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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CAROL HOLMES, Plaintiff and Appellant, v. PAUL MOODY TSOU, Defendant and Respondent.	B204745 (Los Angeles County Super. Ct. No. SC091186)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Kronstadt, Judge. Affirmed.

Morris S. Getzels Law Office and Morris S. Getzels for Plaintiff and Appellant.

Taylor Blessey and Julianne Marie DeMarco; Greines, Martin, Stein & Richland, Martin Stein, Alison M. Turner and Sheila A. Wirkus for Defendant and Respondent.

Appellant Carol Holmes ("Holmes") appeals from a jury verdict in favor of respondent Paul Moody Tsou ("Tsou") in a medical malpractice action. The gravamen of Holmes's complaint was that Tsou was negligent in performing a non-surgical procedure to treat her fractured wrist and in failing to offer her a surgical option as an alternative treatment. Holmes now raises two arguments on appeal. First, she contends that the trial court erred in refusing to give the jury three special instructions that she requested on the issue of informed consent. Second, she claims that the trial court erroneously excluded evidence of a letter from the Medical Board of California concerning its conclusions about the treatment provided by Tsou. For the reasons set forth below, we conclude that there was no error in the trial court's instructional and evidentiary rulings, and accordingly, affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Tsou's Medical Treatment of Holmes

On July 23, 2005, Holmes, then a 71-year-old rancher, suffered a fractured right wrist when she was thrown across a stall by her horse. The fracture was severe and communited, meaning that both wrist bones were shattered. Holmes initially was treated in the emergency room at Los Robles Hospital. She then sought treatment from her primary care physician, who in turn referred Holmes to Tsou, an orthopedic surgeon.

Holmes attended her first appointment with Tsou on July 29, 2005. During the initial visit, Tsou performed a physical examination of Holmes's injured wrist and also reviewed her medical history. At the time of her injury, Holmes suffered from various medical conditions, including diabetes, osteopenia, arthritis, carpal tunnel syndrome, and chronic back problems. She also had a history of blood clots, multiple broken bones, numerous bouts of pneumonia, allergies to pain medication, negative reactions to anesthesia, and a prior cardiac arrest. During the time she was treated by Tsou, Holmes was taking Coumadin, a blood-thinning medication, to prevent blood clots.

A fractured wrist typically can be treated with a closed reduction or an open reduction procedure. A closed reduction is a non-surgical procedure in which the treating

physician manipulates the bones into their proper anatomic position. An open reduction, on the other hand, is a form of surgery in which the physician makes an incision into the wrist and then surgically puts the bones back together in their proper alignment. The objective of both treatments is to restore the original anatomy of the wrist.

Based on Holmes's medical history and the nature of her fracture, Tsou concluded that an open reduction procedure was not a reasonable option for Holmes, and that the only reasonable treatment options at the time were a closed reduction or no reduction at all. Tsou did not offer Holmes the choice of surgery at any time during her first appointment or discuss that option with her. Instead, Tsou reviewed the closed reduction procedure with Holmes and obtained her consent for that particular treatment. Tsou and his orthopedic technician then performed a closed reduction on Holmes's fractured wrist and placed it in a cast. Although the procedure was extremely painful for Holmes and caused her to cry, Tsou never offered her a local anesthetic to ease the pain.

Holmes had follow-up appointments with Tsou on August 3 and 24, 2005. On each occasion, Tsou had x-rays taken of her wrist, which revealed that there was a loss of reduction. During the second visit, Tsou performed another closed reduction procedure on Holmes's wrist and placed it in a new cast. During the third visit, Tsou decided that he could not further manipulate the fractured bones with a closed reduction so he simply had the cast removed and replaced with a shorter one. Tsou did not offer Holmes the option of surgery on either occasion because he concluded that an open reduction was still not a reasonable option for her. Tsou instructed Holmes to follow up with him again in a few weeks.

