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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COSME CAMARGO, SR., et al., Plaintiffs and Respondents, v. JOHN F. KENNEDY MEMORIAL HOSPITAL, INC., Defendant and Appellant.	G049518 (Super. Ct. No. INCR445520) O P I N I O N
COSME CAMARGO, SR., et al., Plaintiffs and Appellants, v. BRIM HOSPITALS, INC., et al., Defendants and Appellants; JOHN F. KENNEDY MEMORIAL HOSPITAL, INC., Defendant and Respondent.	G049519

Appeals from judgments and postjudgment orders of the Superior Court of Riverside County, Randall Donald White, Judge. Judgment filed April 28, 2011. Reversed and remanded with directions. Judgment filed August 25, 2011. Reversed. Postjudgment order regarding motion for a new trial. Affirmed in part and reversed in part and remanded. Postjudgment order regarding attorney fees. Affirmed.

Stephen G. Root; Boudreau Williams and Jon R. Williams for Plaintiffs and Respondents in G049518 and for Plaintiffs and Appellants in G049519.

The Arkin Law Firm and Sharon J. Arkin for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiffs and Respondents in G049518 and Plaintiffs and Appellants in G049519.

Agajanian, McFall, Weiss, Tetreault & Crist, Scott Brian McFall, Paul L. Tetreault; Greines, Martin, Stein & Richland, Timothy T. Coates and Marc J. Poster for Defendant and Appellant in G049518 and for Defendant and Respondent in G049519.

Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson; Davis, Grass, Goldstein, Housouer, Finlay & Brigham, Jeffrey W. Grass and Richard V. Zavala for Defendants and Appellants in G049519.

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INTRODUCTION

Cosme Camargo, Jr. (Camargo), died as the result of necrotizing fasciitis, more commonly known as flesh-eating bacteria, at the age of 45. His surviving family members and other dependents[1] sued two hospitals that treated Camargo—Palo Verde

[1] Plaintiffs include Camargo's father, Cosme Camargo, Sr., who sued as Camargo's successor in interest; Camargo's mother and sister, Camargo's adult and minor children, Camargo's girlfriend, and Camargo's nonrelated minor dependents.

Hospital (Palo Verde)[2] and John F. Kennedy Memorial Hospital, Inc. (JFK). After a lengthy jury trial, judgment was entered against both Palo Verde and JFK for $398,069 in economic damages, and $4,301,000 in noneconomic damages, and for an additional $1,840,000 in noneconomic damages against Palo Verde. The trial court granted Palo Verde's motions for a judgment notwithstanding the verdict and for a new trial. A separate judgment was entered vacating the original judgment against Palo Verde. JFK appeals from the original judgment; plaintiffs appeal from the second judgment in favor of Palo Verde, from the order granting Palo Verde's motion for a new trial, and from an order denying plaintiffs' motion for attorney fees. Palo Verde filed a protective cross-appeal from the original judgment.

On plaintiffs' appeal from the second judgment, we conclude the trial court erred in granting Palo Verde's motion for judgment notwithstanding the verdict and motion for a new trial on the issue of the ostensible agency of the doctor who treated Camargo at Palo Verde. Substantial evidence supported the jury's finding that the doctor was an agent of Palo Verde, and, based on the facts in the record, no reasonable trier of fact could have found he was not the hospital's ostensible agent.

The trial court also granted the motion for judgment notwithstanding the verdict. It did so on the grounds that (1) the doctor who treated Camargo at Palo Verde owed no duty to disclose to Camargo, to plaintiffs, or to the doctor at JFK whom the Palo Verde doctor convinced to admit Camargo to JFK, and (2) the lack of a finding of a relationship that would give rise to a duty to disclose on the part of the Palo Verde doctor was fatal to the fraudulent concealment claim. Substantial evidence, however, supported the jury's findings as to Camargo—to whom the Palo Verde doctor owed a fiduciary duty

[2] Brim Hospitals, Inc., is a corporation that operated Palo Verde, and was the entity actually named in the third amended complaint. Province Healthcare Company, Inc., was a parent company of Palo Verde, against which the judgment was entered. We will refer to Palo Verde, Brim, and Province collectively as Palo Verde to avoid confusion.

as a matter of law, and for whom no separate finding of a relationship creating a fiduciary duty was required. Therefore, the trial court erred in granting the motion for judgment notwithstanding the verdict.

