G032653

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

REY PIEDRA, a Minor, by his Guardians Ad Litem,
JESUS PIEDRA and AGRIPINA ARROYO
Plaintiff and Appellant,

vs.

JAMES M. DUGAN, M.D.,
Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT FOR ORANGE COUNTY (00CC11446)
CLAY SMITH, JUDGE

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Court Rules

Miscellaneous

G032653

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RESPONDENT'S BRIEF

INTRODUCTION

Plaintiff Rey Piedra was rushed to Fountain Valley Regional Hospital in a critically ill condition, and then suffered cardiac arrest while under the care of defendant, James M. Dugan, M.D., in the pediatric intensive care unit. Piedra sued Dr. Dugan for negligent medical care, battery and lack of informed consent. He alleged that apart from Piedra's parents' general consent to his treatment at Fountain Valley, Dr. Dugan should have obtained their specific informed consent before administering a medication called Ativan. The trial

court granted nonsuit on Piedra's battery claim. Thereafter, a nearly unanimous jury found in favor of Dr. Dugan on the negligent care and lack of informed consent causes of action.

On appeal, Piedra does not challenge whether substantial evidence supports the jury's finding that Dr. Dugan's treatment complied with the standard of care. Instead, he argues the defense verdict on lack of informed consent is not supported by substantial evidence because there was no evidence Dr. Dugan specifically discussed the medication Ativan with Piedra's parents. A physician's duty to disclose the risks and alternatives of treatment, however, is not absolute. Courts have limited the scope of this duty in two respects, both of which apply here. First, a physician's duty to disclose is limited to treatments that pose significant risks and does not include commonly used, low-risk medications. Here, substantial evidence showed that Ativan is a commonly used, low-risk medication. Second, a physician is excused from disclosure requirements in emergency circumstances. Here, Piedra had only a 10% chance of survival by the time he reached Dr. Dugan, and the use of Ativan was integral to Dr. Dugan's emergency efforts to quickly diagnose and stabilize Piedra's condition. The jury's defense verdict was, therefore, supported by substantial evidence.

Piedra also argues that the trial court committed prejudicial error by, (1) giving BAJI No. 14.64, an instruction regarding Piedra's settlement with former defendants in the action; (2) reserving the issue of present value discounting of future damages for a post-verdict adjustment and excluding any evidence regarding the present value of Piedra's damages; and (3) granting a nonsuit on his battery claim. Piedra's arguments fail because the trial court's decisions were correct and, in any event, did not prejudice him.

The trial court correctly used BAJI No. 14.64 to inform the jury why Dr. Dugan's former codefendants were no longer in the case without

disclosing the specific terms of settlement. In any event, the use of this instruction was not prejudicial. It was also appropriate, in this MICRA case, for the trial court to reserve present value discounting for a post-verdict proceeding. Moreover, because the jury never reached the issue of damages, the exclusion of present value evidence was not prejudicial.

The nonsuit on battery was also correct. Piedra's parents expressly and impliedly consented to his treatment at Fountain Valley. Dr. Dugan's use of Ativan was integral to his efforts to diagnose and stabilize Piedra's critical condition, and, therefore, was not a substantial departure from the parents' consent. Although there was evidence Piedra's mother told *others* at the hospital that she did not want anyone giving any medications to her child without discussing them with her first, Dr. Dugan was not aware of any such instruction. Dr. Dugan could not have committed battery by disregarding an instruction that was never communicated to him.

Finally, despite the ample evidence supporting the jury's defense verdict on informed consent and the fatal defects in Piedra's battery claim, Piedra contends *he* is entitled to judgment as a matter of law on both lack of informed consent and battery. This contention is frivolous. Even if this court were to identify prejudicial error (there was none), the remaining disputed factual issues would require a new trial.

STATEMENT OF FACTS

1. Piedra becomes seriously ill, and is rushed to Fountain Valley by ambulance.

On May 20, 1994, Piedra's parents brought him to a medical clinic for evaluation of a severe rash. (1 RT 88-92, CT 120.) The examining physicians suspected that Piedra was having a systematic allergic reaction to Phenobarbital, which he had been taking to control seizures, and determined that his condition was grave. (1 RT 91-92, CT 121.) They rushed Piedra to Fountain Valley Regional Hospital ("Fountain Valley") by ambulance. (CT 121.)

2. Piedra's parents consent to his treatment at Fountain Valley.

Piedra's mother signed a Fountain Valley Conditions of Admission form stating she consented to "the procedures which may be performed during [Piedra's] hospitalization . . . including emergency treatment or services, and which may include, but are not limited to laboratory procedures, x-ray examination, medical or surgical treatment or procedures, anesthesia, or hospital services rendered the patient under the general and special instructions of the patient's physician or surgeon." (Exh. 1 at pp. 355-356 (attached); see also 5 RT 951-952.) Piedra's mother also understood that she was presenting Piedra for treatment at Fountain Valley. (5 RT 951-952.)

Piedra was admitted to Fountain Valley by the on-call physician, Dr. Feygin. (1 RT 89.) Dr. Feygin noted swelling in the extremities and eyes, a decreased appetite, a middle ear infection, and skin irritations. (1 RT 92-

93.) She ordered that Phenobarbital be discontinued and replaced with another anticonvulsant, Ativan, as needed for seizures lasting longer than two minutes. (1 RT 93-94; see also 1 RT 100-102.)

3. Dr. Dugan, a pediatric intensive care unit specialist at Fountain Valley, begins a broad-based treatment plan.

On the morning of May 21, Dr. Dugan, a pediatric intensive care unit (PICU) specialist at Fountain Valley, responded to a call for a consult regarding Piedra. (1 RT 141; 2 RT 399.) Dr. Dugan discovered Piedra's liver was enlarged, he was dehydrated and anemic, he was suffering from a rash, he had a history of seizures, and he had an allergic reaction to Phenobarbital. (2 RT 404-405). Based on this information, Dr. Dugan's differential diagnosis included: (1) sepsis, i.e., infection (2 RT 468-469); (2) Stevens-Johnson disease, i.e., inflammation that can occur as the result of a viral infection or a reaction to medications (2 RT 469-470); and (3) Kawasaki Syndrome, i.e., a disease that can cause aneurysm in the coronary artery and enlargement of the gallbladder (2 RT 472). He ordered an echocardiogram and an EKG to determine whether Piedra had any cardiac abnormalities. (2 RT 476.) He also ordered several lab tests to help diagnose the patient. (2 RT 476-478.) Piedra was admitted to the PICU. (1 RT 120.)

From Dr. Dugan's physical examination of Piedra and the lab results, it was clear that Piedra was extremely ill. (2 RT 478-479.) Piedra's integumentary, hepatobiliary, hematologic, coagulation, and cardiovascular systems were all in jeopardy. (*Ibid*.) There was a 90% chance he would die. (2 RT 479.) Piedra needed fluids and blood products, which had to be administered through a central line. (1 RT 142; 2 RT 474, 476, 480.) The attending physician in charge of Piedra, Dr. Salcedo, explained to Piedra's

parents in Spanish that he needed a transfusion, and Piedra's father signed his consent to the central line procedure. (2 RT 428-432, 467-468; 5 RT 956, 1026; exh. 1, p. 201.)

Placement of the central line required sedation. (2 RT 421-422.) Dr. Dugan used Versed and Ketamine for this purpose. (1 RT 142, 144; 2 RT 421-422.) The Ketamine dose had to be repeated three times in the course of the procedure as each dose wore off. (1 RT 148, 156-157, 165; 2 RT 486; 3 RT 513.) The central line was completed by noon and the necessary fluids and blood products were administered thereafter. (1 RT 148, 165-166.)

4. A nurse administers Ativan to facilitate an echocardiogram, one of the critical diagnostic procedures in Dr. Dugan's treatment plan.

Hospital staff performed the echocardiogram on Piedra at 5:30 p.m.. (1 RT 187-188; 2 RT 423.) Pursuant to Dr. Dugan's order that Ativan be administered as necessary to calm Piedra (2 RT 424), a nurse administered Ativan after determining his movements were too erratic to allow an accurate echocardiogram (1 RT 187-189).

5. Dr. Dugan orders a second dose of Ativan and stat lab tests in response to a prolonged seizure that presents an emergency situation.