Dissatisfied with Tsou's treatment, Holmes did not return to him for any further care. Instead, she sought an opinion from another orthopedic surgeon, Dr. Prosper Benhaim ("Benhaim"), on September 7, 2005. Benhaim concluded that Holmes's wrist had healed in an abnormal or non-anatomic position. As a result, Holmes reported that she was suffering from severe pain in her wrist and a significant decrease in her range of motion. Benhaim recommended that Holmes try physical therapy for a few months rather than corrective surgery. After several months of therapy, however, Holmes was

still in pain. At that point, Benhaim offered Holmes the option of surgery, which she later agreed to have done. On March 7, 2007, Benhaim performed corrective surgery on Holmes's wrist. Following the surgery, Holmes was able to regain the use of her wrist for most daily functions and reported being pain-free.

Following her treatment with Tsou, Holmes filed an administrative complaint against Tsou with the Medical Board of California (the "Medical Board"). In a December 21, 2005 letter to Holmes, a consumer services analyst for the Medical Board reported that an unidentified medical consultant had conducted a review of her complaint and related medical records to determine whether Tsou departed from the standard of care required in the practice of medicine in his treatment. The analyst stated that it was the opinion of the consultant that Tsou should have discussed a surgical option with Holmes and given her the opportunity to choose surgery. The analyst went on to state that the consultant had identified "a simple departure from the standard of care regarding the treatment provided by Dr. Tsou."

II. Holmes's Medical Malpractice Action against Tsou

On September 22, 2006, Holmes brought a civil action against Tsou for medical malpractice. In her complaint, Holmes alleged that Tsou was negligent in his actual treatment of her wrist and in his failure to apprise her of other treatment options, including surgery. The matter went to a jury trial in October 2007.

At trial, Holmes called Dr. Chadwick Smith ("Smith") to testify as an expert on her behalf. Smith opined that the standard of care required Tsou to offer all reasonable treatment options and that surgery was a reasonable option for Holmes. He testified that a closed reduction inevitably results in a loss of function and anatomic position, whereas an open reduction allows for faster healing and a return to normal function. According to Smith, to comply with the standard of care, Tsou should have told Holmes that the best option for her wrist to return to near normal function and appearance was to have an open reduction procedure. On cross-examination, however, Smith admitted that medical opinions vary as to whether surgery is a reasonable treatment option for a particular

patient, and that doctors could have differing opinions on the proper course of treatment and still be within the standard of care.

Dr. Stephen Kay ("Kay") testified as an expert witness for Tsou. According to Kay, most wrist fractures are treated conservatively with a closed reduction or no reduction at all. He testified that Tsou acted reasonably in performing a closed reduction procedure on Holmes's wrist and that Tsou's choice of treatment had returned the wrist to a near anatomic position. Kay further opined that, based on Holmes's medical history and the communited nature of her fracture, an open reduction was not a reasonable treatment option for her. In particular, Kay testified that Holmes's history of blood clots, diabetes, cardiac arrest, and medication allergies significantly increased her surgical risk, and that he would not perform surgery on any patient taking Coumadin because of the potential for bleeding complications. It was Kay's opinion that Tsou acted within the standard of care at all times during his treatment of Holmes.

On October 17, 2007, the jury reached a unanimous verdict in favor of Tsou, and the trial court thereafter entered judgment against Holmes. On December 14, 2007, Holmes filed a timely notice of appeal.

DISCUSSION

I. Refusal to Give Special Jury Instructions on Informed Consent

A. Relevant Proceedings

Holmes first contends that the trial court erred in refusing to instruct the jury with three special instructions that she requested on the issue of informed consent. The first proposed instruction provided that "[o]nce a doctor has made a treatment decision then the fact that other doctors would disagree or that there are other schools of thought on the correct treatment may be material information which should be disclosed to the patient in obtaining consent to the procedure." The second requested instruction stated that "[a]n integral part of a physician's overall obligation to the patient is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." The third instruction indicated that "[y]ou

may decide that the evidence supports the conclusion that the doctor should have disclosed information concerning a nonrecommended procedure." According to Holmes, the purpose of these instructions was to inform the jury that a physician may be liable for medical malpractice for failing to disclose a nonrecommended treatment to a patient. She reasons that each requested instruction was consistent with her theory of the case that Tsou should have offered her the option of surgery.

