3d Civ. C034381
(cons. w/3d Civ. C035554)

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CHARISSE CROWTER, et al.

Plaintiffs and Appellants

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Respondent

Appeal From Judgments Of The Sacramento Superior Court
Honorable John R. Lewis, Judge Presiding
(Sacramento Superior Court No. 97AS01979)

RESPONDENT'S BRIEF

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INTRODUCTION

The Appellants' Opening Brief proclaims this to be a case of first impression about whether California recognizes a cause of action for so-called "ghost surgery." (AOB 1) In fact, the issues in these consolidated appeals do not relate to whether such a cause of action exists in California; rather the issues on appeal deal with what forms of action are available to litigate allegations of ghost surgery against a public entity.

In the proceedings which gave rise to the appeal in 3rd Civ. C034381, the trial court properly held that appellant Brown's breach of contract cause of action was not suitable for class certification because individual issues predominated over common issues. The trial court relied on a decision of this Court, coincidentally also entitled *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982 (hereinafter "*Brown v. Regents*"). (CT I, 494.)[1/]

In the proceedings giving rise to the appeal in 3d Civil C035554, the trial court correctly held that plaintiffs could not proceed against respondent, the Regents of the University of California, pursuant to Business and Professions Code sections 17200 and 17500, because--as a public entity--the Regents is not a "person" within the meaning of those statutes. The court therefore entered summary judgment in favor of respondent. (CT II, 368, 373, 377.)

In its order denying class certification, the court directed that appellants had 20 days leave to amend their complaint if they wished to

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[1] The designation "CT I" refers to the Clerk's Transcript in the first appeal, 3d Civil C034381. The designation "CT II" refers to the Clerk's Transcript in the second appeal, 3d Civ. C035554. The Reporter's Transcripts in the first appeal, 3d Civ. C034381 will be designated "RT I." Citations to the pleadings appended to respondent's Motion to Augment will be designated "Mo/Aug." (See footnote 2, *infra*.)

proceed with an individual cause of action for breach of contract. (CT I, 492.) When no amendment was filed, respondent sought summary adjudication of appellant Brown's individual cause of action for breach of contract. Not only did Brown not oppose that portion of respondent's summary adjudication motion, she in fact disavowed any intention of pursuing her individual breach of contract action. (CT II, 34.) The trial court dismissed Brown's individual breach of contract cause of action as part of the summary judgment proceedings. (CT II, 368, 373.)

Now, in support of a transparently frivolous appeal, appellants have filed an Opening Brief which egregiously misrepresents the procedural posture of the case. Omitting any reference to the dismissal of Brown's individual breach of contract action (CT II, 368, 373), the Appellant's Opening Brief erroneously asserts--not once, but three times--that the trial court found that Brown had a viable individual breach of contract action (AOB 5, 23, 41). This misrepresentation as to the viability of Brown's individual cause of action is critical to appellants' ability to prosecute their appeal in 3d Civil C034381, because--as the Opening Brief recognizes (AOB 21)--one of the prerequisites for class certification is that the class representative have claims typical of the class.

The Appellants' Opening Brief also misrepresents the state of the evidence before the court in connection with the certification request, incorrectly claiming it was undisputed that "ghost surgery" was routine practice at respondent's hospital. (AOB 1-2.) In fact, appellants' evidence was sharply disputed by respondent; appellants' counsel conceded as much at the certification hearing (RT I, 8); and the trial court expressly cited the contrary evidence in ruling that individual issues predominated over common issues, making appellants' breach of contract action unsuitable for class certification (CT I, 495).

The Opening Brief also mischaracterizes the legal principles underlying the trial court's decision, claiming that the court analyzed the facts on tort principles rather than contract principles. (AOB 5.) In fact, the trial court expressly set forth the pertinent contract principles on which it relied in its order denying class certification (CT I, 492-495), and appellants' counsel conceded at the certification hearing that the court had correctly enunciated the pertinent contract principles (RT I, 2-3). Thus, even if appellants could surmount the hurdle posed by the unchallenged dismissal of Brown's individual cause of action, they would still have no basis for overturning the ruling denying certification, because they have failed to demonstrate any abuse of the trial court's considerable discretion in determining the suitability of class certification.

With respect to the appeal in 3d Civ. C035554, the Appellants' Opening Brief fails to set forth any of the procedural or substantive facts which were before the trial court in connection with the summary judgment motion. Appellants' statement of purportedly material facts is limited exclusively to the facts adduced by them in support of their certification motion. (AOB 12-20.)[2/] The Appellants' Opening Brief thus grievously violates rules 13 and 15 of the California Rules of Court and leaves appellants devoid of either factual support or legal justification for reversal of the judgment in 3d Civ. C035554.

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[2] Appellants were so inattentive to the facts before the trial court in connection with the summary judgment proceedings that, in preparing their Opening Brief, appellants blithely ignored the fact that the Clerk's Transcript had omitted respondent's points and authorities, declarations and exhibits in support of the summary judgment motion--papers which appellants themselves had designated as part of the record on appeal. On December 6, 2000, respondent filed a Motion To Augment to include the missing parts of the designated record on appeal in 3d Civ. C035554.

Appellants' apparent strategy of misrepresentation, omission and obfuscation demonstrates that the pending appeals are not merely non-meritorious, but that they are being prosecuted in bad faith. Respondent is confident that this strategy will prove unsuccessful, since even based on their biased and truncated presentation, appellants have still totally failed to demonstrate any error in the trial court's rulings. The judgments must, therefore, be affirmed.

STATEMENT OF THE CASE AND THE FACTS[3/]

A. The Complaint And The Answer

Appellants' Second Amended Complaint, the operative pleading (hereinafter "the complaint"), alleged three causes of action. The first and second causes of action were brought in the names of both Charisse Crowter and Ruth Brown on behalf of the general public. The first cause of action alleged unfair competition within the meaning of Business and Professions Code section 17200.[4/] (CT I, 1-4.) The second cause of action alleged untrue and misleading advertising within the meaning of section 17500. (CT I, 4-5.)

As to each of these two causes of action, appellants alleged that respondent had violated the subject statutes in its operation of the

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[3] Because many of the critical facts in this case are legal and/or procedural in nature, respondent is presenting a combined statement of procedural and substantive facts. The extensive length of the statement is due to the fact that it encompasses appeals from two separate judgments with very different *material* facts and standards of review.

[4] All further statutory references are to the Business and Professions Code, unless otherwise indicated.

University of California Medical Center, Davis, as well as at all other medical facilities operated by respondent. (CT I, 2, 4.) Specifically, as to their section 17200 cause of action, appellants asserted that under a standard consent form, every surgical patient gave consent for the performance of an operation or procedure by a specific named physician, but that operations were performed by someone other than the authorized physician, under a practice that appellants denominated "ghost surgery;" that patient medical records "wrongfully reflected" that the authorized physician had performed the operations; and that patients were billed as though the operations had been performed by the authorized physicians. (CT I, 2-3.) As to their section 17500 cause of action, appellants repeated the above allegations and also alleged that respondent had represented that there would be no substitution of surgeons without the consent of the patient. (CT I, 4.)

The third cause of action, brought in the name of Ruth Brown only, was for breach of contract. It was pleaded as a class action. The class allegations are that each class member entered into a "written agreement" with respondent to receive an operation at a University operated hospital, and that the terms of the "agreement" were set forth in a standard consent form. The identity of the doctor who was to perform the operation was set forth in the consent form which contained a proviso that the "class member" would be informed of any substitution and given the opportunity to refuse the substitution. It is further alleged that respondent "routinely substituted another person for the named doctor" without the patient's knowledge and without any communication regarding the substitution, but billed for the operation as though it had been performed by the named doctor. It is also alleged that the named representative's claim "is typical and representative of the class claims." (CT I, 5-6.)

Respondent filed an answer generally denying the allegations of the complaint, and asserting, *inter alia*, as affirmative defenses appellants'

failure to state facts sufficient to constitute a cause of action; lack of standing of both the individual and class plaintiffs; lack of appellant's capacity to represent the class based on claims atypical of the class; predominance of individual issues of law and fact over common issues; appellants' consent to the conduct complained of; the government immunity provisions of Government Code sections 810-996; and respondent's exemption from liability under sections 17200 and 17500. (CT I, 13-16.)

