issue of causation. (AOB 13) They have no bearing on the issue of duty and the necessity for expert evidence on the standard of disclosure adhered to by skilled practitioners with respect to the paste. (*Cobbs, supra*, 8 Cal.3d at p. 244-245.)

Plaintiff cites *Jambazian, supra*, 25 Cal.4th at pp. 847-848, for the proposition that the patient's subjective fears and hopes do not require expert testimony. Once again plaintiff confuses two distinct aspects of informed consent differentiated by *Cobbs* (8 Cal.3d at p. 243), and referenced in the portion of *Jambazian* that plaintiff cites: First is the physician's appreciation, as an expert, of the existence of a risk requiring disclosure; second, is the weighing of that risk, *after it has been disclosed*, against the patient's subjective fears and hopes. As to *the latter* no expert testimony is required. The language in *Jambazian* that plaintiff relies on (AOB 12) has no bearing on the type of evidence necessary to establish the existence of a risk requiring disclosure.

Plaintiff conveniently overlooks the pertinent holding of *Jambazian* with respect to when expert evidence is necessary to establish a duty to

disclose. (25 Cal.App.4th at pp. 846, 848-850.) The issue in *Jambazian* was whether the plaintiff had a particular medical condition which required disclosure of the particular range of effects of a proposed procedure. (25 Cal.App.4th at p. 848.) The plaintiff claimed that he suffered from diabetes, but he offered no medical evidence to support the claim. (*Id.* at p. 845.) This Court *rejected* the plaintiff's contention that expert evidence was unnecessary to defeat the defendant's summary judgment motion. (25 Cal.App.4th at pp. 846-847.)

Jambazian found that case law did *not* support the proposition that "a lay witness may render a medical opinion as to whether a patient has a condition which requires particular advice be given as to risks of a surgery." (*Id.* at p. 848.) Rather, it held that informed consent cases are guided by the general rules governing use of expert testimony: "'If the fact sought to be proved is one within the general knowledge of laymen, expert testimony is not required; otherwise the fact can be proved *only* by the opinions of experts.' (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 982 [80 Cal.Rptr. 373].)" (*Jambazian*, *supra*, 25 Cal.App.4th at pp. 848-849, emphasis added.) Because the plaintiff presented no expert evidence to establish the prerequisite medical facts that could have given rise to a duty of disclosure, *Jambazian* affirmed the summary judgment. (*Id.* at pp. 849-850.) The instant case presents an equivalent situation.

As noted above, *Cobbs* holds that a physician is required to ascertain the patient's history of adverse reaction to medication, "*but no warning beyond such inquiries is required as to the remote possibility of death or serious bodily harm.*" (8 Cal.3d at p. 244, emphasis added.) Defendant satisfied that standard by obtaining a history of plaintiff's allergies. The only allergies that plaintiff reported were to penicillin and surgical tape. (2RT 105-106.) The issue of whether those allergies signaled any likelihood of an allergic reaction to the morphine paste, or its ingredients, that would have required disclosure of this "additional information," is a medical question dependent on expert testimony both as to the existence of the risk and the practice of skilled practitioners with respect to disclosure. (*Cobbs, supra*, 8 Cal.3d at pp. 244-245; *Jambazian, supra*, 25 Cal.App.4th at pp. 848-850.)

Defendant, who had been properly designated as an expert witness (Aug. Req., Exh. B), testified, based on the medical literature he had consulted, and his extensive experience in using the paste, that he knew of no risks associated with its use, and that the standard of care did not require its disclosure. (3RT 187-189, 193, 244.) Plaintiff introduced *no* evidence--let alone the required expert evidence--to dispute this testimony. Nor did he proffer any competent evidence to do so at trial or at the hearing on the directed verdict motion. Plaintiff was testifying as a lay person. He had

failed to satisfy the procedural prerequisites for testifying as an expert. (See Aug. Req., Exhs. C & D, and Argument V below.) His own testimony, therefore, could not suffice to establish a duty to disclose. The court had no option but to grant the motion for directed verdict, and enter judgment accordingly. (*Arato, supra*, 5 Cal.4th at pp. 1190-1191; *Jambazian, supra*, 25 Cal.App.4th at p. 850; *Vandi*, *supra*, 7 Cal.App.4th at pp. 1071-1072; *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535.)