Based on Holmes's claim that Tsou failed to obtain her informed consent by not disclosing a surgical option, the trial court indicated that it would give the standard informed consent instructions set forth in the Judicial Council of California Civil Jury Instructions (CACI). The court refused, however, to give Holmes's requested special instructions on the grounds that the matters addressed therein were adequately covered by the CACI instructions.[1] At the close of the evidence, the trial court instructed the jury on the issue of informed consent with the following modified versions of CACI Nos. 532 and 533:

> A patient's consent to a medical procedure must be 'informed.' A patient gives an 'informed consent' only after the orthopedist has fully explained the proposed treatment or procedure.
>
> An orthopedist must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. An orthopedist must give the patient as much information as she needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be

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[1] After hearing the argument of counsel, the trial court stated to Holmes' attorney, "the CACI instructions are a comprehensive whole, and you can make arguments based on the expert testimony that the informed consent was inappropriately obtained or wasn't appropriately presented, but I don't think that means that you're entitled to a special instruction that goes beyond the terms here, particularly when the general rule is that there's 'no general duty of disclosure concerning a treatment or procedure a physician does not recommend.' . . . [¶] . . . I think the CACI instructions are a unified whole, and I think they should be adequate here . . . ."

told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. An orthopedist is not required to explain minor risks that are not likely to occur.

Carol Holmes claims that Dr. Tsou was negligent because he performed a closed reduction on Carol Holmes without first obtaining her informed consent. To establish this claim, Carol Holmes must prove all of the following:

1. That Dr. Tsou performed a closed reduction on Carol Holmes;

2. That Carol Holmes did not give her informed consent for the closed reduction;

3. That a reasonable person in Carol Holmes's position would not have agreed to the closed reduction if she had been fully informed of the results and risks of and alternatives to the procedure; and

4. That Carol Holmes was harmed by a result or risk that Tsou should have explained before the closed reduction was performed."

B. Standard of Review

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him or her which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomplete. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; see also *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["[i]rrelevant, confusing, incomplete or misleading instructions need not be given"].) A court also may refuse an instruction requested by a party when the legal point raised is adequately covered by other instructions given. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11 (*Arato*); *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 (*Mathis*).)

When the contention on appeal is that the trial court failed to give a requested jury instruction, we review the record in the light most favorable to the party proposing the instruction to determine whether it was warranted by substantial evidence. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 572; *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.) However, even where the trial court erred

in refusing to give a requested instruction, a reviewing court will only reverse the verdict if the error was prejudicial. (*Soule v. General Motors Corp.*, *supra*, at p. 570.) An instructional error in a civil case is not prejudicial unless it is reasonably probable that the complaining party would have obtained a more favorable result in the absence of the error. (*Soule v. General Motors Corp.*, *supra*, at p. 570; *Ayala v. Arroyo Vista Family Health Center*, *supra*, at p. 1361.)

The special jury instructions requested by Holmes related to the issue of informed consent. A claim for failure to obtain informed consent arises out of a "physician's duty to disclose to a patient information material to the decision whether to undergo treatment." (*Arato*, *supra*, 5 Cal.4th at p. 1175.) Material information is "'information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure.'" (*Id.* at p. 1186.) The physician also must disclose to the patient "'such additional information as a skilled practitioner of good standing would provide under similar circumstances.' [Citation.]" (*Id.* at p. 1190.) "If a doctor fails to make reasonable disclosure and a prudent person in the patient's position would have declined the procedure had disclosure been made, then the doctor may be held liable in negligence if the risks inherent in the procedure materialize. [Citation.]" (*Mathis*, *supra*, 11 Cal.App.4th at p. 339.)