B. The Certification Motion

On August 5, 1999, appellants filed a memorandum of points and authorities seeking class certification of Brown's breach of contract cause of action, pursuant to Code of Civil Procedure section 382. (CT I, 19 et seq.)[5/] Appellants grounded their certification request on the premise that the consent to surgery form signed by patients constituted the contract between the parties, and on the claim that there were no conversations with patients' subsequent to the execution of the consent form, advising them of "substitutions." (CT I, 23, 36-37.)

Brown's designated "proposed class" was all surgical patients at respondent's hospitals between July 18, 1993 to July 18, 1997, "whose operation was performed in whole or in part by someone other than the surgeon named in the written agreement (Consent) for surgery." (CT I, 24, emphasis added.)[6/] The certification request explained that the

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[5] Although the certification request alleged that most of the facts in issue were undisputed (CT I, 37), respondent's opposition to certification refuted that allegation (CT I, 225-228), as will be shown below.

[6] For purposes of expediting the litigation, it was agreed that (continued...)

substitutions of surgeons to which the complaint referred, and which Brown denominated "ghost surgery," involved participation in surgery by residents who were described as "physicians in training to be accredited surgeons" who provided medical services to patients "under the supervision of the patient's attending physician." (CT I, 29-30.)

The examples of ghost surgery which Brown alleged ranged from emergency room surgeries where the named attending surgeon was on call but not physically present, to cases where a surgeon was absent for part of a surgery because of participation in another, overlapping, surgery, to operations where the named surgeon was present in the operating room but merely supervised or assisted a resident, to cases where a resident had any involvement in a surgery apart from passing instruments to the surgeon. (CT I, 23, 30, 69.)

The certification request acknowledged that the "responsible surgeon" is obliged to be physically present in the operating room only for the definitive or key portions of a procedure, and that there are no general definitions of what constitutes the definitive or key portion of particular types of operations. Rather the determination is made on a case by case basis by the attending physician. Following an operation, the attending physician completes a form, under penalty of perjury, attesting to whether he was present for the entire operation or only key portions, which he is required to describe. If not present for the entire operation, the attending physician must also attest to whether he was involved in another, overlapping, operation. The hospital is not permitted to bill for residents' services. (CT I, 30.)

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[6](...continued)
for pretrial motions, the class would temporarily be limited to hospital patients at the UC Davis hospital. (CT I, 24.)

The facts alleged as to Brown's surgical experience were claimed to be typical of the class. (CT I, 39.) According to Brown's declaration in support of the certification request, she was referred to Dr. White at UC Davis by her urologist because of concern about a recurrence of bladder cancer. She met Dr. White during a pre-operative visit to UC Davis. She signed a consent to surgery form which was obtained from her by Dr. Williams, a resident. The consent stated that Dr. White would be her surgeon and that she would be informed of any substitution of surgeons and would be given an opportunity to refuse consent to the substitution. She further averred that it was very important to her to know that her operation was "in the hands of Dr. White, whom [she] believed to be a competent and experienced surgeon." (CT I, 68-69.)

Brown asserted that because her anesthetic did not work effectively she was able to feel the insertion of a cytoscope into her bladder and heard comments being made by the surgeon manipulating the cytoscope. She believed that the voice she heard was not that of Dr. White, who had a distinctive Irish accent. She thought the speaker was Dr. Williams, although she could not see him. She also believed, based on a review of her medical records, that Dr. White had not been present during the first part of the procedure. (CT I, 69.)

Finally, Brown averred that she had agreed to be operated on by Dr. White. She knew Dr. Williams would assist him, but she thought this meant Dr. Williams would be passing some instruments to Dr. White or otherwise assisting him in some minor role. She believed that she had been deceived by the physicians and as a result had lost her right to know who her surgeon was and the opportunity to refuse to consent to a substitute. She did <u>not</u> aver that she would have refused consent had she been told in advance precisely what Dr. Williams would be doing during her surgery.

She believed that the hospital billed for the surgery as though it had been performed by Dr. White. (CT I, 69-70.)[7/]

C. Respondent's Opposition To Certification

Respondent's opposition to certification was grounded on the legal proposition that certification is inappropriate when each class member's right to recover depends on facts peculiar to his own case (CT I, 224), and on factual showings that individual issues predominate in this case (CT I, 225-227, 233-236), and that Brown was not a suitable class representative (CT I, 236-238). Specifically, respondent's showing in opposition to certification was as follows:

1. The Consent Form Was Not The Contract.

Respondent's opposition noted that while there is no California law on point, there is a sizeable body of out-of-state authority (*Kovacs v. Freeman* (Ky. 1997) 957 S.W.2d 251; *Perry v. Saint Francis Hosp. & Med. Ctr*. (D.Kan. 1995) 886 F. Supp 1551; *Wilson v. Board of Regents* (1992) 262 Ga. 413 [419 S.E.2d 916]) holding that consent to surgery is a process which arises out of the informed consent conversation between patient and physician. The written consent form is evidence that an informed consent conversation took place, and that the patient has decided to have a specified

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[7] In addition to the allegations regarding Brown, the certification request contained allegations regarding the surgical experience of one Judy Sadek who had been an emergency room patient at UC Davis. Sadek had filed a personal injury action as a result of her surgery. That suit had been settled and appellants acknowledged that Sadek was not a member of the proposed class. (CT I, 31-33.)

surgery; however, the consent form, *per se*, is not an enforceable contract. (CT I, 229-230.)

Respondent also submitted evidence to the trial court consistent with the views expressed in the out-of-state authority. Drs. Chapman and Szabo testified at deposition that consent is a process arising out of the conversation between the physician and patient, and that the consent form is simply a written record of the fact that the consent conversation had been held. (CT I, 229, 286, 356.) Additionally, respondent's opposition noted that the consent form signed by Brown contained neither recitation of consideration, nor time for performance. It contained no promise by the patient to pay for services rendered, nor any promise by the named surgeon to perform the operation. It was not signed by Dr. White, the named surgeon, but rather by Dr. Williams, the resident who conducted the informed consent conversation and signed as the "informant." The consent form imposed no obligation on the patient to submit to surgery. Instead it expressly reserved to the patient the right to refuse any proposed operation or procedure prior to its performance. Finally, not only did it not purport to be the complete agreement between the parties, but it contained explicit acknowledgement by the patient that her consent derived from informed consent conversations in which the nature, purpose, risks and benefits of the surgery had been fully discussed, along with alternative methods of treatment, and during which the patient's questions had been answered fully to the patient's satisfaction. (CT I, 230, 276.)

As further evidence that the consent form is not the complete contract, respondent submitted an additional form executed by patients entitled "Terms and Conditions of Service" which informs them that respondent's hospital is a teaching and research institution and that under the supervision of an attending physician, interns, residents, medical

students and postgraduate fellows may participate in the care of patients as part of the medical education program. (CT I, 230, 278.)

2. Interpretation Of The Consent Form.

With respect to interpretation of the consent form itself, respondent's opposition noted that appellants were predicating not only Brown's right to recover, but that of the class members as well, on a single provision of the consent form (which respondent identified as "the substitution provision") which states: "I understand that I will be informed of any substitution of the doctor named above and will be given the opportunity to refuse substitution." (CT I, 231, 276.) However, appellants' certification request ignored the immediately preceding provision of the consent form (which respondent identified as "the authorization provision") which provides: "I authorize _____, M.D., and those who he or she may designate as associates or assistants to perform the following operation or procedure _____ as well as any related or incidental diagnostic or therapeutic procedures that they believe may be necessary." (CT I, 232, 276, emphasis added.)

Respondent urged that the substitution provision needed to be interpreted in the context of the authorization provision, as well as the Terms and Conditions of Service form. (CT I, 232.)