The trial court's order granting the motion for a new trial on the issue of duty was not erroneous. A reasonable trier of fact could have found in favor of Palo Verde on the issue whether, in the absence of jury findings of fact establishing the Palo Verde doctor had a relationship with certain of Camargo's relatives or the JFK doctor sufficient to create a duty to avoid concealing information, no such duty had been proven to support a claim for fraudulent concealment. The wording of the special verdict form makes it impossible to determine whether the jury found the Palo Verde doctor concealed facts from Camargo (to whom he owed a fiduciary duty as a matter of law) or from Camargo's relatives and the JFK doctor (to whom a duty not to conceal may or may not have arisen), or both. The trial court did not err in determining a new trial on this issue was appropriate.

On JFK's appeal from the original judgment, we reverse and remand with directions to the trial court to modify the amount of noneconomic damages in conformity with MICRA[3] and Proposition 51.[4] Because all claims for which the jury found JFK liable were "based on professional negligence" (Civ. Code, § 3333.2, subd. (a)), the noneconomic damages limitations of MICRA apply. For the same reason, the liability apportionment rules of Proposition 51 apply to JFK. We reject JFK's other arguments regarding the sufficiency of the special verdict forms and alleged instructional error. As explained in detail *post*, the jury was correctly instructed on the cause of action for willful misconduct, which is an aggravated form of negligence, distinct from ordinary negligence and subject to proof of additional elements, but is not an intentional tort.

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[3] Medical Injury Compensation Reform Act of 1975 (Stats. 1975, 2d Ex. Sess. 1975-1976, ch. 1, § 1, p. 3949).

[4] Fair Responsibility Act of 1986, Civil Code section 1431 et seq.

Further, the jury's special verdicts regarding negligence and willful misconduct together establish that all the elements of willful misconduct were proven against JFK. We therefore reverse the judgment and remand the matter to the trial court to enter a judgment against JFK consistent with the provisions of MICRA and Proposition 51.

Because we conclude that the motion for a new trial was properly granted as to the cause of action against Palo Verde for fraudulent concealment, we need not address the issues raised in Palo Verde's protective cross-appeal.

Finally, plaintiffs appeal from a postjudgment order denying their motion for an award of attorney fees. The trial court did not err in denying the motion because the factual findings necessary to award plaintiffs their attorney fees under Health and Safety Code section 1317.6, subdivision (j) were not made by the jury. We affirm that order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On the morning of August 10, 2004, Camargo presented at the Palo Verde emergency room, complaining of pain and swelling in his left arm. A surgeon on staff at Palo Verde, Dr. Anjani Thakur, diagnosed Camargo with compartment syndrome, which is a blood flow blockage, and operated on his arm to restore his circulation and cut away some tissue. Camargo's personal physician examined Camargo after the operation, and agreed with Dr. Thakur's diagnosis. Camargo remained at Palo Verde overnight.

On August 11, blood tests showed Camargo's white blood cell count was high and rising. Another physician on staff at Palo Verde, Dr. Hossain Sahlolbei, diagnosed Camargo with necrotizing fasciitis. The only treatment for necrotizing fasciitis is surgical removal of all necrotic tissue. It was decided that this treatment could not be provided at Palo Verde because the hospital lacked the necessary equipment, facilities, and specialists, and the nurse anesthetist on staff said he could not intubate Camargo.

Dr. Thakur tried to convince Dr. Ricardo Cacdac, a surgeon at JFK, to admit Camargo; Dr. Cacdac refused because he did not believe JFK could handle a patient with necrotizing fasciitis. Dr. Thakur then convinced Dr. Quy Vinh, an internist at JFK, to admit Camargo; Dr. Thakur did not disclose to Dr. Vinh that Dr. Cacdac had already declined to admit Camargo, or that Camargo was suffering from necrotizing fasciitis.

Camargo was transported by ambulance from Palo Verde to JFK during the evening of August 11, 2004. An emergency room nurse at JFK prioritized Camargo's condition as urgent, and an emergency room doctor, Dr. Donald Fink, examined Camargo and dressed his surgical wound. Although the necrotizing fasciitis diagnosis was noted on several medical reports that were transferred to JFK with Camargo, the diagnosis was not noted in the JFK emergency room documents. Camargo was transferred to a hospital ward, then to JFK's intensive care unit, but the correct diagnosis was still not reported on Camargo's medical chart at JFK. Dr. Fink consulted with the orthopedic surgeon on call, and both agreed that JFK could not provide the care Camargo needed.

Dr. Vinh, who had admitted Camargo to JFK, conferred with another orthopedic surgeon, Dr. Jon McLennan, who concluded that Camargo needed to be at a tertiary facility, meaning one offering a higher level of care and equipment than was available at JFK. Drs. Fink, Vinh, Cacdac, and McLennan all agreed that the risks of keeping Camargo at JFK outweighed the risks of transporting him to a hospital in San Diego that could provide a higher level of care.