C. Special Instruction on Other Schools Of Thought

Holmes's first requested instruction regarding "other schools of thought" was based on a verbatim statement in *Mathis* that "[o]nce a doctor has made a treatment decision then the fact that other doctors would disagree or that there are other schools of thought on the correct treatment may be material information which should be disclosed to the patient in obtaining consent to the procedure." (*Mathis*, *supra*, 11 Cal.App.4th at p. 343.) Holmes argues that the trial court erred in refusing her requested instruction because it was an accurate and nonargumentative statement of the law that applied to her theory of the case. In particular, she asserts that the expert testimony established that there were two schools of thought on how to treat a fractured wrist – open reduction and

closed reduction – and that the parties' experts disagreed on which treatment was preferable. According to Holmes, without her proposed instruction, the jury had no way of knowing that the open reduction school of thought may have been material information which Tsou had a duty to disclose to Holmes to obtain her informed consent.

Contrary to Holmes's claim, however, *Mathis* does not support her assertion that the trial court was required to give her requested instruction. In *Mathis*, the plaintiff heirs sued their decedent's heart surgeon for medical malpractice after the decedent died from complications following coronary bypass surgery. (*Mathis*, *supra*, 11 Cal.App.4th at pp. 337-338.) At trial, the plaintiffs proposed the following special jury instruction on informed consent: "'When surgery or other dangerous therapeutic procedures are being considered, the physician must inform the patient of the available alternatives or schools of thought and the hazards involved so that the patient is able to give effective consent to the proposed treatment.'" (*Id*. at p. 340.) The Court of Appeal upheld the trial court's refusal to give the requested instruction, in part, because the standard BAJI instructions used by the trial court on the subject of informed consent were sufficient. (*Id*. at p. 344.)

As the *Mathis* court reasoned, "[w]hen a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances. [Citation.] The instructions given by the court in this case fully and adequately instructed the jury with respect to this duty of disclosure." (*Mathis*, *supra*, 11 Cal.App.4th at p. 343.) The *Mathis* court did note in dicta that information about "other schools of thought" on the proper treatment for a patient may be "material," and thus, the plaintiffs were "free to present expert evidence and argument that, as a factual matter, the existence of an opposing school of thought was material information that should have been disclosed." (*Id*. at pp. 343, 345.) It nevertheless concluded that a special instruction on other schools of thought was not necessary because "the standard instructions on informed consent

utilized by the [trial] court . . . were adequate to put the question of informed consent, and its component of material information, before the jury." (*Id*. at p. 344.)

The same reasoning applies here. The trial court's use of the standard CACI instructions on informed consent fully and adequately instructed the jury as to a physician's duty to disclose to a patient all material information needed to make an informed decision about a proposed treatment. As instructed by the trial court, CACI No. 532 provided that "[a]n orthopedist must give the patient as much information as she needs to make an informed decision, . . . and any other information skilled practitioners would disclose to the patient under the same or similar circumstances."[2] While the trial court refused to give her requested special instruction, Holmes was allowed to present, and did present, expert evidence and argument to support her theory that an open reduction procedure was an opposing school of thought that should have been disclosed. The standard informed consent instructions used by the trial court were therefore adequate to put before the jury the issue of whether Tsou had a duty to disclose the option of surgery to Holmes to obtain her informed consent to the non-surgical option. As in *Mathis*, a separate special instruction on other schools of thought was not required.

D. Special Instruction on Available Choices

Holmes's proposed special instruction on "available choices" was based on the California Supreme Court's holding in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 (*Cobbs*) that "as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." Holmes contends that this

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[2] This specific language in CACI No. 532 is similar to the standard BAJI instruction on informed consent. BAJI No. 6.11 provides, in pertinent part, that "a physician has a duty to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed operation or treatment," and that "[m]aterial information is information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure."

statement of the law applied to her theory of the case because the expert testimony established that there were two available choices – an open reduction or a closed reduction – for treating her injury, and Tsou admitted that he did not offer Holmes an open reduction or discuss that option with her. Holmes reasons that, without her requested instruction, the jury had no way of knowing that Tsou had a duty to disclose the available choice of surgery to Holmes to obtain her informed consent. We disagree.