Additionally, respondent noted that despite Brown's asserted belief that a "substitution" occurred any time a resident did anything to assist in the surgery other than handing instruments to the named surgeon, or whenever the named surgeon did not personally perform every procedure involved in the surgery (CT I, 69, 231-232, 361, 371, 382), she also testified that when she gave her consent for surgery she understood that she gave permission for Dr. White, her named surgeon, to designate associates and

assistants to perform the procedure (CT I, 232, 359-360). Respondent argued that the interpretation of the substitution provision which appellants were urging was inconsistent with the authorization provision of the consent form, and with Brown's own deposition testimony. (CT I, 232.)

3. The Disputed Individualized Facts

Appellants had alleged routine substitutions of emergency room surgeons without notification to patients, particularly with reference to shift changes. (CT I, 32, 34-35.) Respondent offered contrary evidence: Drs. Chapman and Pappas testified that in the emergency room setting, when there were shift changes, it was common practice for the new team to introduce themselves to the patient, and explain what their roles were. These conversations would be recorded in notes on the patients' charts, although the original consent form would not be redone. (CT I, 291, 303-304, 330-332, 335.) This practice was "very routine" except in those situations where the patient's condition required urgent action and the patient was either in distress or not awake. Under those circumstances efforts would be made to contact members of the patient's family. (CT I, 332, 335.)

As a matter of policy and practice, on-call attending physicians in non-life threatening emergency cases would be in the operating room well before commencement of the key portions of surgery, although not necessarily before the patient was prepped and anesthetized. It would be rare for a resident even to make an incision prior to the arrival of the attending physician. In the rare case where the on-call attending physician was not present for the key parts of the surgery, he would not be treated as the responsible surgeon. (CT I, 301-302, 305-306.)

When surgeries are scheduled to overlap, it is done with the expectation that the scheduling will not interfere with the attending surgeon's ability to be present for the key portion of both surgeries. The surgery schedule includes prep time and the anesthesia process, which may take more time than the surgery itself, and for which the surgeon's presence is unnecessary. Therefore, true overlap cannot be determined from the scheduling paperwork. (CT I, 289-290, 342-343.)

It is also standard practice to advise all patients that residents will be actively participating in surgeries performed by the surgeon named in the consent form. (CT I, 292-294.) A single surgeon cannot accomplish most of the surgeries performed at UC Davis. The surgeries are complex and require more than one pair of hands actively participating in the procedure, no matter how experienced the surgeon. (CT I, 308, 311.) It is not possible to tell patients at the time of the consent conversation which particular procedures a resident will be performing because decisions as to what the attending physician will do and what the resident will do is not predictable in advance. It will vary from patient to patient even for the same type of operation depending on the patient's condition and what transpires during the course of the surgery. Attempting to lay it out in advance in specific detail is anxiety producing for the patient. (CT I, 309-310.)

It is respondent's practice not to charge for the services of residents in those rare emergency situations where the resident assumes the role of responsible surgeon and performs key portions of surgery in the absence of the attending physician. A surgeon's bill is generated only when an attending physician certifies that he was present for the key portions of the surgery. (CT I, 297, 317, 354-355.) Determination of what constitutes the key portion of any particular surgery is made on a case by case basis by the attending surgeon depending on the nature of the procedure and the overall medical condition of the particular patient. (CT I, 288, 295-296.)

4. No Showing Of Material Breach

Respondent further urged in opposition to certification that appellants had failed to plead that any breach of contract was material, because they had not alleged that Brown or any other member of the proposed class would have refused consent to a particular "substitution" of surgeons. More significantly, the issue of materiality, like the issue of contract formation, would be unique to each member of the proposed class. Materiality would necessarily vary based not just on the extent of the resident's participation in the surgery, but on whether the patient had an ongoing previous relationship with the surgeon, whether the patient selected the surgeon based on knowledge of the surgeon's particular skills or reputation, or whether the patient chose the facility rather than any particular doctor. It would also depend on whether the surgery was elective or emergency, the urgency of the patient's condition, whether delaying commencement of surgery to await the arrival of the attending physician would have been life threatening, and whether the physician could have predicted in advance of the operation what procedures the patient's condition would have required him to perform personally and what procedures he would have had to delegate in order to best serve the patient's needs. (CT I, 233-235.)

5. Individualized Nature Of Damages Issues

Respondent's opposition also noted that the only form of damages mentioned in the request for class certification was a claim of unjust enrichment. However, in order to prove overbilling, each member of the class would individually have to prove first, that the named surgeon had not performed the key portion of that plaintiff's surgery, and second, that the

amount billed for the surgery exceeded the quantum meruit value of the services actually performed by the named surgeon. (CT I, 235.)

6. Brown's Unsuitability As Class Representative

Finally, respondent's opposition to certification contended that Brown was an unsuitable class representative, first, because there had, in fact, been no substitution of surgeons in Brown's case, and second, because she could not establish the materiality of the breach she asserted. (CT I, 236-237.) Although Brown's declaration asserted that it was important for her to know her surgery was in Dr. White's hands, her deposition testimony refuted that averment. She testified that she contacted Dr. White only because her urologist in Grass Valley referred her to him. She knew nothing about Dr. White's status or background. She did not know if he was a professor or a resident. (CT 237-238, 364-366.)

She consulted with Dr. White on July 8, 1996. She returned to UC Davis for a preoperative appointment on July 22, 1996, expecting to see Dr. White again, but instead she saw Dr. Williams. She did not ask to see Dr. White or ask where he was. She did not consider not going through with the surgery because Dr. White was not present. Dr. Williams explained the nature of the surgery to her. He seemed to be completely in charge, as if he would be doing the surgery, so she asked him if he was going to do the surgery. He told her that Dr. White would do the surgery and he would assist. (CT I, 238, 367-372, 380-381.)

Brown understood when she gave her consent to surgery that Dr. White might designate associates and assistants to perform the procedure. (CT I, 237, 359.) She did not remember reading the substitution provision when she signed the consent form. (CT I, 369-370.) Thus, she obviously could not have relied on it.

Brown based her claim of "substitution" on comments she attributed to Dr. Williams which she heard when she awakened sometime during surgery. However, according to her deposition testimony, her surgery had taken two hours, whereas she was awake for an estimated 15 to 30 minutes, after which additional anesthetic caused her to lose consciousness again. (CT I, 236-237, 373-374.) Furthermore, the surgical drape prevented Brown from seeing who was performing any part of the surgery. She never saw either Dr. Williams or Dr. White and did not know whether Dr. White performed the procedure. (CT I, 237, 375-379.)

The operation record for Brown's surgery demonstrated that Dr. White was present "from the time we shot the first retrograde pyelogram all the way through the end of the case when the Foley catheter was placed." (CT I, 75, 237.) Dr. White testified that he did not know if he was actually there earlier or not, but his presence at the time of the first pyelogram would have been recorded because that was the first critical point of the surgery. (CT I, 237, 385.)[8] Dr. White also testified that he had no independent recollection of plaintiff's surgery; however, based on his practice in a case such as hers, he would have been present when the cystoscope was inserted, he would have looked at the video, aimed the camera, and examined the organ. It is likely that he personally had performed the transurethral resection. The surgery required the team efforts of a surgeon and an assistant. (CT I, 237, 387-388.)

Respondent urged that the evidence showed, as a matter of law, that there was no substitution of surgeons in Brown's case both because Dr. White was present and performed the key parts of the surgery; and because Brown was fully aware that Dr. Williams would assist in the surgery before she signed the consent form. Moreover, based on the consent conversation

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[8] Appellants offered no medical evidence to the contrary.

Brown regarded Dr. Williams as capable of performing the procedure himself, compelling the conclusion that the specific extent of Dr. Williams' participation was a matter of indifference to her. (CT I, 238.) Finally, Brown could not establish unjust enrichment because she had no understanding of how the UC hospitals billed for services of different physicians, did not know if there was any difference between the charge for services of a professor of medicine and a resident, and had not offered any evidence that she would not have agreed to the charges billed had she known precisely what Dr. Williams' level of participation in her surgery would be. (CT I, 238, 362-363.)