Dr. Vinh arranged for Camargo to be transported to the University of California, San Diego Medical Center. The air transportation ordered by Dr. Vinh could not be used because of bad weather. An ambulance operated by a private ambulance company—American Medical Response (AMR)—arrived at JFK at 5:00 a.m. on August 12, 2004. Camargo was accompanied in the ambulance by JFK intensive care nurse Linda Minnis, and AMR paramedic Freddy Miller.

The ambulance left JFK about 5:30 a.m. on August 12. During the transport, Camargo's condition continued to deteriorate. Miller could not keep a tube inserted in Camargo's airway, and instead used a manual airbag to keep Camargo oxygenated. When Camargo struggled to breathe, Minnis and Miller used restraints and sedated Camargo in an attempt to assist his breathing. Miller and Minnis weighed the possibility of stopping at a hospital along the way in order to stabilize Camargo, but decided the best course of action was to get him to a facility equipped to treat him as soon as possible.

Rather than the University of California, San Diego Medical Center, the AMR ambulance transported Camargo to Scripps Mercy Hospital, which is also in San Diego; the ambulance arrived at Scripps about 7:55 a.m. In the emergency room, Camargo was intubated. At the time, Camargo was determined to be experiencing multisystem organ failure and suffering from sepsis, with an extremely poor prognosis. Dr. Dennis Mayer, a Scripps surgeon, decided surgery to remove the necrotic tissue was required on an emergency basis. Despite the surgery, Camargo's condition continued to decline as the day wore on. Dr. Mayer advised members of Camargo's family the situation was hopeless, but they asked that further efforts be made. Camargo was taken to surgery again on August 13, but he died in the operating room.

Plaintiffs filed a complaint on August 12, 2005. The third amended complaint, which was the operative complaint at the time of trial, alleged the following causes of action against JFK and/or Palo Verde: negligence, willful misconduct, constructive fraud, actual fraud by misrepresentation and/or concealment, intentional infliction of emotional distress, and abuse of a dependent adult.[5] After a 34-day trial, a jury returned 15 separate special verdict forms. The trial court received an advisory opinion from a private referee as to the appropriate form of the judgment.

[5] Other defendants were dismissed or settled with plaintiffs.

Based on the jury's special verdicts, the trial court entered judgment as follows:

1. Plaintiffs Anthony Camargo, Mariah Camargo, Bianca Camargo, Daniel Camargo, Christian McDaniel, and Joseph Camargo, all by and through their guardian ad litem, and Michael Ragan, Kasie Camargo, Nigel Camargo, and Caesar Camargo (all of whom were Camargo's children or minor dependents) were collectively awarded $398,069 in economic damages, and $4,301,000 in noneconomic damages from Palo Verde and JFK, jointly and severally.

2. Plaintiffs Elizabeth Webb (Camargo's girlfriend), Stella Camargo Styers (Camargo's sister), Esther Camargo (Camargo's mother), and Cosme Camargo, Sr. (Camargo's father), were each awarded $460,000 in noneconomic damages from Palo Verde.

3. Camargo's estate was awarded nothing.

4. Palo Verde was entitled to a credit against plaintiffs' $475,000 settlement with Dr. Thakur.

5. JFK was entitled to a credit against plaintiffs' $29,999 settlement with Dr. Vinh.

6. Postjudgment interest was awarded from the date of the jury's special verdicts.

7. Plaintiffs (except Camargo's estate) were awarded their costs of suit.

8. The trial court reserved the issue of plaintiffs' right to recover attorney fees from JFK, pursuant to Health and Safety Code section 1317.6, subdivision (j). JFK timely appealed from the judgment.

Palo Verde filed a motion for judgment notwithstanding the verdict and a motion for a new trial. After briefing and argument, the trial court granted both motions. The court then entered a judgment vacating the previous judgment as to Palo Verde, and ordering that plaintiffs should take nothing from Palo Verde.

Plaintiffs filed a motion for attorney fees, pursuant to Health and Safety Code section 1317.6, subdivision (j). The trial court denied the motion, finding: "There were no specific jury findings and the evidence does not show that the jury necessarily concluded that JFK violated Health & Safety Code section 1317."

Plaintiffs timely filed a notice of appeal from the order granting the motion for a new trial, the judgment vacating the judgment against Palo Verde, and the postjudgment order denying the motion for attorney fees. Palo Verde filed a protective cross-appeal from the original judgment.

DISCUSSION

I.

PLAINTIFFS' APPEAL

A.

Did the trial court err in concluding Dr. Thakur was not Palo Verde's agent?

The first two issues raised by plaintiffs' appeal involve the trial court's ruling on Palo Verde's motion for judgment notwithstanding the verdict and motion for a new trial. "In passing upon the propriety of a judgment notwithstanding the verdict, appellate courts view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.)