At 8:35 p.m., a nurse observed Piedra suffer what she believed to be a prolonged seizure, i.e., a seizure lasting more than two minutes. (1 RT 171, 195, 198, 216-127; 2 RT 438; 3 RT 527.) She immediately reported this to Dr. Dugan. (3 RT 527.) Dr. Dugan concluded that Piedra's seizure required

treatment on an emergency basis, and therefore ordered a dose of Ativan to prevent another seizure and various lab tests to be done on a rush basis. (2 RT 440; 3 RT 529-530.)

6. The lab tests reveal respiratory distress requiring intubation.

The lab results came in at 11:00 p.m. (1 RT 230-231; 3 RT 538.) They showed respiratory distress and acidosis.[1/] (1 RT 231; 3 RT 538.) In response to this information, Dr. Dugan ordered an immediate dose of Romazicon to reverse the effects of the Ativan, because Ativan can cause respiratory distress, and intubated Piedra at 11:45 p.m.. (1 RT 232, 236.) The intubation required medication to prevent movement and suffering. (2 RT 444.) Dr. Dugan used Succinylcholine and Pavulon to paralyze Piedra's muscles and Fentanyl for pain relief. (1 RT 236; 2 RT 444-445.)

7. Piedra suffers cardiac arrest.

At midnight, Piedra's condition began to deteriorate rapidly, resulting in cardiac arrest. (1 RT 236-241.) A Code Blue was called on him at 12:32 a.m. (1 RT 241.) Approximately thirty minutes later, Piedra's vital signs improved and the code was over. (1 RT 242-244.) However, Piedra suffered repeated seizures and had to be transferred to UCLA where his condition could be closely monitored with high-tech equipment. (3 RT 561-563.)

Piedra was released from UCLA about three months later, in August 1994. (4 RT 893.) His parents were told that he had suffered severe brain

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1/ Acidosis is increased acidity in the blood stream resulting from an impaired ability to eliminate carbon dioxide from the body. (1 RT 276.)

damage from the cardiac arrest and was likely to remain in a vegetative state for the rest of his life, which his UCLA doctors predicted would be three to six months. (4 RT 893-895.) At the time of trial in 2003, Piedra was still alive and living at home. (4 RT 913.)

PROCEDURAL HISTORY

1. Piedra sues Dr. Dugan for medical malpractice, lack of informed consent and battery.

The operative complaint alleges that Dr. Dugan was negligent in his treatment of Piedra, failed to obtain the informed consent of Piedra's parents to the use of Ativan, and committed battery by administering Ativan to Piedra. (CT 63-65.)[2/]

2. The trial court grants nonsuit on battery, and the jury returns a defense verdict on medical malpractice and lack of informed consent. Piedra appeals.

Piedra's claims were tried to a jury for eleven days in April, 2003. After the close of evidence, but prior to deliberations, the trial court granted nonsuit on Piedra's battery claim, a decision that will be discussed in more detail below. (6 RT 1282, 1288-1289; see *post*, pp. 23-38.) A nearly unanimous jury then found in favor of Dr. Dugan on both the negligence and informed consent claims. (CT 282-283.)

2/ The complaint also mentions Phenobarbital, but there is no evidence that Dr. Dugan administered any Phenobarbital to Piedra.

After the trial court entered judgment in favor of Dr. Dugan and denied Piedra's motions for a new trial and judgment notwithstanding the verdict, Piedra filed this appeal. (CT 190-192, 274, 276-287.)

LEGAL ANALYSIS

I.

THIS COURT SHOULD AFFIRM THE JUDGMENT BECAUSE SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT AND THE TRIAL COURT COMMITTED NO PREJUDICIAL ERRORS.

A. The jury's defense verdict on informed consent is supported by substantial evidence.

1. The substantial evidence standard requires this court to resolve all factual disputes and make all permissible inferences in favor of Dr. Dugan.

Piedra argues on appeal that this court should reverse the informed consent judgment on the ground the verdict is not supported by substantial evidence. (AOB 15, 38-45; see AOB 16-38.) This court must uphold the jury's verdict if substantial evidence supports the verdict on any theory. (See *Reynolds v. Willson* (1958) 51 Cal.2d 94, 99 [in reviewing a verdict, the question is whether there was substantial evidence in the record to support the verdict on *any* of the theories presented at trial]; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1046 [a reviewing court need only find substantial evidence supporting *one* of several theories of

liability asserted at trial in order to affirm a verdict for the plaintiff].) "Substantial evidence" means evidence that has "'ponderable legal significance . . . . It must be reasonable . . . , credible, and of solid value . . . .'" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 (*Kuhn*).)

In determining whether substantial evidence supports the verdict, the court must resolve all evidentiary conflicts and indulge all reasonable inferences in support of the party who prevailed below. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Kuhn*, *supra*, 22 Cal.App.4th at pp. 1632-1633.) The court cannot reweigh the evidence or substitute its deductions for the inferences actually or presumptively drawn by the jury. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

2. A physician's duty to disclose the risks and alternatives of a proposed treatment is limited: (1) a physician need not discuss commonly used medications that very seldom result in serious ill effects; and (2) the disclosure requirements do not apply in an emergency.

The section in Piedra's opening brief addressing the lack of informed consent claim is devoted primarily to establishing that Dr. Dugan did not discuss Ativan with Piedra's parents. (AOB 41-45.) This emphasis is misplaced. Physicians have a duty to inform their patients of the known risks of death or serious harm associated with proposed treatments. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 (*Cobbs*).) This duty, however, is not

absolute. Rather, the courts have established reasonable limitations, including:

(1) Physicians need not discuss risks inherent in common procedures where those procedures very seldom result in serious ill effects. (See *Cobbs*, *supra*, 8 Cal.3d at p. 244) and

(2) Physicians are excused from disclosure requirements in emergency circumstances. (See *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57 [holding that express consent is not required "in cases of emergency, or unanticipated conditions where some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment"]; *Thor v. Superior Court* (1993) 5 Cal.4th 725, 746, fn. 15 [noting the *Preston v. Hubbell* rule]; *Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [stating that it is proper for a physician to exceed the express consent of a patient where necessary to protect the patient's health or life].)

The jury in this case was properly instructed on both of these exceptions. (2 Augm. CT 28 [instructing the jury, "there is no duty to discuss minor risks inherent in common procedures, when those procedures very seldom result in serious ill effects"], 31, 33 [instructing the jury that "[a] physician is not liable for damages for injury or death caused in an emergency situation occurring [in a hospital] on account of a failure to inform a patient of the possible consequences of a medical procedure where . . . [t]he medical procedure was undertaken without the consent of the patient because the physician reasonably believed that the medical procedure should be undertaken immediately and that there was insufficient time to fully inform the patient"], 29 [instructing the jury that to find liability, it must conclude "a

reasonably prudent person in the patient's position would not have consented to the [treatment] if [he] [or] [she] had been adequately informed of all the significant perils"].)

Although only one limitation on the duty to disclose need apply to support the judgment, both limitations apply here.

3. The informed consent issue is limited to Dr. Dugan's use of Ativan only.

At trial, Piedra based his lack of informed consent claim entirely on Dr. Dugan's use of Ativan at 5:30 p.m. and 8:35 p.m. on May 21. (6 RT 1298, 1302, 1401-1405.) His post-trial motions focused even more narrowly on only the 5:30 p.m. use of Ativan. (1 Augm. CT 304-310.)

On appeal, however, Piedra for the first time challenges the use of Versed and Ketamine, too. (See AOB 44.) Piedra did not mention either Versed or Ketamine as a basis for his informed consent claim in the complaint (see CT 64 [mentioning Phenobarbital only]) or his trial brief (see CT 124-125 [mentioning Ativan and Phenobarbital only]). Nor did he do so in his closing argument. To the contrary, Piedra's counsel told the jury that while it "would have been nice" for Dr. Dugan to have discussed these medications with the parents, their use was "probably unavoidable." (6 RT 1297; see also 1 RT 142, 144; 2 RT 421-422.)

Piedra's arguments regarding Versed and Ketamine, raised for the first time on appeal, should be disregarded because he waived them by failing to present them to the jury or the trial court. (See *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874-879 [plaintiffs could not raise a new theory of liability on appeal where they failed to raise it in their complaint, trial brief or argument to the jury]; *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498,

fn. 9 ["appellants may not raise a factually novel legal theory of liability on appeal"].) Accordingly, in this brief we discuss only whether substantial evidence refutes the theory Piedra presented at trial, i.e., that Dr. Dugan should have specifically discussed Ativan with Piedra's parents before administering it.