D. The Tentative Ruling On Certification

On October 7, 1999, the court issued its tentative ruling denying certification of the breach of contract cause of action and dismissing the class allegations. The court directed that if plaintiffs wished to proceed individually as to "Count 3" an amended complaint could be filed and served no later than October 27, 1999. For purposes of its ruling, the court assumed the existence of an ascertainable class and did not reach the issue of adequate representation. (CT I, 492.) The court found "that the nature of the 'agreements' in issue and the varied nature of the alleged breaches, are such that there are not predominate common questions of law or fact; rather, there are numerous and substantial individualized questions which predominate." (CT I, 492.)

The court noted that the proposed class encompassed surgical patients "whose operations were 'performed in whole or in part by someone other than the surgeon named in the written agreement (Consent) for surgery.'" It included situations where the attending physician: allowed a resident to perform the surgery or a "'key'" portion thereof; was absent

from the room for a key portion of the surgery; was present, but not scrubbed, during surgery; was present and scrubbed, but merely directed another in the performance of the surgery; and "traditional surgical activity and the transfer of care as to emergency room admittees upon changes in shifts." (CT I, 493.)

The tentative ruling concluded that, contrary to appellants' contentions, the meaning of the substitution provision in the consent form "cannot be ascertained in a 'one size fits all' vacuum. . . . The ultimate 'contractual' question in the context of this case is what each patient understood the 'substitution' to mean. Once that has been determined on an individual basis, the question would then become: what is the contended activity of substitution in the individual case, and is that activity consistent with the patient's understanding? In sum, the unique circumstances leading to the signing of each consent form are relevant, as is the precise nature of any discussion as to what portion of a given surgery might be performed by an assistant or resident." (CT I, 494, emphasis added.)

The court further found that once the individual facts as to consent were determined, it would then be necessary to determine, on an individual basis the level of participation of any resident, and whether it violated the patient's understanding. It concluded that these were all major issues and that they were individual, not common in nature. (CT I, 494.)

While the court did not reach the issue of adequate representation, it did note that "plaintiffs are and can be specific regarding their own communications, understandings, and operation circumstances. The issues discussed above regarding commonality therefor [sic] become issues also regarding typicality of the representative's claims." (CT I, 494.)

E. The Certification Hearing

At the October 7, 1999, hearing on certification, appellants' counsel agreed with the court's tentative finding that the ultimate contractual issue in the class action was what each patient understood substitution to mean. Appellants' counsel further stated that if the surgical role of residents was discussed as part of the consenting process, then the court's tentative ruling would be correct, "because that consenting process would be different from patient to patient." (RT I, 2-3.) Appellants' counsel conceded that had the defense introduced "some evidence that there is a custom and practice within the hospital of physicians discussing with patients the role of the residents in the consenting process, they would have, I think, defeated us, because I would have to agree, yes, it would vary then. If it's discussed, it has to be different from patient to patient." (RT I, 5, emphasis added.)

Having made these concessions, appellant's counsel erroneously contended: (a) that there was no evidence in the record that the role of residents was explained during the consent conversation; and (b) that respondent had not produced any evidence of any communications with patients relevant to consent after the consent forms were signed. (RT I, 4-5, 7-8.)

These assertions were refuted by counsel for respondent who cited the deposition testimony of Drs. Chapman and Pappas which contradicted appellants' representations as to the nature of the evidence respondent had introduced in its opposition papers. (RT I, 12.)[9/]

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[9] As noted above, Dr. Chapman had testified that it was standard practice to advise all patients that residents would be actively participating in their surgery. (CT I, 292-294.) Drs. Chapman and Pappas had testified to the common practice, after shift changes, for the new team to introduce themselves to the patient, explain what their roles were, and make a notation of the conversation in the patient's chart, although the original consent form would not be redone. (CT I, 291, 303-304, 330-332, 335.)

Appellants' counsel also suggested to the court the possibility of certifying a narrower class than originally proposed, eliminating those patients involved in emergency room surgeries involving shift transitions. In making this suggestion, appellants' counsel retreated from his assertion that there was no evidence in the record of patient communications following execution of the consent forms. He conceded that there "may be some representations after the consent form to the patient in the emergency room setting when a team transitions, so that it would perhaps be unfair to include that for certification." (RT I, 8.)

He also suggested eliminating those cases where the surgeon was present in the operating room, "but not actively participating" in the operation, leaving for certification those cases where the surgeon was either entirely absent from the room or absent for key portions of the surgery. (RT I, 9.) Respondent's counsel noted that Brown, the only named plaintiff, did not fall within the newly redefined class appellants' counsel was proposing. (RT I, 15.) At no time during the certification hearing did appellants' contend that the court's tentative ruling had failed to analyze the case under contract principles.

F. The Final Order Denying Certification

Following the hearing, the court issued a final order confirming the tentative ruling. The court declared that it was unpersuaded by appellants' contentions about the state of the evidence. The court cited Dr. Chapman's testimony regarding patient advisements as to the surgical role of residents. (CT I, 495.) In addition to denying certification of the originally proposed class, the court also denied the request for certification of the narrowed class. It found that there was no evidence of the number of cases involving total absence of the named surgeon and insufficient evidence regarding the

narrowed class to meet appellants' burden of proving that class certification was appropriate. (CT I, 495-496.)

As for the proposal to certify cases involving surgeons absent for key portions of the surgery, the court found that "individual questions would still outweigh any common questions of law or fact." The court determined each surgery is different and therefore the definition of the key portion of a surgery would differ in every case, depending on the patient's "unique surgical needs, each patient's understanding of the role of the resident in the surgery, and each patient's understanding of what 'key' or 'substantial' means with respect to his/her unique surgery," which could not be determined on a classwide basis. (CT I, 496.)

G. Further Proceedings In Connection With Certification

Following the court's final order denying certification, appellants noticed a motion for reconsideration. (CT I, 498 et seq.) Respondent filed opposition, citing amongst other grounds, the fact that the motion merely reasserted the arguments appellants had made at the hearing. (CT I, 614.) Appellants then withdrew their request for reconsideration and filed the appeal in 3d Civil C034381. (CT I, 656-657.)

H. The Summary Adjudication And/Or Summary Judgment Proceedings

1. The First And Second Causes Of Action

Following dismissal of the class allegations, respondent filed a motion for summary adjudication and/or summary judgment. The motion sought judgment on the first and second causes of action on the theory that

respondent is not a "person" within the meaning of sections 17200, 17201, 17500, and 17506. (CT II, 1.) In support of the motion, respondent cited a body of case law holding that the definition of the term "person" in sections 17201 and 17506 does not include government entities. (Mo/Aug. 9-13.) Respondent argued that there was no basis in law or logic for treating the Regents differently from other government entities with respect to the scope of sections 17201 and 17506. (Mo/Aug. 13-16.)

In addition, relying on this Court's decision in *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1204, respondent urged that Government Code section 818.8 provides a total affirmative defense to appellants' first and second causes of action. (Mo/Aug. 19-20.)

Respondent's separate statement of undisputed material facts in support of the summary judgment motion established the following facts relevant to both respondent's status as a public entity and the fact that it is engaged in governmental activity in the operation of its hospitals and medical schools:

> "1. The University of California is a constitutionally mandated public trust administered by the Regents which has full powers of organization and government over the University, with authority to delegate to the university faculty such authority and functions as it deems wise.
>
> "2. The University is the primary state supported academic agency for research.
>
> "3. The University has exclusive jurisdiction in public higher education over graduate instruction in the profession of medicine.
>
> "4. To fulfill the University's obligations in the field of medical education, the Regents has established medical schools and teaching hospitals at the San Francisco, Los Angeles, Davis, Irvine and San Diego campuses of the University, and has adopted an educational curriculum designed to provide comprehensive medical education and

practical training to medical students, interns, residents, teaching and research fellows, and professors.

"5. The University's Hospitals are operated by the Regents as public entity hospitals in conjunction with the University medical schools.

"6. The University's Hospitals are operated by the Regents for the primary purposes of promoting medical research and furthering medical knowledge amongst medical students, interns, residents, teaching and research fellows, and professors.