We review the trial court's order granting a new trial for abuse of discretion. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 194.) We may not reverse the order "'unless the opposing party demonstrates that no

reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.]" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)[6]

In one of the special verdicts, the jury found that Dr. Thakur was an agent of Palo Verde. The court, however, found that there was no evidence in the record to support such a finding, based on the conditions of admission form signed by Esther Camargo (Esther) when Camargo was admitted to Palo Verde.

Palo Verde offered in evidence Camargo's conditions of admission form, which reads in relevant part as follows: "Physician[s] are independent contractors [¶] All Physician[s] and surgeons furnishing services to the patient, including the radiologist, pathologist, anesthesiologist and the like, are independent contractors and are <u>not</u> employees or agents of the hospital." (Some capitalization omitted.) Esther signed the conditions of admission form, on the line under the following paragraph: "The undersigned certifies th[at] he/she has read the foregoing, received a copy thereof, and is the patient, the patient's legal representative, or is duly authorized by the patient as the patient's general agent to execute the above and accept its terms."

Ostensible agency between a hospital and a doctor practicing at that hospital can be established by proof of "(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff." (*Mejia v. Community Hospital of San*

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[6] Code of Civil Procedure section 629 permits the trial court to grant both a motion for judgment notwithstanding the verdict and a motion for a new trial: "If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed." The trial court's order granting the motion for a new trial did not specify the grounds on which it was granted, or the reasons for granting the motion, other than to say: "Having considered the submitted matter the Court rules as follows: [¶] Motion for New Trial Granted[.] [¶] Due to the Court's ruling on the Motion for Judgment Non-Obstante Verdicto. Pursuant to CCP 657 (c)."

Bernardino (2002) 99 Cal.App.4th 1448, 1457 (*Mejia*).) In *Mejia*, the court held that, "absent evidence that plaintiff should have known that the radiologist was not an agent of respondent hospital, plaintiff has alleged sufficient evidence to get to the jury merely by claiming that she sought treatment at the hospital." (*Id.* at p. 1460.)

Palo Verde contends this case differs from *Mejia* because there was evidence that Camargo should have known Dr. Thakur was not its agent—namely, the conditions of admission form. The problem with this argument is Camargo did not sign that form; only Esther did. Palo Verde does not point to any evidence that Esther was Camargo's legal representative or was authorized to act as Camargo's agent in signing the form. The fact Camargo and Esther had a familial relationship is insufficient, without more, to establish Esther was Camargo's agent. (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 589-590 ["there is no statutory authorization for a person to agree to arbitration based solely on a familial relationship with the patient"]; *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301 [mentally incompetent mother, who had not signed durable power of attorney in favor of her children, could not be bound to arbitrate claims against nursing home, based on her children's signing arbitration agreement on her behalf].)

Esther testified that when Camargo arrived at the Palo Verde emergency room, he was able to talk to the nurses, and "[h]e had to stop there at the little desk to check in medical cards and all that kind of stuff and information." Esther's testimony regarding the conditions of admission form was as follows:

"Q. [By plaintiffs' counsel:] Okay. When you took your son to the hospital on the morning of August 10th, there was some paperwork required to be signed; right?

"A. Right.

"Q. Okay. You signed some of that paperwork?

"A. I believe I signed one sheet.

"Q. Do you remember what it was?

"A. Just that they were admitting him into the hospital.

"Q. Okay. Did you read that form?

"A. No, not really. [¶] . . . [¶]

"Q. . . . Were you aware of the contents of the form that you signed?

"A. No, I wasn't.

"Q. Now, did anyone at the hospital give you any information that if something went wrong with the care, there were mistakes made, that the hospital could not be held accountable?

"A. No, ma'am.

"Q. Did anyone at the hospital give you any information that the doctors and other personnel at the hospital treating your son were not agents or employees of the hospital?

"A. No, ma'am. They just handed me the paper and told me to sign.

"Q. Okay. With respect to your own subjective understanding at that time, what did you believe was the relationship of the doctors to the hospital?

"A. The doctor was there to care for the patient and go to the emergency, and that's what you expect doctors in the hospital to take care of—the patient."

Esther testified as follows on cross-examination by Palo Verde's trial counsel:

"Q. Now, you told us when you got to the hospital, you were given some papers to sign?

"A. Yes.

"Q. And going to the hospital with your son on August 10, 2004, that was an important event for you?

"A. It was a big event.

"Q. You were seeking medical care for your son?

“A. That’s correct.

“Q. So the documents that the hospital gave you, those would be important documents?

“A. Admitting him.