Contrary to Holmes's contention, *Cobbs* does not stand for the proposition that, as a matter of law, Tsou had a duty to disclose the availability of an open reduction procedure to Holmes to obtain her informed consent. Rather, in holding that there was a duty of reasonable disclosure, *Cobbs* made clear that the scope of a physician's duty must be measured by the "patient's need" for adequate information to make an informed decision, and that such "need is whatever information is material to the decision." (*Cobbs*, *supra*, 8 Cal.3d at p. 245.) Two decades later, the Supreme Court in *Arato* reaffirmed this holding, and further held that it was for the jury to decide what particular information was material to the patient's decision. (*Arato*, *supra*, 5 Cal.4th at pp. 1186-1187.) In *Arato*, the Supreme Court also addressed the proper method of instructing the jury on the issue of informed consent, stating that "[r]ather than mandate the disclosure of specific information as a matter of law, the better rule is to instruct the jury that a physician is under a legal duty to disclose to the patient all material information . . . needed to make an informed decision regarding a proposed treatment." (*Id*. at p. 1186.) The Court concluded that the scope of such duty was adequately covered by the standard BAJI instructions on informed consent. (*Ibid*.)

Both *Cobbs* and *Arato* support a conclusion that Tsou had a duty to disclose to Holmes whatever material information she needed to make an informed decision, and that it was for the jury to decide whether a surgical treatment option was part of the material information that should have been disclosed. The CACI instructions used by the trial court adequately addressed the scope of this duty by providing that a physician must disclose to a patient "as much information as she needs to make an informed decision" and "any other information skilled practitioners would disclose," and by instructing the

jury to consider the relevance of informing the patient of alternatives. No further instruction on the duty to disclose available choices was necessary.

The decision in *Traxler v. Varady* (1993) 12 Cal.App.4th 1321 (*Traxler*) is also on point. The plaintiff in *Traxler* proposed the same special instruction on available choices that Holmes sought in this case. (*Id*. at p. 1332.) The trial court used instead the standard BAJI instructions on informed consent. (*Ibid*.) The Court of Appeal affirmed on the grounds that the trial court was "not required to instruct in the specific words requested by a party so long as the jury is adequately instructed on the applicable law," and that the plaintiff's proposed instruction "was simply a slightly more specific restatement of the principle already stated in BAJI No. 6.11 that 'it is the duty of the physician to disclose to the patient all material information to enable the patient to make an informed decision . . . .'" (*Ibid*.) The *Traxler* court reasoned that it was not error "to refuse an instruction excerpting specific language from an opinion if the principle expressed by the excerpted language is encompassed by the more general instruction already given. [Citation.]" (*Id*. at p. 1333.)

That is the case here. The standard CACI instructions given by the trial court on informed consent adequately encompassed the legal principle expressed in Holmes's proposed special instructions. Holmes's requested instruction regarding available choices was properly refused.

E. Special Instruction on Nonrecommended Procedures

Holmes's final requested instruction regarding "nonrecommended procedures" was based on dicta in *Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 (*Vandi*) that "[i]n an appropriate case there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." Holmes claims that there was such evidence in this case because Tsou testified that the reason he did not discuss the open reduction procedure with Holmes was that he did not recommend it, whereas Holmes's expert testified that Tsou should have offered her the option of surgery and fell below the standard of care in failing to do so. According to Holmes, without the requested instruction, the jury had no

way of knowing that Tsou may have had a duty to disclose a treatment option that he did not actually recommend in order to obtain Holmes's informed consent. Consistent with *Vandi*, however, we conclude that the trial court correctly refused Holmes's requested instruction.

In *Vandi*, the plaintiff sued his physicians for medical malpractice based on their failure to recommend an immediate diagnostic procedure that, in the physicians' professional judgment, was not medically indicated. (*Vandi, supra*, 7 Cal.App.4th at p. 1066.) The trial court refused the plaintiff's request to instruct the jury on a modified theory of informed consent concerning the disclosure of a nonrecommended procedure. (*Id*. at p. 1068.) The Court of Appeal affirmed on the grounds that there was "no general duty of disclosure with respect to nonrecommended procedures," and that the plaintiff's claim that his doctors should have recommended a particular medical procedure was adequately addressed in the general negligence instructions. (*Id*. at p. 1071.)