IV. THE COURT DID NOT ERR IN APPLYING THE "PRUDENT PERSON" STANDARD TO PLAINTIFF. THAT STANDARD IS INTEGRAL TO INFORMED CONSENT LAW IN CALIFORNIA.

A. The Foundational Rationale Of *Cobbs* Is Predicated On The "Prudent Person" Standard.

In his third argument, plaintiff contends that defendant owed plaintiff a more extensive duty of disclosure than would have been owed to a lay patient, because plaintiff is a doctor and therefore is capable of a greater understanding of the medical issues involved than a lay patient would be. (AOB 17-18.) Plaintiff's argument turns *Cobbs* on its head.

Cobbs enunciated four postulates which serve as the rationale for the informed consent rules that *Cobbs* adopted. First, "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." Second, competent adults have the right to decide whether or not to submit to medical treatment. Third, effective consent must be informed. Fourth, "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." (8 Cal.3d at p. 242, emphasis added.) Thus, *Cobbs* imposed the duty to disclose only because of the superior knowledge of physicians vis-a-vis lay patients.

The scope of the duty is consistent with that rationale. The physician is only required to "explain in lay terms" the known risks of death or serious injury inherent in a proposed treatment, which *Cobbs* recognizes as the information a reasonably prudent lay patient would need to make an informed decision. (8 Cal.3d at pp. 243-244.) Similarly, for purposes of establishing causation, after an undisclosed complication develops, a patient's claim that he would not have submitted to treatment, if disclosure had been made, must be measured by an objective "prudent person" standard. (*Id.* at p. 245.)

In *Truman v. Thomas* (1980) 27 Cal.3d 285, 291, after citing *Cobbs*' underlying postulates, the Court opined that the duty of disclosure might be expanded, if the physician knew or should have known of the patient's "unique concerns or *lack of familiarity with medical procedures* . . . ."

(Emphasis added.) No California case has suggested that the duty of disclosure might be expanded if the patient had superior knowledge of medical procedures or treatments.

The trial court properly applied the prudent person standard to plaintiff in measuring the scope of defendant's duty to disclose, and correctly determined that it had been met. *Cobbs*' rationale is wholly inconsistent with imposing a *higher* duty of disclosure when the patient is also a physician, and therefore, presumably, is *not* relegated to "an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process." (8 Cal.3d at p. 242 .)

If anything, the import of *Cobbs,* and of *Truman v. Thomas, supra*, 27 Cal.3d at p. 291, clearly suggests that, if a different standard of disclosure were to be employed where the patient is also a physician, it would be that a *lesser* duty of disclosure should be placed on the treating physician, because when dealing with a physician-patient courts may *not* "safely assume" a lack of parity of knowledge between doctor and patient. (*Cobbs*, *supra*, 8 Cal.3d at p. 242.) To the contrary, in such cases courts may assume that the physician-patient is aware of the general risks of surgery, and is at least knowledgeable enough to ask pertinent questions during the informed consent process to satisfy himself that he has the information he requires to give an informed consent. Plaintiff has presented

no cogent rationale, consistent with *Cobbs*, that would support imposing a higher duty on a physician whose patient was also a physician. And of course, he produced no expert evidence as to what specific disclosure such "higher" duty would have required in this case. (*Vandi*, *supra*, 7 Cal.App.4th at p. 1071.)

B. Plaintiff's Out Of State Authority Does Not Support Plaintiff's Argument; It Actually Undermines It.

Unable to find California authority that supports adoption of a rule requiring greater disclosure when the patient is a physician, plaintiff urges this Court to follow the path taken by the Texas Supreme Court in *Jackson v. Axelrad, supra*, 221 S.W.3d 650 ("*Jackson*"). However, that path does not lead where plaintiff wishes to go. (AOB 20-24.)[8/]

In *Jackson*, as here, both the plaintiff and the defendant in a medical malpractice case were physicians. The case turned on a question of whether the *plaintiff* was negligent in failing to provide information to the defendant that would have aided the defendant's diagnosis and altered the mode of treatment. The jury found that the plaintiff was 51% at fault and the defendant was 49% at fault. Under Texas comparative negligence law, this resulted in a "take nothing judgment" against the plaintiff. (Slip Opin. 2.)