4. Substantial evidence establishes Ativan is a commonly used, safe medication.

In *Cobbs*, *supra*, 8 Cal.3d at p. 244, the Supreme Court held physicians are not required to secure informed consent for commonly used treatments that very seldom result in serious illness. This exception to the duty to disclose is applicable here. Indeed, this exception is particularly important in the context of intensive care. The typical intensive care patient presents with a host of complicated and serious problems. If intensive care physicians like Dr. Dugan were forced to constantly interrupt their work to inform patients about every test and every medication ordered, no matter how commonly used or how remote the risk, then they would not be able to act with the speed necessary to stabilize their seriously ill patients.

In this case, Robert Spear, a specialist in pediatric intensive care and anesthesiology (5 RT 1131), testified that Ativan is "very commonly" used in pediatric intensive care units and is considered a "very safe" drug (5 RT 1150). Cecilia Karins, a nurse in the PICU at Fountain Valley (1 RT 171), similarly testified that Ativan is "frequently used in children," and is the drug of choice to treat children for seizures (1 RT 187, 200). Even Arnold Gale, Piedra's expert on pediatrics, admitted that Ativan is commonly used as an emergency drug for seizures on a short-term basis and is considered to be a safe drug. (2 RT 382.) The jury reasonably could have found from this

evidence that Ativan is a commonly used drug that very seldom, if ever, results in serious ill effects.[3/] (See 2 Augm. 28 [the applicable jury instruction].) For this reason alone, the judgment for Dr. Dugan on Piedra's informed consent claim should be affirmed.

5. Substantial evidence establishes that Dr. Dugan administered Ativan to Piedra in emergency circumstances.

The "emergency treatment" exception to the informed consent requirements is also applicable to this case. (See *Preston v. Hubbell*, *supra*, 87 Cal.App.2d at pp. 57-58.)

By the time he reached Dr. Dugan, Piedra had only a 10% chance of survival. (2 RT 478-479.) Although Piedra seeks to parcel off the Ativan as a non-emergent part of Dr. Dugan's treatment of Piedra's critical condition, his argument is unavailing. (AOB 39-41). Piedra had widespread systemic problems that required a multi-faceted approach, including the use of blood products, fluids and diagnostic tests. (2 RT 404-405, 468-472, 478-480.) A nurse gave the first dose of Ativan at 5:30 p.m. to ensure that one of the

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3/ Piedra claims Dr. Dugan admitted Ativan is a deadly drug. (AOB 31.) Actually, Dr. Dugan testified that Ativan can be deadly when it interacts with other medications. (2 RT 433.) He did not, however, testify regarding how significant a risk is posed, i.e., how often Ativan has such an effect. A medication may be considered low risk even if it carries a serious but remote risk. (See *Cobbs*, *supra*, 8 Cal.3d at p. 244 [stating there is no requirement to discuss treatment that *seldom* causes serious ill effects].) Therefore, Dr. Dugan's testimony does not contradict the evidence discussed above that Ativan is a commonly used, low risk medication. Moreover, to the extent there is a conflict in the evidence, this court should resolve the conflict in favor of Dr. Dugan. (See *In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 614.)

diagnostic tests Dr. Dugan ordered, an echocardiogram, would be accurate. (1 RT 187-189.) Both the echocardiogram and the Ativan were necessary, non-elective components of Dr. Dugan's emergency treatment of Piedra. (See *ibid*.; 2 RT 476.)[4/]

The second dose of Ativan, administered just after 8:35 p.m., was similarly emergent. Dr. Dugan, reasonably relying on a nurse's observations, concluded that Piedra had a prolonged seizure accompanied by apnea and desaturation – a life-threatening situation. (1 RT 171, 195, 198, 216-218; 2 RT 438; 3 RT 527, 530-531.) He determined that Piedra needed an anti-convulsant immediately. (3 RT 530.) Piedra argues this dose of Ativan was not necessary because his seizure was over by the time the nurse called Dr. Dugan. (AOB 39-40.) However, Dr. Dugan's expert on pediatric intensive care, Dr. Spear, testified that administering an anti-convulsant to Piedra at that time was required to avoid the risk of additional seizures that could interfere with respiration and require intubation. (5 RT 1168-1169.) Dr. Brody, a pediatric neurologist (6 CT 1204), further confirmed that a seizure accompanied by apnea and desaturation requires medication on an ongoing basis even after the initial seizure is over (6 RT 1221-1222, 1231). In addition, Dr. Dugan explained that the remaining level of Phenobarbital in Piedra's system at the time of the seizure was insufficient to prevent further seizures. (3 RT 527-529.)

Despite the ample evidence supporting application of the *Preston v. Hubbell* emergency treatment exception, Piedra argues that the exception

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4/ The nurse who treated Piedra did not characterize the first administration of Ativan as an emergency procedure. (2 RT 329.) The jury, however, reasonably could have concluded it was an emergency procedure based on the evidence that Piedra was facing a high probability of death absent immediate diagnosis and treatment (2 RT 478-479) and the nurse's testimony that the Ativan was necessary to ensure an accurate test result (1 RT 187-189).

cannot apply because his parents were available at all times to discuss his treatment options. (AOB 29.) The mere presence of the parents in the hospital, however, does not mean it was practical or advisable for the treating physician to take the time to consult with them regarding every step of Piedra's emergency treatment. Even assuming that, in hindsight, the two administrations of Ativan could have waited while Dr. Dugan located Piedra's parents, obtained a translator, and discussed the risks and benefits of the medication, no such discussions were required under the circumstances. Dr. Dugan and the nurses were attempting to save Piedra's life – which was hanging by a thread – by undertaking a multi-faceted approach to his widespread systemic problems and uncertain diagnosis. (See *ante*, pp. 4-7, 14.) The jury could reasonably have concluded that Dr. Dugan would not have been able to render effective emergency care if he had to constantly engage in discussions with the parents (through a translator) about every medication Piedra needed. Thus, the jury could reasonably have found that, under the totality of the circumstances Dr. Dugan faced, it would have been impractical for him to have sought express informed consent for the two administrations of Ativan.

Because the jury's verdict is supported by substantial evidence on at least one theory – in fact it is supported on two separate theories – the judgment should be affirmed. (See *Reynolds v. Willson, supra*, 51 Cal.2d at p. 99.)

B. The trial court's use of BAJI No. 14.64 was not prejudicial error.

1. The trial court correctly used BAJI No. 14.64 in this case.

Piedra claims he was deprived of a fair trial by the trial court's decision to give BAJI No. 14.64, an instruction regarding settlement. (AOB 51-53.) His argument should be rejected because BAJI No. 14.64 was an appropriate instruction.

The trial court instructed the jury early on in the trial that Piedra had previously asserted claims against several defendants that were no longer at issue *and that the jury was not to consider this fact for any purpose*:

> Ladies and Gentlemen, during the course of this trial you may receive testimony or other evidence which pertains to; 1, Pacificare Health Systems, Inc.; 2, Fountain Valley Regional Hospital; 3, Leslie Brody, M.D., 4, Philip Madrid, M.D.; and 5, Joaquin Merida, M.D. Although plaintiff initially asserted a claim of medical negligence against these parties, such claim is no longer an issue in this case and those persons and entities are no longer parties in this case. *Do not speculate as to why these persons and entities are no longer involved in this case. You should not consider this during your deliberations.*

(3 RT 512, emphasis added.) Piedra agreed to this instruction. (3 RT 507-508.)

Then, at the end of trial, the trial court gave BAJI No. 14.64, telling the jury that the absent defendants had settled with Piedra and that the court would make an adjustment after the verdict to account for the settlements:

> In this case the plaintiff has made a settlement with (1) Pacific Health Systems, Inc., successor-in-interest to FHP Healthcare, (2) Foutain [sic] Valley Regional Hospital, (3) Leslie Brody, M.D., (4) Phillip Madrid, M.D., & (5) Joaquin Mericla, M.D.. The amount of the settlement has been disclosed to the court but not to you. [¶] If you find that the plaintiff is entitled to recover

> against the defendant James M. Dugan, M.D., then *you should award damages to the plaintiff for the same amount you would have awarded as if no such settlement had been made.* [¶] In that event, *the court will later deduct the amount of this settlement from the amount of your award and your verdict will be reduced accordingly*."