“Q. Okay. Now, I want to show you, and I don’t believe this has been previously marked, Your Honor, but we have it marked 00307. We can mark it as the court’s next in order.

“The Court: That will be 96.

“The clerk: Correct.

“The Court: What’s it called?

“[Palo Verde’s counsel]: This is the—there’s no title on it, but it appears to be a conditions of admissions form from Palo Verde Hospital.

“The Court: All right.

“Q. By [Palo Verde’s counsel]: Now, ma’am, can you tell us right here if that’s your name?

“A. That’s my name.

“Q. All right. Is that your signature?

“A. Yes, it is.

“Q. Okay. So you signed this document?

“A. Yes, I did.

“Q. And it was your custom and practice to read all the important documents before signing them; isn’t that right?

“A. You said in my place of business?

“Q. It was your custom and practice to read all important documents before you signed them?

“A. Well, generally, yeah.

"Q. And up here at the top of this document there's a paragraph. Do you see that first paragraph?

"A. Yes, I do.

"Q. Okay. Then in capital letters it says, 'Physicians are independent contractors.' [¶] Right under that, 'All physicians, surgeons furnishing services to the patient, including the radiologist, anesthesiologist, and the like are independent contractors and are not employees or agents of the hospital. Some of these physicians will bill separately for their services.' Do you see that?

"A. Yes, I see it now." (Some capitalization omitted.)

No evidence was admitted, other than the conditions of admission form itself, that would cause a reasonable person to know that Dr. Thakur was *not* an agent of Palo Verde.

Additionally, trial exhibit No. 96 is only one page of what might be a multiple-page document. Further, there is a line under the "Physician[s] are Independent Contractors" (some capitalization omitted) paragraph, which calls for the patient to initial the paragraph. In this case, that paragraph was not initialed by Camargo or Esther.

Camargo did not sign the conditions of admission form or initial the specific paragraph acknowledging the lack of an agency relationship between Palo Verde and Dr. Thakur. Esther did not initial the paragraph regarding the lack of an agency relationship. Camargo, the patient, was an adult and was able to speak for himself at the time Esther signed the form. There is no evidence that Camargo authorized Esther to act on his behalf in signing the form, or that Esther was Camargo's agent as a matter of law. The trial court erred in granting the motion for judgment notwithstanding the verdict on this issue. Further, based on the evidence in the record, no reasonable trier of fact could have found Camargo had, or should have had, knowledge that Palo Verde disclaimed Dr. Thakur as its ostensible agent. Therefore, the trial court abused its discretion in granting the motion for a new trial on this ground as well.

B.

Did the trial court err in concluding Dr. Thakur owed no duty to Camargo, to plaintiffs, or to Dr. Vinh to avoid concealing information relating to Camargo's condition and treatment?

Palo Verde moved for judgment notwithstanding the verdict and for a new trial, on the ground that the jury's special verdict on the claim for fraudulent concealment against Palo Verde lacked a finding of duty. Although the jury instructions told the jury that plaintiffs were required to prove Palo Verde had a duty to disclose medical information about Camargo in order to establish a fraudulent concealment claim, the special verdict form did not ask the jury to find facts establishing such a duty existed, or that Dr. Thakur had a relationship with the relevant persons giving rise to such a duty. In the special verdict form, the jury found (1) Dr. Thakur intentionally failed to disclose an important fact that plaintiffs, Camargo, or Dr. Vinh did not know and could not reasonably have discovered; (2) Dr. Thakur intended to deceive plaintiffs, Camargo, or Dr. Vinh by concealing the fact; (3) Camargo, plaintiffs, or Dr. Vinh relied on Dr. Thakur's deception, and that reliance was reasonable under the circumstances; and (4) Dr. Thakur's concealment was a substantial factor in causing harm to plaintiffs.

In granting the motion for judgment notwithstanding the verdict, the trial court found: "The jury did not make a finding that a duty to disclose existed. Plaintiffs' concealment claims are based upon Dr. Thakur's failure to disclose to them and to another doctor that Cosme Camargo appeared to be suffering from necrotizing fa[sc]iitis. Plaintiffs claim that they would have sought better or different treatment for Cosme if they had known that he was possibly suffering necrotizing fa[sc]iitis. The existence of a duty is [a] matter for the court to decide. However to establish their claim for active concealment Plaintiffs were required to prove the existence of a relationship between them and Dr. Thakur that imposed upon Dr. Thakur a duty to disclose. See CACI. 1901. Plaintiffs in fact admitted such. . . . No such finding was made by the jury. There was no

fiduciary relationship between Dr. Thakur and the Plaintiff[s] herein. The existence of such a relationship is critical where the concealment theory is based upon harm suffered by Cosme Camargo[,] the patient[,] not Plaintiffs as a result of the alleged concealment by Dr. Thakur[,] Cosme Camargo's doctor[,] to Plaintiffs[,] relatives of Cosme Camargo[,] who were purportedly acting on his behalf."