"7. Maintenance of the University's teaching hospitals is integral to carrying out the Regents' educational mandate in the field of medicine.

"8. The core function of the University medical schools and hospitals is to train physicians who are well prepared to render competent medical services upon completion of their course of study.

"9. Assignment of the duties and responsibilities of students, interns, residents, fellows, and professors in the care of patients, and delineation of the supervisory responsibilities of professors and other professional staff, is integral to the educational purposes of the University's medical schools and teaching hospitals.

"10. Patients are advised upon admission that the University hospitals, including UC Davis Medical Center, are teaching and research hospitals, and that under the supervision of the attending physician, residents, interns, medical students and postgraduate fellows may participate in the care of patients as part of the educational program of the institution." (CT II, 7-9.)

The above facts were supported in whole or in part by the declarations of William H. Gurtner, Vice President, Division of Clinical Services Development, University of California, Office of the President. (Mo/Aug. 29-30; CT II, 7-9, 315.)

2. The Third Cause Of Action

With respect to the third cause of action for breach of contract, respondent sought summary adjudication of Brown's individual cause of action on the ground that the indisputable material facts demonstrated that Brown could establish neither measurable injury nor failure to perform a material promise. (Mo/Aug. 20-23; CT II, 10-14.)

Appellants' opposition to the motion disavowed any intention by Brown to pursue an individual breach of contract action. They argued, however, that Brown's case could provide evidence in support of appellants' first and second causes of action because a plaintiff may sue under the unfair competition laws without having an individual action. (CT II, 34.) With respect to the first and second causes of action, appellants argued that respondent is subject to the police power of the state.[10/]

I. The Ruling On Summary Judgment

On March 28, 2000, the court issued an order finding that, as a result of appellant's decision not to amend the complaint to state an individual cause of action for breach of contract, the summary adjudication request was being treated as a motion to dismiss the third cause of action, which the court granted. (CT II, 368, 371.)

With respect to the first and second causes of action, the court found that the Regents was not a "person" within the meaning of sections 17201 and 17506. The court based its finding on this "determinative issue" on this Court's decision in *Trinkle v. California State Lottery*, *supra*, 71

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[10] The legal authorities cited in connection with the summary judgment proceedings are discussed below, as pertinent.

Cal.App.4th 1198, and an earlier line of cases reaching similar conclusions. (CT II, 368-371.)

The court rejected appellants' "police power" argument because the court determined that the issue in this case was not whether the Legislature had the power to include respondent within the purview of the statutes, but rather whether the Legislature in fact had done so. The court concluded that the Legislature had not. (CT II, 369-371.)[11/]

On April 21, 2000, the court entered its formal order reaffirming the ruling reflected in its March 28, 2000, minute order. (CT II, 372-376.) On May 4, 2000, the court entered judgment in respondent's favor. (CT II, 377-378.)

J. The Second Appeal

On May 5, 2000, a notice of appeal was filed on behalf of Appellant Crowter. On May 9, 2000, a second notice of appeal was filed on behalf of Appellant Brown. (CT II, 379, 384-385.)

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[11] The court also overruled appellants' objections to respondent's undisputed facts numbers 6 and 10 at the time it ruled on the summary judgment motion--the only objections raised to the undisputed facts cited above. (CT II, 370.)

ISSUES ON APPEAL

I.

AS A RESULT OF THE UNOPPOSED DISMISSAL OF BROWN'S INDIVIDUAL BREACH OF CONTRACT ACTION SHE LACKS STANDING TO REPRESENT THE "CLASS." THE APPEAL IN 3D CIVIL C034381 SHOULD THEREFORE BE DISMISSED.

Appellants acknowledge that a party seeking class certification must be a member of the class. (AOB 21.) A person who has not stated a personal cause of action against a defendant lacks standing to sue as a class representative. If the named class representative is dismissed from the action, she loses standing to prosecute the class action. (*Baltimore Football Club, Inc. v. Superior Court* (1985) 171 Cal.App.3d 352, 361; *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 845; *Phillips v. Crocker-Citizens Nat. Bank* (1974) 38 Cal.App.3d 901, 908, 910; *Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 859-860.)

Respondent's opposition to the certification request alleged, *inter alia*, that Brown had failed to establish the elements of a viable individual breach of contract action. (CT I, 236-237.) The Appellant's Opening Brief, in a gross misstatement of the record, asserts: "Significantly, the trial court found the action to be meritorious as its order denying certification nevertheless held that the action could proceed on an individual basis." (AOB 23.) The trial court made no such finding! To the contrary, when it denied class certification, the court directed that if appellants wished to proceed individually as to the breach of contract action, they would have to amend their complaint within 20 days. (CT I, 492.) Clearly this ruling signified that the existing complaint was inadequate to state an individual

cause of action, otherwise there would have been no need to amend. Any doubts on that point were resolved in the summary judgment proceedings.

When Brown failed to take advantage of the opportunity the trial court had given her to amend her complaint, respondent sought summary adjudication of the third cause of action. In response, Brown expressly disavowed any intention of pursuing an individual cause of action. She asserted that her situation could provide evidence in support of her first and second causes of action because a plaintiff may sue under the unfair competition laws without having an individual action, but made no such claim with respect to the class action. (CT II, 34.) Her individual breach of contract action was dismissed without objection. (Mo/Aug. 20-23; CT II, 10-14, 34, 368.) Appellants' Opening Brief does not challenge the propriety of the dismissal, and thus appellants have waived any claim of error on appeal, just as they waived objections to dismissal in the trial court. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal. App. 3d 834, 858-859, fn. 13.)

As a result of the dismissal of Brown's individual cause of action she no longer has standing to prosecute the class action. *(Baltimore Football Club, Inc. v. Superior Court, supra,* 171 Cal.App.3d at p. 361; *Simons v. Horowitz, supra,* 151 Cal.App.3d at p. 845; *Phillips v. Crocker-Citizens Nat. Bank, supra,* 38 Cal.App.3d at pp. 908, 910; *Payne v. United California Bank, supra,* 23 Cal.App.3d at pp. 859-860.) Appellants never sought leave to amend to name any other class representative who could state an individual cause of action. (*Silva v. Block* (1996) 49 Cal.App.4th 345, 352.) The only other named patient whose medical history was described in connection with the certification request was Ms. Sadek whose own claims against respondent had been settled and who therefore was not a member of the proposed class, as appellants have acknowledged. (CT I, 33;

AOB 16.) This Court should therefore dismiss the appeal in 3d Civil C034381.

II.

IF THIS COURT REACHES THE MERITS OF THE CERTIFICATION RULING, THE JUDGMENT DENYING CERTIFICATION MUST BE AFFIRMED BECAUSE THE TRIAL COURT APPLIED PROPER LEGAL CRITERIA IN REACHING ITS DECISION.

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) If the court's ruling is supported by substantial evidence it will be upheld on appeal, unless the court employed improper criteria or erroneous legal assumptions in reaching its decision. However, if the court stated "'[a]ny valid pertinent reason'" for denial of certification, its ruling will be upheld. (*Lindner*, *supra*, 23 Cal.App.4th at pp. 435-436; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655-656.)

Appellants contend that the trial court here used improper legal criteria and assumptions by applying tort principles, rather than analyzing and applying contract principles. (AOB 5.) The record conclusively refutes this contention. The court's tentative ruling declared: "The ultimate '<u>contractual</u>' question in the context of this case is what each patient understood the 'substitution' to mean. Once that has been determined on an individual basis, the question would then become: what is the contended activity of substitution in the individual case, and is that activity consistent

with the patient's understanding?" (CT I, 494, emphasis added.) Clearly, this was an analysis of the applicable law under contract principles.