(2 Augm. 43, emphasis added.)

Piedra claims that BAJI No. 14.64 was an inappropriate instruction, but he does not cite any supporting case authority. Instead, he relies on the statement in the Use Note on BAJI No. 14.64: "This instruction is designed for use where the fact of a settlement with a joint tortfeasor has been disclosed to the jury but not the amount of the settlement which has been disclosed to the court." (Use Note to BAJI No. 14.64 (2004 ed.) p. 673; see AOB 52.) Piedra argues the Use Note means that BAJI No. 14.64 should only be used when *evidence* regarding settlement is introduced during the trial. (AOB 52.) The Use Note, however, does not state that the fact of settlement must have been established by the evidence at trial. (See Use Note to BAJI No. 14.64 (2004 ed.) p. 673.) It does not, therefore, support Piedra's argument.

Moreover, Piedra's argument is negated by the Comment to BAJI No. 14.64 and the language of the instruction.

The Comment to BAJI No. 14.64 references cases in which all evidence regarding settlement was excluded, *Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 177 and *Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082. (Comment to BAJI No. 14.64 (2004 ed.) pp. 673-674.) This suggests BAJI No. 14.64 should be given in exactly the circumstances of this case, i.e., where the court has excluded evidence regarding settlement. (See *Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 179 [holding that where the plaintiff admits to the terms of settlement, the proper procedure is to exclude evidence regarding the settlement and give BAJI No. 14.64].)

Finally, the language of BAJI No. 14.64 suggests it applies here. The instruction *informs* the jury that a settlement was reached. (BAJI No. 14.64 (2004 ed.).) This information would not be necessary where evidence regarding a settlement is introduced during trial. The logical inference, therefore, is that the instruction should be used where such evidence is excluded.

In sum, the trial court was correct to give BAJI No. 14.64 in this case.

2. Even if the trial court erred by giving BAJI No. 14.64, the error was not prejudicial.

A judgment cannot be reversed for instructional error unless "it seems probable that the error prejudicially affected the verdict." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983.) In determining whether an erroneous jury instruction has prejudiced a litigant, courts have considered the following factors: (1) any indications by the jury itself that it was misled; (2) the effect of other instructions; (3) the closeness of the evidence; and (4) the effect of counsel's arguments. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876.) All of these factors show that the trial court's decision to give BAJI No. 14.64, even if erroneous, did not prejudice Piedra's case.

First, there were no indications from the jury that it was misled by BAJI No. 14.64. Indeed, the settlements could only have been relevant to damages, an issue the jury never had to reach because it found no liability. (CT 282-285; see *Steele v. Hash* (1963) 212 Cal.App.2d 1, 3 [admission of evidence regarding settlement amount not prejudicial error because the jury never reached the issue of damages]; *Vahey v. Sacia*, *supra*, 126 Cal.App.3d at pp.

179-180 [failure to give BAJI No. 14.64 was harmless error where jury found for defendant on negligence and never reached the question of damages].)

In addition, other instructions removed any potential for prejudice. Indeed, *in the same sentence* stating that Piedra and the former defendants had settled their differences, the court told the jurors not to consider the settlements because the court would make appropriate adjustments to any damages award. (2 Augm. 43.) By explaining that the court would make the appropriate adjustment after the verdict and by omitting any reference to the amount of the settlement, the trial court's instruction would be more likely to *protect* Piedra from any attempt by the jury to reduce his damages award to account for the liability of the dismissed parties (the "empty chair defense") than it would be likely to prejudice him. Moreover, the court's earlier instruction that the jury should not consider for any purpose why the former defendants are no longer in the case further reduces the likelihood the jury considered the settlements. (See 3 RT 512; see also *Steele v. Hash*, *supra*, 212 Cal.App.2d at p. 3 [a reviewing court should presume the jury followed the trial court's instructions].)

Next, the evidence in this case was not closely balanced but weighed heavily in favor of Dr. Dugan. (See *ante*, pp. 13-15.) Piedra argues the fact that the jury took only 90 minutes to decide liability proves prejudice. (AOB 52.) To the contrary, the ease of the jury's decision more likely reflects the lack of merit in Piedra's claims.[5/]

5/ Piedra claims this court must view the evidence in the light most favorable to a claim of instructional error. (AOB 7, citing *Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633.) He misstates the correct standard of review. A reviewing court must view the evidence in the light most favorable to the applicability of a rejected instruction. (*Sills*, *supra*, 40 Cal.2d at p. 633.) It should, however, *impartially* examine the closeness of the evidence in determining whether an erroneous instruction was prejudicial. (continued...)

Finally, Dr. Dugan's counsel did not mention the settlements in his closing argument or insinuate in any manner that Piedra had recovered his losses or was being greedy by pursuing Dr. Dugan. (See 6 RT 1316-1328, 1338-1385.) Nor did Piedra's counsel mention settlement. (See 6 RT 1292-1316, 1385-1411.)

Piedra does not address any of the above factors. Instead, he simply argues in a conclusory manner that BAJI No. 14.64 damaged his credibility and "gave the jury license to disregard Plaintiffs' case." (AOB 52.) Piedra's conclusion is speculative. The settlements did not decrease his credibility. Assuming the jury even considered the settlements, it easily could have viewed the settlements as *validating* Piedra's claims. Why else, they might have thought, would the codefendants have agreed to settle? (See *Vahey v. Sacia*, *supra*, 126 Cal.App.3d at p. 179 [plaintiff in car accident case wanted to admit evidence regarding her settlement with other defendants as evidence validating his claims].) Moreover, the mere fact of settlement, without any specifics regarding the amount, could not have suggested to the jury that Piedra was fully compensated for his injuries.

In sum, the trial court's decision to give BAJI No. 14.64 did not deprive Piedra of a fair trial and does not warrant a new trial.

5/ (...continued)
(See *LeMons v. Regents of University of California*, *supra*, 21 Cal.3d at p. 876.)

C. The trial court did not commit prejudicial error by excluding present value discounting evidence.

Piedra also challenges the trial court's granting of a motion in limine by former defendant Dr. Merida that resulted in the exclusion of evidence regarding how to reduce future damages to present value and the omission of a present value determination from the special verdict form. (1 RT 2-5.) Piedra claims this was prejudicial error warranting a new trial. (AOB 49-51.) There was no error and no prejudice.

In medical malpractice cases, MICRA requires that the trial court periodize future damages awards that exceed $50,000 upon the defendant's request. (Code Civ. Proc., § 667.7, subd. (a).) The Supreme Court has approved two alternative approaches in malpractice cases in which the future \damages are likely to exceed $50,000: (1) the jury can determine gross future damages only and thereafter the court can discount those damages to present value in the course of determining the proper periodization, or (2) the jury can be instructed to find both the gross and present value amounts. (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 649-650.) In this case, the trial court chose the first option, reserving for itself the task of present value discounting. (1 RT 2-5.) Therefore, evidence of present value was irrelevant and properly excluded. (See Evid. Code, § 350.)

Piedra argues his battery claim was not subject to MICRA and, therefore, he should have been permitted to introduce evidence of present value. (AOB 49.) Piedra has not cited, and we have not found, any case addressing how to handle present value and periodizing where the plaintiff asserts both medical malpractice and an intentional tort. But we need not analyze this question because a nonsuit was properly granted on Piedra's battery claim. (See *post*, pp. 23-38.)

Even assuming *arguendo* that the trial court should have allowed evidence of present value while the battery claim was still pending, the error was rendered harmless by the nonsuit.

Moreover, the exclusion of evidence of present value is irrelevant to the jury's ultimate determination that Dr. Dugan did not violate the standard of care. Because the jury never reached the issue of damages, Piedra was not prejudiced by his inability to discuss present value discounting.

Piedra argues he was prejudiced because his gross damages might have been viewed by the jury as equivalent to a "deed to the moon" and might, therefore, have damaged his overall credibility. (AOB 50.) This is sheer speculation. Piedra presented evidence of the severity of his injuries and backed his claimed damages with the testimony of an economist. (See 4 RT 669-703, 732-742, 747-749.) Although Dr. Dugan challenged elements of Piedra's claimed damages, including, for example, the assumption that Piedra has a normal life expectancy, Dr. Dugan never argued that the claimed damages were outrageous or that they demonstrated Piedra's greed or untruthfulness. (See 4 RT 737, 742-747; 6 RT 1378-1381.)