In considering the evidence in the light most favorable to plaintiffs, we conclude the trial court erred by granting the motion for judgment notwithstanding the verdict on the cause of action for fraudulent concealment against Palo Verde. The special verdict form did not ask the jury to make findings of fact as a predicate for establishing Palo Verde owed a duty to plaintiffs. The existence of a duty was a matter for the court, not the jury, to decide.

With respect to Camargo, the jury was not required to make a finding of a relationship creating a duty to disclose in order for the court to find a duty existed. Dr. Thakur owed a fiduciary duty to Camargo as a matter of law. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748 ["The doctor-patient relationship is a fiduciary one and as a consequence of the physician's 'fiducial' obligations, the physician is prohibited from misrepresenting the nature of the patient's medical condition."].) The jury's findings on the special verdict form clearly established all the necessary elements of the fraudulent concealment claim as to the concealment of important medical facts from Camargo, and the trial court erred in entering judgment notwithstanding the verdict on the claim of fraudulent concealment against Palo Verde to the extent it related to Camargo.[7]

As to Camargo's family members and Dr. Vinh, the evidence was in conflict as to whether a relationship existed between those individuals and Dr. Thakur,

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[7] The judgment awarded no damages to Camargo's estate. Nonetheless, the issue of a duty owed to Camargo with respect to the fraudulent concealment claim is relevant to our analysis. Assuming Dr. Thakur fraudulently concealed important medical information from Camargo, that concealment could have caused damage to foreseeable plaintiffs, including but not necessarily limited to Camargo's dependents.

from which a duty not to conceal an important fact could arise. Specifically, Esther testified that on the evening of August 10, 2004, Dr. Thakur told her: "Surgery went well. He'll be going home in the morning." Defendant's girlfriend testified that on the afternoon of August 10, Dr. Thakur told her that Camargo "was going to be okay," and would be going home from the hospital on the following day.[8] Dr. Vinh testified Dr. Thakur told him Camargo had an infection in his arm and required surgery that could be performed by any general surgeon, while failing to disclose Camargo had necrotizing fasciitis, and required immediate, emergency surgery. Some evidence reflects that at the time Dr. Thakur was making reassuring statements to Camargo's family members and minimizing Camargo's condition to Dr. Vinh, he was aware that Camargo, in fact, was suffering from necrotizing fasciitis, which would lead to Camargo's death if not properly treated. Yet, for his part, Dr. Thakur testified he did not know for sure that Camargo had necrotizing fasciitis, and believed Camargo needed to have surgery at JFK before any diagnosis could be made. Dr. Thakur also denied misrepresenting Camargo's condition to anyone while Camargo was still at Palo Verde.

The factual predicate of a relationship creating a duty upon Dr. Thakur to disclose important information to persons other than Camargo was necessary to establish

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[8] We reject Palo Verde's argument that California's privacy law prevented Dr. Thakur from disclosing the nature of Camargo's medical condition to his mother or girlfriend. When Camargo was treated at Palo Verde in 2004, Civil Code former section 56.16 provided: "Unless there is a specific written request by the patient to the contrary, nothing in this part shall be construed to prevent a provider, upon an inquiry concerning a specific patient, from releasing at its discretion any of the following information: the patient's name, address, age, and sex; a general description of the reason for treatment (whether an injury, a burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in subdivision (c) of Section 56.05." Former section 56.16 "represents a pragmatic solution to the problem faced by health care providers surrounded by concerned friends and family of a patient." (*Garrett v. Young* (2003) 109 Cal.App.4th 1393, 1407.) To have advised Camargo's family members that his condition was grave and required specific treatment to avoid fatality would not have violated former section 56.16.

a claim for fraudulent concealment. Those necessary facts had to be found by a jury. (Judicial Council of Cal. Civ. Jury Instns. (2012) Directions for Use for CACI No. 1901, p. 1127 ["if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed"]; see *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337 ["Each of the [nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise."].)