Furthermore, at the certification hearing, appellants' counsel quoted the court's statement and agreed that the court had correctly stated the ultimate contractual principle. (RT I, 2.) Thereafter, when appellants filed their aborted motion for reconsideration they made no allegation that the trial court had utilized a tort analysis or that it had failed to apply contract principles. (CT I, 501-507.) Now, bereft of any meritorious theory on which to ground their appeal, appellants have manufactured a claim, out of whole cloth, that the court used a "proximate cause" analysis to deny certification. (AOB 26.) Nowhere in the court's tentative ruling or in its final ruling did it ever use the term "proximate cause," nor can its statement of reasons permit any reasonable inference that it was employing a proximate cause analysis. Rather, the only conclusion permissible from examination of the court's ruling is that it analyzed the issues before it under the contract principles which it expressly stated it was utilizing. (CT I, 492-496.)

III.

IN ADDITION TO APPLYING THE CORRECT LEGAL ANALYSIS, THE TRIAL COURT ALSO RELIED ON THE APPROPRIATE, INDEED CONTROLLING, LEGAL AUTHORITY.

In addition to the erroneous claim that the trial court applied a tort analysis rather than a contract analysis, appellants also contend that the court's reliance on *Brown v. Regents, supra*, was misplaced, on the theory that *Brown v. Regents* was a tort action which has no applicability in a contract setting. (AOB 26.) Again appellants are mistaken. The plaintiff in

Brown v. Regents pled both contract and tort causes of action, including a breach of contract cause of action. (151 Cal.App.3d at pp. 986-987.) This Court found that class certification was inappropriate on either theory of recovery. (151 Cal.App.3d at pp. 989, 991.)

Brown v. Regents, like the present case, involved allegations of misrepresentation and concealment about medical treatment at UC Davis. (151 Cal.App.3d at pp. 986-987.) Like appellants in the present case, the plaintiff in *Brown v. Regents* relied on certain uniform medical center documents. The court noted that while those documents could probably suffice to establish certain elements of a fraud cause of action, beyond this one element of commonality "we encounter a veritable quagmire of tough factual questions which can only be resolved by individual proof." (151 Cal.App.3d at p. 989.) Specifically, the Court held that whether a particular class member had relied on the written representation would "require close scrutiny of what was said between a class member and his physician." (*Ibid*.) The Court further held that the plaintiffs' failure to establish a sufficient community of interest as to their tort causes of action also "necessarily" extended to the remaining causes of action including the breach of contract action. (151 Cal.App.3d at p. 991.)

The same considerations apply with even greater force to the present case. Here the individual issues relate not only to the individual consent conversations between each class member and his or her physician--the basis for contract formation--but also to the level of participation of residents in each class member's surgery, and whether the individual class member considered that level of participation material to the patient's consent to surgery--the factors relevant to contract breach. The trial court's reliance on *Brown v. Regents* was therefore well-placed.

Appellants argue that *Brown v. Regents* is distinguishable because appellants are not claiming "injury or harm to any class member," and

therefore "the health" of individual class members is not in issue here. (AOB 25-26.) However, the form of "ghost surgery" appellants allege involves questions of informed consent as to the role of residents in class members' surgeries. Establishing informed consent--or lack thereof--varies from patient to patient and clearly is dependent on what is appropriate to the individual patient's medical condition. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) What constitutes informed consent is no less individualized in the breach of contract context than it is in the tort context.

The decision in *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th 644 also confirms that the trial court here applied the correct legal standard. In *Caro* the plaintiff-consumer had sued on a variety of theories, including breach of contract and unjust enrichment. The grounds of the action were allegations regarding misleading labeling of orange juice. The trial court found that individual issues predominated over common issues, because "the existence of a material misrepresentation was not a common issue." (18 Cal.App.4th at p. 667, emphasis added.) The *Caro* Court held that the trial court's determination was proper because a misrepresentation of fact is material only if the plaintiff relied upon it, meaning that absent the misrepresentation the plaintiff would not have acted as he did. (18 Cal.App.4th at p. 668.)

This analysis applies also in the informed consent context; and it applies whether the plaintiff sues under a tort theory or a contract theory. (*Brown v. Regents*, *supra*, 151 Cal.App.3d at pp. 989, 991.) A physician's duty to disclose is measured by the patient's need for information that is material to the decision to undergo surgery. In order to demonstrate lack of informed consent, "[t]here must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs v. Grant, supra*,

8 Cal.3d at p. 245, emphasis added.) Obviously such determinations can only be made on an individual basis, not on a group basis.

IV.

APPELLANTS HAVE NOT CITED A SINGLE CASE WHICH AUTHORIZED CLASS CERTIFICATION PREDICATED ON ALLEGATIONS OF GHOST SURGERY.

Appellants' Opening Brief (AOB 6-10, 27-28) cites a number of out-of-state cases involving an individual right to recover based upon allegations of ghost surgery. (*Dingle v. Belin* (2000) 358 Md. 354 [749 A.2d 157]; *Perna v. Pirozzi* (1983) 92 N.J. 446 [457 A.2d 431]; *Guebard v. Jabaay* (1983) 117 Ill.App.3d 1 [452 N.E.2d 751]; *Buie v. Reynolds & Freie* (Okla.App. 1977) 571 P.2d 1230].) None of these cases involved class action allegations.

In fact, *Perna v. Pirozzi, supra*, on which appellants heavily rely (AOB 8-9, 27), has been held to be inapplicable even to an individual action for the particular type of conduct on which appellants base their lawsuit. In *Perna v. Pirozzi*, substitution of one member of a private group medical practice for another was held to be ghost surgery. However, a later New Jersey case held that the rule in *Perna v. Pirozzi* does not apply when a patient consents to surgery by a doctor and his "assistant or associate," a resident participates in the surgery, and the plaintiff does not claim that the procedure did not reasonably require the services and talents of two doctors. (*Monturi v. Englewood Hospital* (1991) 246 N.J. Super. 547 [588 A.2d 408].) Appellants here have never claimed that the services of two doctors was not required in the surgery of any class member. Thus, not only have appellants failed to present any authority to support their claim that

allegations of ghost surgery can be pursued by way of a class action, their own authority has not even been held applicable to an individual cause of action for the type of ghost surgery at issue here.

V.

THE TRIAL COURT HAVING APPLIED THE CORRECT LEGAL ANALYSIS, AND HAVING RELIED ON THE APPROPRIATE LEGAL AUTHORITY, APPELLANTS' ARGUMENT BOILS DOWN TO AN IMPROPER REQUEST FOR THIS COURT TO REWEIGH THE EVIDENCE.

The burden of proving that the factors favoring certification outweigh those precluding certification rests with the plaintiff. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 820.) Appellants acknowledge that the burden of proof was theirs. (AOB 21.)

It has been black letter law in this state for more than 50 years that a class action cannot be maintained where each member's right to recover depends on facts peculiar to his own case. (*Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, 838-840, 842-843.) Trial courts are afforded great discretion in weighing conflicting evidence to determine whether individual or common issues predominate. Provided the court employed correct legal criteria, its factual determinations will not be overturned if they are supported by substantial evidence. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 435; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Caro v. Proctor & Gamble Co.*, *supra*, 18 Cal.App.4th at pp. 666-667.)

Appellants' Opening Brief attempts to circumvent the substantial evidence rule by citing only the evidence which they introduced below, and by invoking the parole evidence rule. (AOB 22-25, 28-29.) They ignore respondent's showing that the consent form was not a contract at all, let alone the complete contract between the parties (CT I, 229-232, 276, 286, 356.); that the trial court expressly concluded that the "substitution provision" in the consent form could not be interpreted in isolation, but had to be interpreted in conjunction with the "authorization provision" and the Terms and Conditions of Service form; and that the parole evidence rule was therefore inapplicable. (CT I, 493-494.)[12/] There was substantial evidence to support these findings, as well as the findings discussed above regarding the predominance of individual issues. Therefore, the trial court's ruling was conclusive, and the denial of certification must be affirmed. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 435; *Richmond v. Dart Industries, Inc.*, *supra*, 29 Cal.3d at p. 470; *Caro v. Proctor & Gamble Co.*, *supra*, 18 Cal.App.4th at pp. 666-667.)

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[12] The parole evidence rule applies only when the parties intended the writing to be complete unto itself. (*Salyer Grain & Mill. Co. v. Henson* (1970) 13 Cal.App.3d 493.) The consent form here obviously does not meet that test.

VI.