Moreover, the jury knew that the court was going to make any needed adjustments to the damages award to account for present value and that the jury was being asked to determine *gross* damages only. The jury was instructed: "As you may be aware, a sum of money to be received the future, or to be spent in the future, can be expressed in terms of its 'present value.' The determination of the present value of a sum of money to be received or spent in the future requires a mathematical calculation. [¶] . . . Do not make any adjustment for the 'present value' of the future medical costs and future loss of earning capacity. If such an adjustment is legally required, the Court will perform the appropriate calculation." (2 Augm. CT 39.)

In sum, there is simply no basis to conclude the jury might have returned a verdict for Piedra on *liability* had present value *damages* been discussed.

Because the trial court had the discretion to reserve present value discounting for a postverdict proceeding, and, in any event, its decision did not prejudice Piedra, Piedra is not entitled to a new trial.

D. The trial court correctly granted a nonsuit on Piedra's battery claim.

1. A judgment of nonsuit is proper when a plaintiff has not established an essential element of his cause of action.

Piedra asserts the trial court erred by granting a nonsuit on his battery claim. (AOB 16-41.) A nonsuit for a defendant should be affirmed if, viewing the evidence in the light most favorable to the plaintiff, the plaintiff cannot establish an essential element of his cause of action. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839.) Reversal is only warranted if there is "some substance to plaintiff's evidence upon which reasonable minds could differ." (*Id.* at p. 839.)

Moreover, contrary to Piedra's apparent belief that all of Dr. Dugan's evidence must be disregarded in reviewing the nonsuit (see AOB 21-29), this court must review *the entire record*, and *not* simply the testimony Piedra alleges requires reversal of the nonsuit. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581 ["The reviewing court may not consider only supporting evidence in isolation, disregarding all contradictory

evidence"]; accord, Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:159, p. 8-98.)[6/]

Finally, an erroneous nonsuit does not warrant a new trial unless it was prejudicial. (*Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1334.) Here, the nonsuit was neither erroneous nor prejudicial.

2. The trial court ruled that Piedra failed to establish the requisite elements of battery because: (1) his parents consented to his treatment; (2) Dr. Dugan did not substantially deviate from that consent; and (3) Dr. Dugan was not aware of Piedra's mother's alleged instruction to obtain her express pre-approval for each and every medication administered to Piedra.

At the hearing on the nonsuit motion, the trial court summarized the evidence regarding consent as follows: "Dr. Dugan finds himself in the P.I.C.U. treating a critical care – critically ill infant. The infant has been admitted presumably pursuant to the conditions of admission. The doctor is completely unaware of any instruction given by the parent to get prior approval before administering any medications. And under those circumstances the doctor administers medication that he believes to be appropriate under the circumstances and compliant with the standard of care. Isn't that the record that we have, and if so where is the battery?" (6 RT

6/ Piedra cites *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 700. *Miller*, however, establishes only that nonsuit cannot be granted based on evidence that *conflicts* with the plaintiff's evidence. (*Id.* at pp. 699-700.) It does not instruct reviewing courts to disregard uncontradicted evidence supporting a defense judgment.

1282-1283.) Piedra's counsel did not answer this question to the trial court's satisfaction, and the trial court ruled that consent was implied under the circumstances. (6 RT 1288-1289.)

The trial court also recognized that where, as it found was the case here, the patient has generally consented to treatment, battery requires evidence of a substantial deviation from the consent: "We're talking here about an intentional tort. That requires either an intentional rendition of treatment that has not been consented to or *a material deviation in the treatment that is consented to*. Where do I find in this record that kind of intentional tortious conduct?" (6 RT 1283, emphasis added.) The trial court listened to Piedra's counsel's response but concluded Dr. Dugan did not materially deviate from the scope of the parents' consent. (6 RT 1288-1289.)

Finally, the trial court concluded that evidence Piedra's mother told others at the hospital not to give medications was insufficient to establish battery because no one communicated her alleged special instruction to Dr. Dugan: "The doctor is completely unaware of any instruction given by the parent to get prior approval before administering any medications . . . Isn't that the record that we have, and if so where is the battery?" (6 RT 1282-1283; see also 6 RT 1288-1289.)

Later, when denying Piedra's new trial motion, the court stated, "I think the totality of the circumstances preclude an issue which would justify sending the issue to the jury, that Dr. Dugan is intending to deviate from the permission here, that he's intending to commit a tort." (6 RT 1448.) On appeal, Piedra isolates and seizes on this remark to argue that the trial court erroneously required him to prove Dr. Dugan intended to commit a tort. (AOB 19-21.) He further argues this was erroneous because battery does not require an intent to harm. (AOB 20.)

However, as shown above, the trial court's actual reasons for granting nonsuit were far broader than Piedra is willing to admit. In fact, contrary to Piedra's characterization, the trial court granted the nonsuit for the three reasons: (1) the parents consented to Piedra's treatment at Fountain Valley; (2) Dr. Dugan did not substantially deviate from the scope of that consent; and (3) to the extent the mother limited or qualified her consent, this was not communicated to Dr. Duncan and, therefore, does not establish battery. As we next explain, these grounds were correct. Moreover, even if the trial court had granted the nonsuit for a different reason, the judgment should be affirmed on these three grounds because they were raised by Dr. Dugan and the trial court, and Piedra therefore had an adequate opportunity to refute them. (See 6 RT 1277-1288; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 971.)

3. Piedra's parents consented to treatment of his condition by Fountain Valley physicians, including Dr. Dugan.

A doctor who treats a patient without the patient's consent commits battery. (*Cobbs*, *supra*, 8 Cal.3d at p. 240 [limiting battery claims in medical malpractice cases to allegations that a physician has failed to obtain consent to treatment].)[7/] Consent can be either express or implied by the conduct of the patient. (See *Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38-39 [stating that a patient's consent to surgery can be implied "by acts or conduct and need not necessarily be shown by a writing or by express words"]; *Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 44 [holding that a touching does not

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7/ If a physician obtains consent but fails to adequately disclose the risks and alternatives of a proposed treatment, the patient has a negligence cause of action only. (*Cobbs*, *supra*, 8 Cal.3d at pp. 240-241.)

constitute battery if the defendant did not act beyond the consent implied by the circumstances]; Prosser & Keaton, Torts (5th ed. 1984) § 18, p. 113 [discussing the law on battery and concluding, "Consent may . . . be manifested by words, or by the kind of actions which often speak louder than words. The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff's conduct"].) In this case, Piedra's mother's consent to his treatment was both express and implied.

Piedra's mother expressly consented to his treatment at Fountain Valley by signing a Conditions of Admission form stating her consent to *any treatment* rendered during the hospitalization under the instructions of the patient's physician:

> The undersigned consents to the procedures which may be performed during this hospitalization or on an outpatient basis, including emergency treatment or services, and which may include, but are not limited to laboratory procedures, x-ray examination, medical or surgical treatment or procedures, anesthesia, or hospital services rendered the patient under the general and special instructions of the patient's physician or surgeon.

(Exh. 1, at p. 355 (attached).) This express consent necessarily included treatment by Dr. Dugan, the PICU specialist on duty. (See *Keister v. O'Neil* (1943) 59 Cal.App.2d 428, 436 [finding that a surgeon had the right to rely on consent procured by the hospital].)

Piedra makes several arguments attempting to avoid the clear import of the Conditions of Admission form. They all fail.

Piedra first argues that the phrase "including emergency treatment" in the consent form should be interpreted to mean *only* emergency treatment. (AOB 24-26.) His interpretation departs from the ordinary understanding of the word "including" as "plac[ing], list[ing], or rat[ing] as a part or component of a whole or of a larger group, class, or aggregate." (Webster's 3d New

Internat. Dict. (1993) p. 1143.) Moreover, the important issue here is not the technical legal interpretation of the consent form, but whether Dr. Dugan reasonably believed the parents had consented to the treatment he rendered. (See *Cobbs*, *supra*, 8 Cal.3d at p. 240 [recognizing that medical battery requires a "deliberate intent to deviate from the consent given"]; Prosser & Keaton, Torts, *supra*, § 18, p. 113.) Based on the broad language in the Conditions of Admission form, Dr. Dugan reasonably could have believed the consent was not limited to emergency treatment but included all treatment provided during Piedra's hospitalization.