8/ Plaintiff has provided this Court with an appendix containing a copy of the slip opinion in *Jackson*, and has utilized the pagination of the slip opinion in his citations to the case. For convenience sake, defendants will do likewise.

The issue before the Texas Supreme Court was whether physician-plaintiffs have a different duty than lay plaintiffs in communicating with their doctors. (Slip Opin. 7.)

The *Jackson* plaintiff [9/] suffered from severe abdominal pain which resulted from undiagnosed diverticulitis. A key to diagnosis of that condition is that patients suffer pain in their lower left quadrant. Applying governing standards of review to disputed evidence, the Court concluded the jury had found that the plaintiff failed to report the site of the pain to the defendant as part of his medical history. As a result, the defendant failed to diagnose the condition and employed a mode of treatment contra-indicated for diverticulitis, resulting in injury to the plaintiff. (Slip Opin. 2-5.)

A lay patient would not have been expected to know the significance of the site of the pain and would not have had a duty to volunteer the information to his physician. The plaintiff argued that he should not have borne a greater responsibility in communicating with his physician than a lay patient would have. (Slip Opin. 7-8.) The Court rejected this argument, holding that the plaintiff's status as a physician imposed a duty on *him* to provide medical information to his doctor, based on the plaintiff's medical expertise, and that the *plaintiff's* negligence in failing to do should be

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9/ Axelrad was the plaintiff in the lawsuit. (Slip Opin. 2.)

measured by the prudent physician standard, not by the lay patient standard. (Slip Opin. 10-12.)

More significantly, for purposes of the present case, not only did the Court in *Jackson* not impose a higher duty on the defendant physician than was required in dealing with a lay patient, *it found that the defendant was not required to ask a fellow physician the same questions he would have asked a lay patient*, but could rely on the physician-plaintiff to volunteer the pertinent information. (Slip Opin. 12.)

The implication of *Jackson* for the present case is clear. Plaintiff here testified not merely that he was a doctor, but that he had a special interest in clinical pharmacology and the medications used to treat spinal injuries. (2RT 46, 48.) He acknowledged that defendant informed him of the nature and extent of the surgery to be performed and he was familiar with the consequences of not undergoing the surgery. (2RT 53, 55, 58, 60.) He was also familiar with the risks of the surgery. (2RT 108-110.) He did not dispute defendant's testimony that during the informed consent conversation, plaintiff was dismissive of defendant's recitation of risks and kept saying, "'I know. I know. I know. These kind of things happen. I know it's not a guarantee. I know bad things could happen.'" (3RT 240.)

Thus, rather than falling within the caveat of *Truman v. Thomas, supra*, 27 Cal.3d at p. 291, that the duty of disclosure might be expanded "[i]f the physician knows or should know of a patient's unique concerns or

lack of familiarity with medical procedures," plaintiff's behavior gave defendant every reason to believe that plaintiff neither needed nor wanted any more detailed information than defendant had provided.

To the extent that this Court wishes to take guidance from *Jackson*, it should conclude that if any higher duty existed here, based on plaintiff's physician status, it rested with plaintiff to inquire as to what medications defendant planned to use, if that was a matter of concern to plaintiff. (Slip Opin. 12.)

V. THE TRIAL COURT PROPERLY RULED THAT PLAINTIFF COULD NOT TESTIFY AS AN EXPERT, BECAUSE HE HAD FAILED TO SATISFY THE MANDATORY PREREQUISITES FOR GIVING EXPERT TESTIMONY.