RESPONDENT SATISFIED THE STATUTORY REQUIREMENTS FOR SUMMARY ADJUDICATION OF APPELLANTS' FIRST AND SECOND CAUSES OF ACTION BY DEMONSTRATING THAT THE REGENTS IS NOT A "PERSON" WITHIN THE MEANING OF SECTIONS 17201 AND 17506.

A defendant establishes a right to summary adjudication by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Sanchez v. Swinerton & Walberg Co*. (1996) 47 Cal.App.4th 1461, 1465; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1594-1598.) Respondent satisfied that burden by demonstrating that, as a matter of law, the Regents is not a "person" within the meaning of sections 17201 and 17506 and therefore is not subject to suit under sections 17200 or 17500.

As was set forth in respondent's points and authorities in support of the summary judgment motion (Mo/Aug. 9), section 17203 provides that an action may be brought against any "person" who engages in unfair competition within the meaning of section 17200. The term "person" is defined by section 17201 to "mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." In *Trinkle v. California State Lottery*, *supra*, 71 Cal.App.4th at p. 1203 ("*Trinkle*") this Court held that the definition of "person" employed by section 17201 does not encompass government entities. An unbroken line of earlier cases had reached the same conclusion. (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 831; *Community Memorial Hospital v. County of Ventura*

(1996) 50 Cal.App.4th 199, 210-211; *Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 Cal.App.3d 308, 318.)[13/]

At the time of the hearing on respondent's summary judgment motion, there was no published decision specifically holding that the *Trinkle* line of cases applies to the Regents. However, in a case decided the day after the trial court granted respondent's motion for summary judgment--*California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542--the Court did consider the precise issue now before this Court. Relying on the *Trinkle* line of cases, *California Medical Assn.* reached the only tenable legal and logical conclusion: The exemption of government entities from section 17200 liability applies to the Regents. (79 Cal.App.4th at p. 551.) The Supreme Court denied a petition for review in *California Medical Assn. v. Regents* on June 27, 2000.

Case law also holds that government entities are exempt from liability under section 17500 because they are not "persons" within the meaning of section 17506 which defines "person" to include "any individual, partnership, firm, association, or corporation." (*Janis v. California State Lottery Com., supra*, 68 Cal.App.4th at p. 831.)[14/] This conclusion was compelled under fundamental principles of statutory construction which require that courts look to the plain language of the statute to discern legislative intent. (*Trinkle, supra*, 71 Cal.App.4th at p. 1203.) The definition of "person" in section 17506 is even narrower than that employed in section 17201.

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[13] Collectively, these cases will be referred to hereinafter as "the *Trinkle* line of cases."

[14] *Janis* is the only case in the *Trinkle* line which had occasion to address the separate question of government liability under section 17500.

It is also compelled by the rule that statutes which deal with the same subject matter be construed together to harmonize them if possible. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065.) False and misleading statements within the meaning of 17500 also necessarily constitute unfair competition within the meaning of section 17200. (*People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 129.) Having excluded government entities from the purview of section 17200, the Legislature obviously did not intend them to be included in section 17500.

As respondent further noted in its points and authorities (Mo/Aug. 12), the legislative intent to exclude government entities from the purview of sections 17200 and 17500 is confirmed by comparison of sections 17201 and 17506 with the contrasting language of section 17021 which defines "person" for purposes of the Unfair Practices Act (§§ 17000-17101). Unlike sections 17201 and 17506 which contain no reference to public entities, section 17021 provides:

> "Person" includes any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation.

(Emphasis added.)

Thus, it is clear that when the Legislature wishes to include public entities within the coverage of the overall regulatory and consumer protection statutes, it does so explicitly. Absence of any similar reference to "municipal or other public corporation" in sections 17201 and 17506 compels the conclusion that the Legislature did not intend those statutes to include such entities. The trial court expressly so concluded in its order granting summary judgment. (CT II, 370, 375.)[15/]

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[15] Appellants cite *People v. Centr-O-Mart* (1950) 34 Cal.2d 702 (continued...)

Construction of sections 17201 and 17506 to exclude public entities is further mandated by the Tort Claims Act (Gov. Code, §§ 810 et seq.) which abolished all common law and judicially declared forms of public entity tort liability, substituting in their place the principle of general governmental immunity, with limited statutory exceptions. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980; *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829; *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, 63.) Absent express language extending coverage of sections 17200 and 17500 to government entities, the principles of government immunity operate to exclude them from the statutes. (*Trinkle, supra*, 71 Cal.App.4th at p. 1202.) The Legislature has expressly declared the Regents to be a "public entity" for purposes of the governmental immunity statutes. (Gov. Code, § 811.2.)

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[15](...continued)
("*Centr-O-Mart*") for the proposition that the state is a "person" for purposes of bringing an action under the Unfair Competition Law, and therefore must also be subject to suit under the law. However, *Centr-O-Mart* adjudicated the right of the District Attorney of San Juaquin County to bring an action under the Unfair Trade Practices Law (§§ 17001-17100), not under the Unfair Competition Law. It is section 17021 which defines "person" for purposes of the Unfair Trade Practices Law. Since section 17021 expressly includes municipal or other public corporations within its definition of "person,"*Centr-O-Mart* has no applicability to the present case.

VII.

APPELLANTS HAVE NOT CITED A SINGLE AUTHORITY WHICH WOULD EVEN SUGGEST, LET ALONE MANDATE, A DEPARTURE FROM THE NOW ESTABLISHED RULE EXEMPTING PUBLIC ENTITIES--INCLUDING THE REGENTS--FROM LIABILITY UNDER SECTIONS 17200 AND 17500.

Appellants cite no authority contrary to the *Trinkle* line of cases, because there is none. They rely on, but misconstrue the import of, *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 940-941, a case which is factually inapposite, but which, when properly construed, actually confirms the propriety of the trial court's ruling in this case. As respondent set forth in its points and authorities in support of the summary judgment motion (Mo/Aug. 10), the factors which distinguish *Notrica* from the present case, and from the *Trinkle* line of cases, serve to confirm the general rule exempting government entities from sections 17200 and 17500. *Notrica* holds that although nominally a public entity, the State Compensation Insurance Fund ("the Fund") is subject to suit under section 17200, <u>because</u> the governmental tort immunity statutes (Gov. Code, § 810 et seq.) do not apply to the Fund. (Accord, *Maxon Industries, Inc. v. State Compensation Ins. Fund* (1993) 16 Cal.App.4th 1387, 1391; *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1514.) Instead, legislation which the Fund itself had sponsored (Ins. Code, § 11873) confers on the Fund the same status as private insurance companies, treating the Fund as a private enterprise, rather than a public entity, with respect to its legal liabilities. In finding that the Fund is subject to section 17200, *Notrica* honors the specific legislative intent embodied in Insurance Code section 11873. Quite obviously, the rationale of *Notrica* has no

bearing on other governmental entities, such as the Regents, which are expressly designated public entities for purposes of the governmental immunity statutes. (Gov. Code, § 811.2.)

Given the Fund's unique legal status (Ins. Code, § 11873), the result in *Notrica* is in no way inconsistent with the strong body of law holding that government entities, including the Regents, are not subject to section 17200. (*California Medical Assn. v. Regents of University of California*, *supra*, 79 Cal.App.4th at p. 551; *Trinkle v. California State Lottery*, *supra*, 71 Cal.App.4th at p. 1203; *Janis v. California State Lottery Com.*, *supra*, 68 Cal.App.4th at p. 831; *Community Memorial Hospital v. County of Ventura*, *supra*, 50 Cal.App.4th at pp. 210-211; *Santa Monica Rent Control Bd. v. Bluvshtein*, *supra*, 230 Cal.App.3d at p. 318.)

The trial court agreed that the linchpin of the ruling in *Notrica* "lay in specific statutes conferring private entity status on the State Compensation Insurance Fund." (CT II, 370, 375.) Appellants have wholly ignored the trial court's analysis of *Notrica*'s significance, and they have failed to offer any basis for reaching a reasonable contrary interpretation of *Notrica*. (AOB 35-36.)