Piedra also argues the Conditions of Admission form did not effectively convey consent to treatment by Fountain Valley physicians because it disclaimed any agency relationship between the hospital and the physicians and stated the physicians were individually responsible for obtaining informed consent. (AOB 25-26.) This argument fails. With respect to the agency clause, the hospital's opinion regarding whether its physicians were agents of the hospital is irrelevant to the question whether Dr. Dugan reasonably assumed that Piedra's parents' consent to treatment at Fountain Valley included the treatment he rendered as a Fountain Valley physician. Moreover, because the only way Fountain Valley, as a corporate entity, can render treatment is through its physicians, it would be nonsensical to interpret the consent form as consent to treatment at the hospital but not by its physicians. Rather, the agency clause was most likely intended as protection against patients suing the hospital for a physician's failure to disclose a particular known risk or alternative, and not as a limitation on the scope of the patient's consent. Finally, the form's statement that physicians have the responsibility to obtain *informed* consent does not negate the effect of the form as a general consent to treatment. (See *Cobbs*, *supra*, 8 Cal.3d at pp. 240-241 [discussing

the difference between lack of informed consent, which sounds in negligence, and medical battery].)

Piedra further argues the Conditions of Admission form did not convey consent to treatment because a nurse testified the form was not a consent form. (AOB 22-23.) The record does not support this contention. The nurse testified that the Conditions of Admission form did not document *informed* consent, as opposed to general consent to treatment at the hospital:

> Q: The question is: the condition of admissions form is not what the hospital uses to document informed consent; isn't that right?
>
> A: Informed consent is different from admit – okay. *What you're asking me is* [sic] *informed consent different from the signed consent when they come into the hospital.*
>
> Q: Go ahead and turn to page 355. You recognize that form, don't you?
>
> A: Yes, I do.
>
> Q: That's the condition of admission that is signed when you come in the front door of the hospital; right?
>
> A: Yes.
>
> Q: Okay. My question is, take a look at that. It's two pages. That is not the form that the hospital uses to document *informed* consent?
>
> A: That's correct.

(2 RT 333-334, emphasis added.) This testimony, therefore, was relevant *at most* to the informed consent claim decided by the jury. It does not negate the mother's express, written consent to Piedra's treatment at the hospital.

Therefore, by itself, Piedra's mother's express consent to treatment is fatal to Piedra's battery claim. In addition, however, the mother impliedly

consented to Piedra's treatment at Fountain Valley by presenting him to the hospital for treatment. She said as much at trial:

> Q. Ms. Arroyo, did you understand that you were presenting your son for treatment at Fountain Valley on May 20, 1994?
>
> A. Yes.

(5 RT 951-952; see *Kritzer v. Citron*, *supra*, 101 Cal.App.2d at p. 39 ["It is *elemental* that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words" (emphasis added)].) She further confirmed that she knew Piedra needed treatment and she wanted the Fountain Valley doctors to make him better. (5 RT 950-951.)

Despite this clear evidence of consent, Piedra claims his mother "resisted having him admitted to Fountain Valley." (AOB 28.) The record does not support Piedra's claim. His mother testified that had the ambulance not brought Piedra to Fountain Valley, she would have taken him to a different hospital. (4 RT 778-780.) This testimony suggests merely that Fountain Valley was not his mother's first choice of hospitals. It does not negate the evidence that his mother consented to his treatment once the ambulance arrived at Fountain Valley.

4. Piedra failed to present substantial evidence that Dr. Dugan significantly deviated from the scope of Piedra's parents' consent.

a. Piedra had to offer substantial evidence that Dr. Dugan significantly deviated from Piedra's parents' consent.

Because undisputed evidence establishes the parents generally consented to Dr. Dugan's treatment of Piedra (see *ante*, pp. 26-29), Dr. Dugan cannot be liable for battery unless he performed substantially different treatment than that to which consent was given. (See *Bradford v. Winter* (1963) 215 Cal.App.2d 448, 452-453 (*Bradford*); *Cobbs*, *supra*, 8 Cal.3d at p. 239; *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1269 (*Conte*).)

For example, in *Bradford*, the plaintiff consented to a bronchoscopy to determine whether he had lung cancer. (*Bradford*, *supra*, 215 Cal.App.2d at p. 450, 454.) During the bronchoscopy, the defendant discovered a mass and took a biopsy of it. (*Id*. at p. 451.) The plaintiff claimed battery on the ground he did not specifically consent to the biopsy. (*Id*. at pp. 452-453.) The court held that consent to the biopsy could be implied from the patient's consent to bronchoscopy because biopsy is a "normal incident" of the procedure. (*Id*. at pp. 454-455.)

In *Cobbs*, the Supreme Court used slightly different language than *Bradford*, but to the same effect. The Supreme Court stated that a battery claim is supported where a doctor performs a "substantially different" treatment than the treatment to which the patient consented. (*Cobbs*, *supra*, 8 Cal.3d at p. 239.) This is consistent with *Bradford's* holding that a doctor

does *not* commit battery when he performs a procedure that is a "normal incident" of the treatment to which the patient has consented. (*Bradford*, *supra*, 215 Cal.App.2d 454-455.)

Finally, in *Conte*, *supra*, 107 Cal.App.4th 1260, the plaintiff consulted the defendant physician regarding a shoulder injury. (*Id.* at p. 1265.) At the end of the visit, he signed a broadly worded consent form authorizing "'any procedure that [the defendant's] judgment may dictate to be advisable for my well-being.'" (*Ibid*.) The defendant then performed surgery on the plaintiff but discovered during the surgery that it was best to leave the shoulder as it was. (*Ibid*.) The plaintiff asserted battery on the ground he had consented to surgery to repair his shoulder, not exploratory surgery. (*Id*. at p. 1268.) The court affirmed a nonsuit on the battery claim, reasoning that a diagnostic surgical procedure "was not a substantially different treatment than the treatment to which [the plaintiff] consented." (*Ibid*.)

Case law thus establishes that a doctor does not commit battery every time his treatment involves a medication or procedure not specifically discussed with the patient. Rather, a substantial departure from consent is required to support a battery claim.

b. Dr. Dugan's use of Ativan was within the scope of the consent because it was integral to the treatment of Piedra's condition.

Piedra claims Dr. Dugan's use of Ativan exceeded the scope of his parents' consent. (AOB 18-19.) Under *Bradford*, *Cobbs*, and *Conte* (see discussion in part 3(a) above), Dr. Dugan's use of Ativan cannot support Piedra's battery cause of action because the Ativan was substantially related to the overall treatment to which the parents had consented.

Dr. Dugan initially instructed the nurses to give Piedra Ativan as needed to keep him calm and comfortable during his hospitalization. (2 RT 424.) Subsequently, a nurse determined Ativan was necessary to calm Piedra during the echocardiogram, a diagnostic test ordered by Dr. Dugan to rule out cardiac abnormalities as a potential cause of Piedra's distress. (1 RT 187-189; 2 RT 476.) Neither Dr. Dugan's general instructions nor the nurse's implementation of them were a substantial deviation from the overall task of diagnosing and stabilizing Piedra's grave condition.

Dr. Dugan ordered a second dose of Ativan, about three hours later, in response to a nurse's report that Piedra had suffered a seizure. (2 RT 411, 438; 3 RT 527, 529-530.) Dr. Dugan believed the Ativan was necessary to prevent further seizures that could have an adverse effect on Piedra's already unstable condition. (2 RT 435-436; 3 RT 529-530.) His decision to give the second dose of Ativan was, therefore, integral to his efforts to stabilize Piedra's condition.

Because Dr. Dugan did not substantially depart from the parents' consent, nonsuit was warranted. (See *Conte*, *supra*, 107 Cal.App.4th at p. 1268 [affirming nonsuit granted on similar facts].)

Piedra does not acknowledge the substantial departure standard in his brief. He does not discuss *Conte* or the relevant portion of *Cobbs*. Instead, he focuses on *Bradford*, arguing it is distinguishable because there was a written consent in that case and not here. (AOB 35.) *Bradford* is *not* distinguishable. In *Bradford*, as here, the patient consented in writing to treatment but claimed his consent did not include the treatment rendered. (*Bradford*, *supra*, 215 Cal.App.2d at pp. 454-455.) *Bradford* is, therefore, indistinguishable from this case. Moreover, the court's rejection of the plaintiff's battery theory in *Bradford* was based on *implied* consent, not the written consent signed by the patient. (*Ibid*.) Therefore, its holding that

consent to a course of treatment impliedly includes any step that is a "normal incident" of the treatment would be applicable to this case even if Piedra's mother had not signed the Conditions of Admission form.