As the *Vandi* court explained, "it is necessary to keep in mind that we are considering a medical procedure which, in the exercise of professional judgment, a doctor does not recommend. If the procedure is one which should have been proposed, then the failure to recommend it would be negligence under ordinary medical negligence principles and there is no need to consider an additional duty of disclosure. The duty suggested by plaintiff, to disclose information about nonrecommended procedures, could arise only where, as here, a physician does not recommend a procedure and competent medical practice did not require that he or she recommend the procedure." (*Vandi, supra*, 7 Cal.App.4th at p. 1070.) The court further concluded that to require disclosures of nonrecommended procedures would impose "an imprecise and unpredictable burden on a physician. [Citation]." (*Ibid*.; see also *Mathis, supra*, 11 Cal.App.4th at p. 342, fn. 6 [noting that appellate courts "have rejected a general duty of disclosure with respect to nonrecommended procedures"].)

Holmes argues that the *Vandi* court expressly recognized that, in an appropriate case, expert evidence might support the existence of a duty to disclose nonrecommended procedures, and asserts that there was such expert testimony in this case. The record does

not support her theory. Holmes's expert never testified that Tsou had a duty to disclose a medical procedure that he did not recommend to comply with the standard of care. Rather, the expert testified that an open reduction was a procedure that Tsou should have recommended because it offered Holmes the best chance for her wrist to return to normal function and appearance. According to Holmes's expert, Tsou fell below the standard of care, in part, because he failed to offer Holmes a treatment option that a reasonable orthopedist would have recommended. Nothing in the expert's testimony, however, established a duty to disclose nonrecommended procedures.

Furthermore, as in *Vandi*, Holmes's claim that Tsou should have recommended a particular medical procedure was adequately addressed in the general negligence instructions given by the trial court. In addition to giving the two CACI instructions on informed consent, the trial court instructed the jury with the standard CACI instructions on ordinary negligence for medical professionals.[3] Because Holmes was not entitled to a special instruction on a duty to disclose nonrecommended procedures, the trial court did not err in refusing her proposed instruction.

II. Exclusion of Evidence of the Medical Board's Letter

A. Relevant Proceedings

Holmes next contends that the trial court erroneously excluded evidence of the Medical Board's letter to her in which an unidentified medical consultant opined that Tsou had acted below the standard of care. Prior to trial, Tsou filed a motion in limine to exclude any direct evidence or expert testimony about the letter on the grounds that the letter was inadmissible hearsay under Evidence Code section 1200 and was more

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[3] Among other CACI instructions, the trial court gave a modified version of CACI No. 501, which stated that "[a]n orthopedist is negligent if he fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful orthopedists would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' [¶] You must determine the level of skill, knowledge, and care that other reasonably careful orthopedists would use in the same or similar circumstances, based only on the testimony of the expert witnesses who have testified in this case."

prejudicial than probative under Evidence Code section 352. Holmes opposed the motion, countering that even if the letter was hearsay, the testifying experts could be examined as to whether they were aware of the letter and relied on it as a basis for their opinions under Evidence Code section 801.

The trial court granted the motion in limine. It concluded that the letter itself was inadmissible hearsay and that the prejudicial effect of allowing either the admission of the letter or expert testimony about its contents outweighed any probative value. At the hearing on the motion, the trial court set forth its reasoning as follows:

> One, I think it's hearsay and it shouldn't be admitted indirectly through the experts saying the content of the letter as opposed to [it being] one of the items [on] which the expert may have relied, if he or she did.
>
> And, two, I think in the exercise of my discretion under Evidence Code 352, the prejudicial effect of allowing either the admission of the letter or having the expert describe in detail the contents of the letter would outweigh the probative value, because the standards being applied by the Medical Board may be different than the standards to which the jury is given instructions. And without the individuals from the Medical Board available to testify as to what they did and how they reached their conclusions and so on, I don't think it's appropriate and fair to allow that letter in.