Plaintiff urges that if this Court concludes expert testimony is necessary to establish a second prong duty of disclosure, it should find that plaintiff should have been allowed to give expert testimony on that subject. He bases this argument on the assertion that he was effectively treated as an expert at trial, because he was allowed to utilize medical terminology in the course of his testimony as a percipient witness. He cites *no* authority that such conduct would permit him to avoid the consequences of his failure to

designate himself as an expert, to qualify himself as an expert, or to oppose the *in limine* motion to exclude his rendering expert opinions. (AOB 24-29.)

A. Plaintiff Waived The Right To Testify As An Expert By His Noncompliance With The Statutory Prerequisites For Doing So, And Defendants Preserved Their Right To Exclude His Expert Testimony By Timely Trial Objections.

As is set forth above, in defendants' Statement Of The Case, defendants served plaintiff with a demand for exchange of expert witness information and production of expert reports. (Aug. Req., Exh. A.) Plaintiff responded with a notice of designation of expert witnesses that did *not* designate plaintiff as an expert witness. (Aug. Req., Exh. C.) Plaintiff filed a supplemental designation of expert witnesses which also did *not* designate him as an expert. (Aug. Req., Exh. D.)

Shortly after plaintiff served his supplemental designation of expert witnesses, defendants filed *in limine* motion No. 8 to exclude opinion testimony by plaintiff on the issues of negligence and standard of care, which plaintiff did not oppose, and which the court granted. (Aug. Req., Exh. E; CT 1-3, 3, 76-77, 114-115; 2 RT 116.) He does not now claim that the motion was wrongly granted.

Defendants filed their demand for exchange of expert witness information in conformity with statutory requirements. (Code Civ. Proc.,

§§2034.210, 2034.220, 2034.230, 2034.240.) Code of Civil Procedure section 2034.210, subdivision (a), expressly makes the statute applicable to any *party* who desires to testify as an expert. If a party fails to list a witness as an expert, in response to a demand for exchange of expert information, the trial court is required to exclude any expert testimony by that witness, upon the objection of the opposing party. (Code Civ. Proc., § 2034.300.) By failing to designate himself as an expert, and thereafter failing to oppose the motion *in limine* to exclude his expert testimony, plaintiff has waived his right to complain on appeal about the timely objections defendants raised at trial to plaintiff's attempts to give expert testimony (2RT 64, 66, 167), or about the court's enforcement of its exclusionary order.

B. Plaintiff Has Made No Showing, In This Court Or In The Trial Court, That He Was Qualified To Testify As An Expert On The Issue Of Informed Consent.

As plaintiff fully acknowledges (AOB 7), his position at trial was that he had no expert witness to offer on the issue of informed consent, and that none was needed. (2RT 174.) Both at trial and at the hearing on the directed verdict motion, plaintiff's offers of proof as to the further testimony he would give, if the court allowed it, related to the reasons, personal to himself, as to why he would have refused the use of the paste based on its component ingredients. (2RT 72, 3RT 449-450.) The offers of proof did not include any assertion that plaintiff qualified as expert on

the frequency of use of the paste by skilled professionals; on any known risks associated with use of the paste; or, most particularly, on the disclosure practices of those skilled practitioners who used it on their patients. The fact that plaintiff used medical terminology in the course of his testimony does not lead to a different conclusion, since none of the excerpts of testimony plaintiff cites (AOB 25-27) have any bearing on the pertinent question on appeal--namely the disclosure practices of skilled practitioners with respect to use of the paste. Therefore, even if this Court were to overlook plaintiff's failure to comply with Code of Civil Procedure section 2034.210 et seq., plaintiff's claim that he should have been allowed to testify as an expert would still have to be rejected. (Evid. Code § 720.)

CONCLUSION

For all of the reasons set forth above, the trial court correctly determined that the specific issue of informed consent raised by plaintiff turned on the disclosure practices of skilled practitioners; that expert evidence was essential to prove plaintiff's claim of lack of informed consent; that plaintiff had neither produced such evidence, nor made an

offer of proof that could support his claim; and that defendants were therefore entitled to a directed verdict. The judgment should be affirmed.

Dated: November ___, 2007 Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains 10,913 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: November 19, 2007

____

Barbara S. Perry

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