Rather than addressing the correct standard, Piedra argues that any non-emergent undisclosed treatment automatically gives rise to a battery claim. (AOB 17-18.) As authority for this contention, he relies primarily on *Berkey v. Anderson* (1969) 1 Cal.App.3d 790. (AOB 17-18.) *Berkey*'s holding, however, is not so broad. The court in *Berkey* merely found nonsuit was improperly granted on battery where there was evidence the physician misrepresented the nature of the procedure he planned to perform by telling the patient that the procedure, which required insertion of a needle into the patient's spine, was "nothing to worry about" and "that the most uncomfortable thing about it was being tilted about on a cold table." (*Berkey*, at p. 804.) This holding does not suggest battery can be found wherever a physician's treatment includes a step not specifically discussed with the patient. Moreover, the Supreme Court later limited *Berkey* to its facts: "While a battery instruction may have been warranted under the facts alleged in *Berkey*, in the case before us the instruction should have been framed in terms of negligence." (*Cobbs*, *supra*, 8 Cal.3d at p. 239.) Thus, because no fraudulent conduct is alleged here, *Berkey* is inapplicable.

The other case Piedra relies on as support for his theory that specific consent is required for all non-emergent treatment is *Cobbs*. (AOB 34, 36.) Three mistakes underlie his reliance on *Cobbs*. First, Piedra fails to recognize that *Cobbs* held the failure of a physician to inform patients regarding the risks of and alternatives to a proposed treatment supports a claim of negligence only, not battery. (See *Cobbs*, *supra*, 8 Cal.3d at p. 240-241.) Thus, to the extent that *Cobbs* discusses a physician's duty to discuss specific treatment options with patients, that duty is relevant to negligence claims only.

Second, as discussed earlier, *Cobbs* does not create an absolute duty to discuss every aspect of treatment with the patient; rather, there are exceptions that apply to this case. (See *ante*, pp. 10-16.) Third, Piedra fails to acknowledge that *Cobbs* allows a battery claim only where the physician substantially departs from the patient's consent. (*Cobbs*, *supra*, 8 Cal.3d at p. 239.) As explained above, there was no substantial departure from Piedra's parents' consent in this case. (See *ante*, pp. 30-33.)

In sum, the two administrations of Ativan were an integral part of Dr. Dugan's treatment of Piedra's serious and complex medical problems and therefore cannot be the basis of a battery claim. *Bradford*, *Cobbs* and *Conte* all limit battery to cases in which the physician (1) renders treatment of a substantially different nature than the treatment the patient sought or (2) otherwise deceives the patient. (See, e.g., *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 662, 664 [doctor committed battery when patient came to him to remove excess skin on her arms, back, thighs and stomach and he gratuitously performed breast enlargement surgery]; *Berkey v. Anderson*, *supra*, 1 Cal.App.3d at p. 804.) Because no such conduct occurred here, the trial court properly granted a nonsuit on Piedra's battery claim.

5. Piedra's battery claim is not supported by his mother's testimony that she told others, but not Dr. Dugan, that she had to expressly pre-approve each and every medication administered to Piedra.

Piedra argues that his parents' consent to his treatment at Fountain Valley was conditioned on their prior approval of all medications. (AOB 36-38.) In order to prove battery under this theory, Piedra had to establish that Dr. Dugan deliberately disregarded an express limitation on the parents'

consent. (See *Conte*, *supra*, 107 Cal.App.4th at p. 1269 [stating that a claim for medical battery under a theory of conditional consent requires that the doctor "intentionally violated the condition while providing treatment"]; *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [stating that battery requires a "'willful disregard'" of the plaintiff's rights]; *Cobbs*, *supra*, 8 Cal.3d at p. 240 [referring to the "requisite element of deliberate intent to deviate from the consent given"].) He cannot meet this requirement because there is no substantial evidence that Dr. Dugan knew the parents' consent was limited.

Piedra's mother testified unequivocally that she did not see Dr. Dugan until 1:30 a.m. on Sunday, May 22 after the code blue event and long after the two administrations of Ativan at issue. (4 RT 786; see AOB 1, 3, 10, 20, 29, 42.) Moreover, the only instruction she claimed to have given Dr. Dugan was not to give Piedra Phenobarbital. (5 RT 962.)

Although Piedra's mother testified that she instructed one or more individuals at the hospital that she did not want medications to be administered to Piedra without discussing them with her first, it was undisputed that no one noted such a conversation in the patient's chart. (See 1 RT 162-163, 250-251; 2 RT 328; see generally exh. 1; see also AOB 3, 9-10, 19.) And, there is no evidence that these individuals, or anyone else, told Dr. Dugan about the mother's alleged request.

Because Piedra has no evidence that Dr. Dugan knew about Piedra's mother's alleged special instruction that the hospital obtain her express pre-approval of all medication, the jury could not have found that Dr. Dugan intentionally violated her request. Therefore, Dr. Dugan cannot be held liable for battery on a conditional consent theory, and nonsuit was properly granted. (See *Conte*, *supra*, 107 Cal.App.4th at p. 1269; *Ashcraft v. King*, *supra*, 228 Cal.App.3d at p. 612; *Cobbs*, *supra*, 8 Cal.3d at p. 240.)

6. The jury's verdict on informed consent establishes that it would have found for Dr. Dugan on the battery claim in any event.

Finally, trial court error does not warrant a new trial unless the record demonstrates the error was prejudicial and that "a different result would have been probable." (Code Civ. Proc., § 475; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.) Here, even if the nonsuit was error (it was not), the error was not prejudicial and does not, therefore, warrant a new trial.

The jury's verdict for Dr. Dugan on the informed consent cause of action establishes that the jury would have rejected Piedra's battery claim if the court had not granted a nonsuit. Dr. Dugan did not claim to have discussed the risks of Ativan with Piedra's parents. Rather, he established he did not have to obtain specific consent for the use of Ativan. (See *ante*, pp. 9-16.) Having apparently concluded that specific consent was not required, as apparent from the verdict on the informed consent claim, the jury could not then have found battery.

Traxler v. Varady, *supra,* 12 Cal.App.4th at p.1334 is on point. In *Traxler*, the Court of Appeal found what was essentially a nonsuit on a battery claim could not have prejudiced the plaintiff in light of the jury's verdict for the defendant physician on informed consent. As here, the physician's defense in *Traxler* relied on an implied consent theory. (*Ibid*.) In the course of an operation to which the patient had consented, the defendant in *Traxler* ordered a blood transfusion that caused the patient to become HIV-positive. (*Id*. at p. 1327.) The patient later sued the physician for lack of informed consent and battery, alleging she had not specifically consented to, and the physician had not discussed, the possibility of a blood transfusion or the risks it entailed. (*Ibid*.) The patient tried her lack of informed consent claim to a

jury, lost, and argued on appeal that the trial court erred by refusing to instruct on battery. (*Id*. at pp. 1327, 1333.) The Court of Appeal held the refusal to instruct on battery could not have been prejudicial in light of the jury's verdict: "The jury, by its verdict on appellant's informed consent cause of action, must have found either that appellant consented or that her consent was implied under the circumstances. Therefore, any error in refusing to instruct on battery was harmless." (*Id*. at p. 1334.)

Traxler teaches that where, as here, a plaintiff seeks to recover under both lack of informed consent and battery on the theory that the physician exceeded the scope of consent without discussing the risks of the additional treatment, and the physician does not contend the additional treatment was specifically discussed, a defense verdict on lack of informed consent compels a defense verdict on battery. In these circumstances, a nonsuit on battery is not prejudicial error.

Piedra may argue that *Ashcraft v. King*, *supra*, 228 Cal.App.3d 604 is applicable. It is not. In *Ashcraft*, the patient agreed to an operation on the condition that if a blood transfusion became necessary, the physician would use family-donated blood only. (*Id*. at p. 609.) The physician allegedly violated this condition and gave the patient HIV-infected blood. (*Ibid*.) The patient sued for lack of informed consent and battery. (*Ibid*.) The trial court granted nonsuit on battery and the jury found for the defendant on lack of informed consent. (*Ibid*.) On appeal, the court found the granting of a nonsuit was prejudicial error because the jury could have found that the physician discussed all risks of the operation but nonetheless violated the patient's express limitation on her consent: "The jury could have found defendant adequately informed Ms. Ashcraft of all significant risks of the surgery, including the risk involved in blood transfusions, *before* obtaining her consent and still have found defendant liable for battery because he

violated the conditional consent Ms. Ashcraft gave after being informed of those risks." (*Id*. at p. 616.)