B. Standard of Review

A trial court generally has broad discretion concerning the admission of evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 196; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.) "'[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' [Citation.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078.) The trial court's exercise of discretion "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Under Evidence Code section 352, evidence is unduly prejudicial if it "uniquely tends to evoke an emotional bias against a party as an

individual, while having only slight probative value with regard to the issues." (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

C. Exclusion of the Letter

The trial court denied admission of the Medical Board's letter on the basis that the letter itself was inadmissible hearsay. Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible unless an exception applies. (Evid. Code, § 1200, subd. (b).) Additionally, "[w]hen multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible. [Citation.]" (*Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1205.)

The trial court did not err in excluding direct evidence of the Medical Board's letter as hearsay. It is apparent that the letter itself was offered to prove the truth of the matter asserted. As Holmes acknowledged in her opening brief, her purpose in offering the letter at trial was to inform the jury that the Medical Board had concluded that Tsou acted below the standard of care in treating her. The letter also included multiple levels of inadmissible hearsay. It set forth the out-of-court statements of a consumer services analyst who in turn summarized the out-of-court opinions of an unidentified medical consultant. Irrespective of whether the testifying experts in this case could be examined about the letter's contents, the letter itself was not admissible evidence. (See, e.g., *People v. Campos* (1995) 32 Cal.App.4th 304, 309 [reports of non-testifying experts were inadmissible hearsay even though testifying expert was allowed to state that she relied on the reports in forming her opinion]; *People v. Young* (1987) 189 Cal.App.3d 891, 913 [although testifying doctors could rely on other doctors' reports as a basis for their opinions, the reports themselves remained inadmissible hearsay].)

D. Exclusion of Expert Testimony about the Letter

The trial court also denied admission of any expert testimony about the Medical Board's letter on the basis that its probative value was outweighed by its prejudicial effect under Evidence Code section 352. An expert may generally base his or her

opinion on any "matter," personally known or made known to the expert, whether or not admissible, that "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates . . . ." (Evid. Code, § 801, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 137; *People v. Montiel* (1993) 5 Cal.4th 877, 918.) "Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.]" (*Ibid*.)

Like other expert witnesses, physicians "are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion" concerning a patient's diagnosis or treatment. (*People v. Campos*, *supra*, 32 Cal.App.4th at pp. 307-308; see also *People v. Catlin*, *supra*, 26 Cal.4th at p. 137 [physician may base his or her opinion in part upon the opinion of another physician].) On direct examination, the expert witness may explain the reasons for his or her opinions, including the matters considered in forming them, and also may testify that reports prepared by other experts were a basis for those opinions. (*People v. Catlin*, *supra*, at p. 137; *People v. Campos*, *supra*, at p. 308.)

However, the exception allowing expert witnesses to incorporate inadmissible hearsay into their testimony is not without limits. Most notably, "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*People v. Campos*, *supra*, 32 Cal.App.4th at p. 308.) In other words, "[t]he rule which allows an expert to state the reasons upon which his [or her] opinion is based may not be used as a vehicle to bring before the jury incompetent [hearsay] evidence." (*People v. Young*, *supra*, 189 Cal.App.3d at p. 913; see also *People v. Coleman* (1985) 38 Cal.3d 69, 92 ["while an expert may give reasons on direct examination for his opinions, . . . he may not under the guise of reasons bring before the jury incompetent hearsay evidence"].) "'"The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is

denied the party as to whom the testimony is adverse."' [Citations.]" (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 894.) Accordingly, "[a]lthough it is appropriate for a physician to base his or her opinion in part upon the opinion of another physician [citations], it generally is not appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion. [Citations.]" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 137.)

Moreover, even where an expert opinion may otherwise be predicated on hearsay, it is within the trial court's discretion to "exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.' [Citation.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) A trial court "'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation]." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) Indeed, "'[w]hen expert opinion is offered, much must be left to the trial court's discretion.' [Citation]." (*People v. Pollock*, *supra*, at p. 1172.)

Holmes argues that, even if the Medical Board's letter was inadmissible hearsay, she was entitled to examine both her expert and Tsou's expert as to whether they were aware of the letter and relied on it in reaching their opinions. Holmes further asserts that, to the extent that either expert relied on the letter as a basis for his opinion, the expert should have been allowed to "state the contents of the document that cause[d] the expert to reach an opinion." We conclude, however, that the trial court acted within its discretion in excluding any expert testimony about the letter.