Case law uniformly supports the CACI No. 1901 instruction. By way of example, a defendant may have a duty to disclose, even in the absence of a fiduciary relationship with the plaintiff, when the defendant has knowledge of material facts that are not accessible to the plaintiff, such as when a real estate broker fails to disclose material information about a property to a potential buyer. (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151.) In contrast, when the allegedly concealed information was available to the plaintiff in written material provided to the plaintiff, but which he or she could not remember receiving, no duty to disclose arises. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482.) Additionally, when a defendant makes certain representations of fact, but fails to disclose additional facts that contradict or qualify the facts represented, a duty to disclose may arise. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 665-666 [corporation made payments to Star Trek creator's ex-wife, but did not inform her she was receiving one-third of profit participation payments instead of the one-half to which she was entitled]; *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613-614 [oral agreements that termination of employment would be for good cause only were superseded by written agreements containing termination of employment without cause provision; corporation did not tell independent sales representatives at the time it induced them to sign written agreements that it planned to

terminate their employment; fraudulent concealment claim survives summary judgment].)

Turning to the motion for a new trial, the issue is whether a reasonable trier of fact could have found for Palo Verde on the theory that Dr. Thakur did not have a duty to disclose important medical information to Camargo, plaintiffs, and Dr. Vinh. As explained *ante*, the jury was not asked to, and did not, make findings that would have established any of the specified persons had a relationship with Dr. Thakur, which would give rise to a duty to disclose important information regarding Camargo's medical condition. Lacking those factual predicates, the trial court could properly have found Dr. Thakur did not have a duty to disclose, but only as to Camargo's family members and Dr. Vinh; as explained *ante*, Dr. Thakur had a fiduciary duty to Camargo as a result of their doctor-patient relationship, and a separate factual finding of a relationship giving rise to a fiduciary duty was unnecessary. The wording of the special verdict form, however, makes it impossible to separate the failure to disclose material facts to Camargo from the failure to disclose material facts to Camargo's family or Dr. Vinh.[9] The trial court did not abuse its discretion in granting the motion for a new trial on the cause of action for fraudulent concealment against Palo Verde.

C.

Did the trial court err in denying the motion for attorney fees?

Plaintiffs argue that the trial court erred by denying their motion for attorney fees, pursuant to Health and Safety Code section 1317.6, subdivision (j), which provides, in relevant part: "Any person who suffers personal harm . . . as a result of a violation of this article or the regulations adopted hereunder may recover, in a civil action

[9] In relevant part, the special verdict form reads: "Did Anjani Thakur, M.D. . . . intentionally fail to disclose an important fact that Plaintiffs and/or Cosme Camargo, Jr. . . . and/or Quy Vinh, M.D. did not know and could not reasonably have discovered?"

against the transferring or receiving hospital, damages, reasonable attorney's fees, and other appropriate relief." Plaintiffs further argue that the portion of the article violated by JFK was the following: "Emergency services and care shall be provided to any person requesting the services or care, or for whom services or care is requested, for any condition in which the person is in danger of loss of life, or serious injury or illness, at any health facility licensed under this chapter that maintains and operates an emergency department to provide emergency services to the public when the health facility has appropriate facilities and qualified personnel available to provide the services or care." (Health & Saf. Code, § 1317, subd. (a).)

However, the issue of violation of Health and Safety Code section 1317 was never submitted to the jury. After the jury's verdicts were read, but before they were entered and the jury was released, plaintiffs' counsel admitted this error:

"The Court: What was the next issue you were talking about?

"[Plaintiffs' counsel]: Health and Safety Code 1317.2. They were not asked, they were not asked whether these code sections were violated, either one of them. That was on my original submission. Somehow it got deleted. We broke it up in separate verdict forms. [¶] And it is a very important question because there are attorneys' fees riding on it." (Some capitalization omitted.)

On appeal, plaintiffs contend that even without a finding by the jury that JFK violated Health and Safety Code section 1317, the jury's findings on other matters were sufficient to award attorney fees under Health and Safety Code section 1317.6, subdivision (j). We disagree. Plaintiffs rely on the jury's findings that (1) an "agent or employee of JFK Memorial Hospital [was] negligent in the diagnosis and treatment of Cosme Camargo, Jr.," and (2) Minnis knew or should have known of the peril to Camargo during the ambulance ride to San Diego and that injury to Camargo was the probable result of that peril, and Minnis consciously failed to avoid the peril. These

findings do not address the specific situation section 1317, subdivision (a) was designed to penalize.

The trial court did not abuse its discretion in denying the motion for an award of attorney fees.

II.

JFK'S APPEAL

A.

The tort of willful misconduct

Several of JFK's issues on appeal involve the jury's finding of liability on the cause of action for willful misconduct. We therefore begin our analysis of JFK's appeal by considering whether willful misconduct is an intentional tort.

Willful misconduct is not a separate tort, but rather """'an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care.'""" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) To establish willful misconduct, a plaintiff must prove the basic elements of a negligence cause of action—duty, breach of duty, causation, and damage—as well as the following additional elements that raise the negligent actor's acts or omissions above a basic want of ordinary care: """(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. [Citations.]"' [Citation.]" (*Id.* at p. 528.)