Ashcraft is not applicable here because the *Ashcraft* plaintiff presented evidence that she told the physician she would only agree to the operation under certain conditions. (*Ashcraft*, *supra*, 228 Cal.App.3d at p. 609.) Here, although Piedra claims his parents placed conditions on their consent to treatment, he has not contended or offered any evidence that they expressed those conditions to Dr. Dugan. (See *ante*, pp. 35-36.) Piedra cannot, therefore, rest his battery claim on a theory of conditional consent. (See *Ashcroft*, at p. 609.) Rather, the only way the jury could have found for Piedra on battery would have been by finding that specific consent for Ativan was required – a theory the jury implicitly rejected by finding for Dr. Dugan on Piedra's lack of informed consent claim.

In sum, because the nonsuit, if error, was not prejudicial, it does not warrant a new trial.

II.

IF THIS COURT DOES NOT AFFIRM THE JUDGMENT, THEN IT SHOULD ORDER A NEW TRIAL ON PIEDRA'S LACK OF INFORMED CONSENT AND/OR BATTERY CAUSES OF ACTION.

A. In determining whether judgment should be entered in favor of Piedra, this court must view the evidence in the light most favorable to Dr. Dugan.

Piedra challenges the denial of his motion for judgment notwithstanding the verdict on the lack of informed consent and battery claims. (AOB 45, 49,

53.) In order to secure judgment in his favor, Piedra must convince this court that there is no substantial evidence supporting a defense judgment on any theory. (See *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730 [reviewing the denial of a motion for judgment notwithstanding the verdict under the substantial evidence standard].) Because the substantial evidence standard applies, this court must view the evidence in the light most favorable to Dr. Dugan. (See *In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 614.)

B. Piedra is not entitled to judgment as a matter of law on his lack of informed consent claim because Dr. Dugan presented substantial evidence that (1) no reasonable person in the position of Piedra's parents would have refused Ativan under the circumstances, and (2) Ativan did not cause Piedra's injuries.

1. Substantial evidence established that no reasonable person in the position of Piedra's parents would have withheld consent to the use of Ativan.

Even if this court concludes Dr. Dugan violated informed consent requirements as a matter of law (it should not so conclude), Piedra cannot recover for lack of informed consent if no reasonable person in his parents' position would have withheld their consent to the administration of Ativan. (See *Cobbs*, *supra*, 8 Cal.3d at p. 245.)

Dr. Dugan presented substantial evidence that the risks of Ativan were remote and the alternatives would have exposed Piedra to unreasonably high risks. Specifically, three expert witnesses testified that Ativan is a commonly

used, safe medication. (1 RT 171, 187, 200; 2 RT 382; 5 RT 1131, 1150.) In addition, Dr. Dugan's experts established the 5:30 p.m. dose of Ativan was necessary to ensure an accurate diagnosis of Piedra's illness (1 RT 187-189; 2 RT 424) and the later dose was necessary to avoid further seizures that could lead to respiratory distress and intubation (1 RT 171, 195, 198, 216-218; 2 RT 438; 3 RT 527, 530; 5 RT 1168-1169; 6 RT 1204, 1221-1222). A jury could conclude from this evidence that no reasonable person in the parents' position would have foregone the first dose of Ativan, with the risk that the echocardiogram might fail to diagnose a heart problem, or the second dose, with the risk that Piedra might suffer respiratory distress from further seizures.

Piedra's argument on this issue (AOB 45-49) should be disregarded because it presents the evidence in the light most favorable to his position and, therefore, is inconsistent with the governing standard of review. (See *In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 614; *Shapiro v. Prudential Property & Casualty Co.*, *supra*, 52 Cal.App.4th at p. 730.)

Piedra states, for example, that Dr. Dugan admitted Ativan was potentially deadly. (AOB 46.) Dr. Dugan, however, said only that the *potential* interaction of the various medications Piedra received throughout the course of his treatment could be deadly *in some unspecified circumstances*. (2 RT 433.) This testimony does not establish that the Ativan posed a risk of death to Piedra as administered. In fact, Dr. Dugan testified that he assessed Piedra's reaction to the medications and concluded that Piedra was *not* at risk for oversedation. (2 RT 426, 434-435, 483-484, 492-494, 499-500; 3 RT 521-522.) Also, a defense expert testified that the sedatives Piedra received have a potentially dangerous synergistic effect only when given simultaneously, and they were not given simultaneously in this case. (5 RT 1094-1095.)

Piedra also claims that Ativan was not necessary to stop his seizure. (AOB 40, 46, 47.) Piedra fails, however, to acknowledge the contrary evidence, discussed above. (See *ante*, pp. 14-15).

Piedra relies on his experts' testimony that Piedra's impaired liver function made him more susceptible to oversedation. (AOB 46.) Dr. Dugan's pharmacology expert, however, refuted this theory. (5 RT 1067-1068, 1074-1075, 1092-1093.)

In addition, Piedra cites his expert's testimony that intubation was an alternative to the second dose of Ativan. (AOB 47.) Drs. Dugan and Spear, however, testified that intubation posed greater risks to Piedra than Ativan. (3 RT 540-543; 5 RT 1158-1160.)

In sum, when properly viewed in the light most favorable to Dr. Dugan, substantial evidence would support a finding by the jury that no reasonable person in the parents' position would have refused the Ativan. Therefore, the trial court properly denied Piedra's motion for judgment notwithstanding the verdict.

2. Substantial evidence showed there was no causal connection between the use of Ativan and Piedra's injuries.

In order to recover for lack of informed consent, Piedra also had to prove that Ativan caused his injuries. (See *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 532-533 [requiring proof that the procedure allegedly lacking informed consent caused the patient's injuries].) More specifically, Piedra had to prove to a "reasonable medical probability" that he would have had a better outcome absent the use of Ativan. (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1315.)

Piedra's theory of causation was that every medication he received at Fountain Valley combined to cause his cardiac arrest. (See 6 RT 1301-1302.) As we now explain, however, Dr. Dugan presented substantial evidence refuting this theory.

Dr. Thompson, Dr. Dugan's pharmacology expert, testified that the sedatives Piedra received could not have combined to cause Piedra's respiratory failure because they were not given simultaneously. (5 RT 1094.) He further testified that, because it is metabolized outside the liver, Ativan does not cross-react with other medications. (5 RT 1092-1093.)

Dr. Spear testified that it would be illogical to conclude that Ativan caused Piedra's respiratory failure because the initial dose of Ativan produced no adverse effect at all. (5 RT 1172-1173.)

Piedra argues that Dr. Dugan admitted Ativan was the most likely cause of Piedra's respiratory failure. (AOB 3, 14, 19, 41.) In fact, Dr. Dugan testified that he believed, but was not positive, that Ativan was responsible for that event. (3 RT 582.) The jury could have chosen to disbelieve Dr. Dugan's unconfirmed suspicion and, instead, accept the testimony of Drs. Thomson and Spear.

In light of the substantial evidence refuting Piedra's theory of causation, judgment cannot be entered in his favor as a matter of law.

C. Piedra's battery cause of action cannot be adjudicated in his favor as a matter of law because Dr. Dugan presented substantial evidence refuting both lack of consent and causation.

We established above that Piedra's battery claim was properly dismissed because his parents consented to his treatment. (See *ante*, pp. 30-

38.) Even if this court were to conclude that nonsuit should not have been granted (it should not so conclude), the evidence of consent precludes this court from directing judgment in Piedra's favor. And, even if this court were to conclude that Dr. Dugan committed battery as a matter of law (he did not), causation must still be tried to a jury. (See *ante*, pp. 42-43.)

Therefore, judgment cannot be entered for Piedra. (See *Shapiro v. Prudential Property & Casualty Co.*, *supra*, 52 Cal.App.4th at p. 730.)

CONCLUSION

For the reasons discussed above, this court should affirm the judgment. If, however, this court does not affirm, then it should order a new trial on Piedra's lack of informed consent and/or battery claims.

Dated: June 9, 2004

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 12,042 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

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