First, contrary to Holmes's argument on appeal, there is no evidence that either her expert or Tsou's expert actually considered the letter in forming their opinions. In opposing Tsou's motion in limine, Holmes did not offer any evidence or argument to support that her expert had reviewed the letter or relied on it in concluding that Tsou acted below the standard of care. Instead, in her opposition to the motion, Holmes

merely asserted that her expert "can be examined as to whether he used the Medical Board opinion as a basis for his opinion" because an opinion by the Medical Board "is certainly . . . of the type that may be reasonably relied upon by an expert in forming an opinion . . . ." While it is generally true that a testifying expert may base his or her opinion in part upon the opinion of another expert, there is nothing in the record to indicate that either did so.

Second, even assuming that the experts had relied on the letter in reaching their respective opinions, Holmes's proposed use of the letter went beyond that permitted by the Evidence Code. Holmes contends that her expert not only should have been allowed to testify that he used the letter as a basis for his opinion, but also should have been allowed to describe "the contents of the document" in setting forth his opinion. Holmes made a similar argument before the trial court. At the hearing on the motion in limine, her counsel acknowledged the general rule that hearsay material on which an expert relies is not itself admissible, but asserted that "I don't think it means that [the expert] can't say what was in the documents that he relied on." It thus appears that Holmes's proffered use of the letter extended beyond examining the experts as to whether they considered the letter in reaching their opinions, and also was directed at revealing the specific contents of the letter to the jury. However, as previously discussed, while an expert witness may testify that he or she relied on the reports of other experts in forming an opinion, the expert "may not, on direct examination, reveal the *content of reports* prepared or opinions expressed by nontestifying experts." (*People v. Campos*, *supra*, 32 Cal.App.4th at p. 308 [italics added].) The purpose of this limitation is to ensure that an expert does not bring inadmissible hearsay evidence before the jury under the guise of explaining the reasons for his or her opinions. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 137; *People v. Montiel*, *supra*, 5 Cal.4th at p. 918.) As our Supreme Court has cautioned, "doctors can testify as to the basis of their opinion [citation], but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury." (*Whitfield v. Roth*, *supra*, 10 Cal.3d at p. 895, fn. omitted.) Holmes's intended

reliance on expert testimony to reveal the contents of the Medical Board's letter was therefore improper.

Finally, apart from the admissibility of the evidence under Evidence Code section 801, the trial court was within its discretion in concluding that the prejudicial effect of expert testimony about the letter outweighed its probative value under Evidence Code section 352. The trial court's ruling reflected its legitimate concern that the jury would not have any basis upon which to evaluate the out-of-court opinions of the unidentified medical consultant referenced in the letter. The jury had no information concerning the qualifications or credibility of the consultant, or the facts on which the consultant based his or her opinion that Tsou departed from the standard of care. The letter itself was unclear as to what standard of care the Medical Board applied in reviewing patient complaints and whether the consultant's opinion that Tsou acted below that standard of care was based on Tsou's performance in the closed reduction procedure, on his failure to offer Holmes an open reduction procedure, or on both. It also was unclear whether the consultant had a complete medical history for Holmes at the time of forming his or her opinion, which was significant given that the testifying experts strongly disagreed as to whether Holmes's medical history made surgery an unreasonable treatment option. Allowing expert testimony about the letter posed the additional risk that the jury would improperly consider the opinions expressed in the letter as "independent proof" that Tsou acted below the standard of care. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618; *People v. Coleman*, *supra*, 38 Cal.3d at p. 91.) As Tsou correctly notes, the letter went to the ultimate issue of whether he was negligent in his treatment of Holmes and had the force of an official government agency, the California Medical Board, behind it. Yet because the Medical Board's consultant was not a witness at trial, Tsou was denied a meaningful opportunity to cross-examine the consultant about the basis for his or her opinion. In light of these legitimate concerns, we cannot conclude that the trial court abused its discretion in excluding any evidence about the Medical Board's letter.

DISPOSITION

The judgment is affirmed. Tsou shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P, J.

JACKSON, J.