Equally inapposite is appellants' reliance on 72 Op. Atty. Gen. Cal. 119 (1989) which deals with an entirely unrelated statute--the Pharmacy Law (§§ 4000-4480). The Opinion never discussed and could not "hold" anything with respect to sections 17201 and 17506. Furthermore, while the attorney general found that the Regents were included within the definition of "person" in former section 4039, that statute provided: "'"Person" includes firm, association, partnership, corporation, state governmental agency or political subdivision.'" (CT II, 128-129, emphasis added.) Given the emphasized language, there was no question as to whether the Legislature intended to include the Regents within the purview of then section 4039. Rather the issue which the attorney general addressed was

whether the Legislature had the power to regulate University pharmacies at all, given the constitutional restrictions on regulation of the University. (CT II, 129.) As is set forth in Argument VIII, *infra*, the issue in the present case is not whether the Legislature could have included the Regents within the purview of the Unfair Competition Law if it had wanted to do so, but rather that it chose not to include the Regents in the definitions of "person" in sections 17201 and 17506. (*California Medical Assn. v. Regents of University of California, supra,* 79 Cal.App.4th at p. 551.)

VIII.

APPELLANTS' RELIANCE ON THE POLICE POWER IS MISPLACED BECAUSE THE ISSUE HERE IS THE LEGISLATURE'S INTENT, NOT THE SCOPE OF ITS POWERS.

Appellants pose the following syllogism: The Regents is subject to the police power of the state; the Unfair Competition Law is an exercise of the State's police power; ergo, the Unfair Competition Law applies to the Regents. (AOB 31-34.) The fatal flaw with appellants' syllogism is that it equates legislative power with legislative intent. The fact that the Legislature may have the power to act does not mean that it has chosen to act. The cases appellants cite in support of their "police powers" argument address issues of legislative power, not legislative intent, and are thus irrelevant. The trial court properly recognized the distinction between issues of legislative power and legislative intent when it rejected appellants' "police power" argument. (CT II, 369.) Relying on the *Trinkle* line of cases, the trial court correctly determined that the Legislature chose not to extend coverage of the statute to government entities including the Regents. (CT II, 370.)

IX.

APPELLANTS' REMAINING THEORIES HAVE BEEN CONSIDERED AND REJECTED BY THE TRINKLE LINE OF CASES.

Appellants have cited no principle of statutory construction and no facts which would permit a determination that the Legislature intended to treat the Regents differently than any other public entity with respect to sections 17200 and 17500. Appellants argue that because sections 17200 and 17500 apply to corporations, and the Regents is organized as a corporation, the Regents therefore fall within the purview of the statutes. Appellants assert that the *Trinkle* line of cases is distinguishable because those cases involved "non-corporate government agencies." (AOB 37-38.) Appellants are, once again, mistaken.

Community Memorial Hospital v. County of Ventura, supra, directly addressed the question of whether the nominal designation of a governmental entity as a corporation is sufficient to bring it within the meaning of the term "corporation" in section 17201. Noting that Government Code section 23003 defines a county as "a body corporate and politic . . .," the Court stated: "[S]trictly speaking, a county is neither a person, nor a corporation, nor a municipal corporation; it is a subdivision of the state. [Citations.]" (50 Cal.App.4th at p. 209.) Therefore, the Court concluded, the corporate designation of counties in Government Code section 23003 did not bring the county within the section 17201 definition of person. (50 Cal.App.4th at p. 210.)

A similar situation exists with respect to the Regents. Though denominated a "corporation," case law characterizes the Regents as: "a branch of the state government equal and coordinate with the legislature, the judiciary and the executive" (*Ishimatsu v. Regents of University of*

California (1968) 266 Cal.App.2d 854, 864); "an institution of the state, a public corporation, a governmental agency, and a public entity" (*Regents of University of California v. Superior Court* (1970) 3 Cal.3d 529, 534); and "a constitutional department or function of the state government" (*California State Employees Assn. v. State of California* (1973) 32 Cal.App.3d 103, 109). The Regents is expressly declared to be a "public entity" for purposes of the governmental immunity statutes. (Gov. Code, § 811.2.)

"Concerns about for-profit corporations have nothing to do with nonprofit teaching hospitals." (*California Medical Assn. v. Regents of University of California, supra,* 79 Cal.App.4th at p. 550.) As with county hospitals, the constitutional designation of the Regents as a corporation is insufficient to bring the Regents within the definition of "person" in sections 17201 and 17506. (*California Medical Assn. v. Regents of University of California, supra,* 79 Cal.App.4th at p. 551; *Community Memorial Hospital v. County of Ventura, supra,* 50 Cal.App.4th at pp. 209-210.)

Appellants seek to dissect the particular activity they complain of and analyze it separately from the overall purposes of operating the Regents' hospitals. They argue that in informing patients of the identity of their surgeon, the Regents are acting in no different capacity than a private hospital. (AOB 33.) However, the *Trinkle* line of cases has consistently held that the fact that the particular act giving rise to the litigation may resemble activities engaged in by private entities is insufficient to draw a public entity within the purview of sections 17200 or 17500. *Trinkle* so held with respect to the competitive business practices of the State Lottery. (71 Cal.App.4th at pp. 1203-1204.) *Community Memorial Hospital v. County of Ventura, supra,* so held with respect to the operation of public hospitals generally, even though they accepted paying patients. (50

Cal.App.4th at p. 210.) *California Medical Assn. v. Regents, supra*, expressly so held with respect to the hospitals and medical centers operated by the Regents. (79 Cal.App.4th at p. 551, fn. 14.) What matters in each of these cases is that the essential purpose of the overall activity is furtherance of the entity's fundamental governmental responsibilities. Here the essential activity under scrutiny is the operation of the Regents' hospitals. As was established by the undisputed material facts in this case (CT II, 7-9), and recognized in *California Medical Assn. v. Regents, supra*, this is the Regents "core governmental function, its *raison d'etre*." (79 Cal.App.4th at p. 548.) The myriad individual activities undertaken in pursuit of that function cannot be analyzed piecemeal to bring them within the purview of a statutory scheme which the Legislature has not extended to government entities generally.

X.

EXTENSION OF THE SCOPE OF SECTIONS 17200 AND 17500 TO ACCOMMODATE APPELLANTS DEMANDS IS UNWARRANTED AND UNNECESSARY FOR PROTECTION OF PATIENTS' RIGHTS.

Appellants contend that this Court has the right and responsibility to protect a patient's right to have an identified surgeon perform his operation. (AOB 40.) Patients have ample rights, under either tort or contract theories, to pursue individual causes of action against the Regents or any other public entity when they are injured as a result of "ghost surgery" or any other failure to obtain informed consent--as was demonstrated by the case of Judy Sadek upon whose situation appellants have relied.

However, any such rights cannot be vindicated under an inapplicable statute. Case law has now firmly established that sections 17200 and 17500 do not apply to public entities, including the Regents. (*California Medical Assn. v. Regents of University of California*, *supra*, 79 Cal.App.4th at p. 551; *Trinkle v. California State Lottery*, *supra*, 71 Cal.App.4th at p. 1203; *Janis v. California State Lottery Com.*, *supra*, 68 Cal.App.4th at p. 831; *Community Memorial Hospital v. County of Ventura*, *supra*, 50 Cal.App.4th at pp. 210-211; *Santa Monica Rent Control Bd. v. Bluvshtein*, *supra*, 230 Cal.App.3d at p. 318.) Appellants urge this Court to ignore this consistent body of law and, in effect, to judicially legislate a form of governmental liability which the Legislature has chosen not to impose. As this Court wisely recognized in *Trinkle*, after eight years of consistent case law, it is too late in the day to embark judicially on a new and uncharted path as to the meaning of sections 17201 and 17506. Any alteration in the definition of "person" or extension of the scope of sections 17200 and 17500 must come from the Legislature. (71 Cal.App.4th at p. 1204.)

CONCLUSION

For the reasons set forth above, the judgments in both 3d Civil 34381 and 3d Civil 35554 should be affirmed.

Dated: December 19. 2000

Respectfully submitted,

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