We conclude that willful misconduct is not an intentional tort, but rather, as the cases have held, an aggravated form of negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753-754 & fn. 4 [distinguishing ordinary negligence, gross negligence, and "'wanton' or 'reckless' misconduct (or '"willful and wanton negligence"')"]; *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 270; *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 360; *Bains v. Western Pacific R.R. Co.* (1976) 56 Cal.App.3d 902, 905; *Snider v. Whitson*

(1960) 184 Cal.App.2d 211, 214-215; *Helme v. Great Western Milling Co.* (1919) 43 Cal.App. 416, 421; *Karimi v. Wells Fargo* (C.D.Cal., May 4, 2011, No. CV 11-00461-RGK (OPx)) 2011 U.S.Dist. Lexis 47902, p. *6.)

Our conclusion is not inconsistent with *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729 (*Calvillo-Silva*), in which the Supreme Court explained that "willful or wanton misconduct is separate and distinct from negligence." The court was not asked to, and did not, reach any conclusion about whether willful misconduct is more akin to negligence or an intentional tort. Nor did the court analyze the applicability of MICRA, the propriety of jury instructions, or the completeness of special verdict findings, as we are called on to do in this case. The statute the court was interpreting in *Calvillo-Silva* was Civil Code section 847, which provides immunity for property owners when an individual is injured on the property while the individual is in the process of committing certain specified felonies. In that case, the plaintiff participated in robbing the defendants' grocery store, and might have held a knife to an employee's throat. (*Calvillo-Silva*, *supra*, at p. 720.) As the robbers left the store, another employee grabbed a gun from under the counter and shot at the plaintiff. (*Ibid.*) The plaintiff was rendered a paraplegic. (*Id.* at p. 718.) The plaintiff pleaded no contest to one count of felony attempted grand theft. (*Id.* at p. 719.)

The court in *Calvillo-Silva*, *supra*, 19 Cal.4th 714, considered whether the provision in Civil Code section 847, subdivision (f), that the statute "does not limit the liability of an owner or an owner's agent which otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" prevented the grocery store owners and employees from claiming immunity under the statute. Ultimately, the court concluded that the trial court could not grant summary judgment in favor of the defendants because "[o]n this record, we cannot say, *as a matter of law*, that the force used by defendants '"reasonably appear[ed] necessary, in view of all the circumstances of the case, to prevent [an]

impending injury.'" [Citation.]" (*Calvillo-Silva*, *supra*, at p. 737, fn. omitted.) Our holding is not inconsistent with the holding in *Calvillo-Silva*. Willful misconduct can be "separate and distinct from negligence" (*id.* at p. 729), due to the additional elements of the cause of action, without rising to the level of an intentional tort.

We also find *Pelletti v. Membrila* (1965) 234 Cal.App.2d 606 distinguishable. The court in that case held: "If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it wilful misconduct, and apply to it the consequences and legal rules which we use in the field of intended torts." (*Id.* at p. 611.) That case, however, was decided in the pre-comparative-fault era; the court identified the issue before it as follows: "In a suit for wrongful death should the issue of wilful misconduct of defendant in the operation of his motor vehicle have been submitted to the jury in order to permit plaintiffs to counter the defense of contributory negligence?" (*Id.* at p. 609, italics omitted.) At the time of the accident, the defendant was intoxicated, grossly inattentive, and driving at an excessive speed (given the time, place, and his own condition); he fled the scene after the accident. (*Id.* at pp. 611-612.) The victim, however, was jaywalking at the time he was struck by the defendant's vehicle (*id.* at p. 608), and his contributory negligence would have provided a complete defense to the defendant. Like *Calvillo-Silva*, the *Pelletti v. Membrila* case distinguishes willful misconduct from negligence, but does not hold that it is an intentional tort for all purposes. With the foregoing in mind, we turn to JFK's arguments on appeal.

B.

MICRA

JFK argues that the trial court erred by failing to apply the limits of MICRA to plaintiffs' noneconomic damages. As relevant to this case, MICRA provides: "(a) In

any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. [¶] (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000). [¶] (c) For the purposes of this section: [¶] . . . [¶] (2) 'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Civ. Code, § 3333.2.)

"[W]hen a cause of action is asserted against a health care provider on a legal theory other than medical malpractice, the courts must determine whether it is nevertheless based on the 'professional negligence' of the health care provider so as to trigger MICRA." (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514.)

In *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 661, the appellate court concluded MICRA's cap on noneconomic damages did not apply to a battery cause of action. In that case, the defendant doctor performed a breast augmentation surgery on the plaintiff, to which she had not consented. (*Id.* at pp. 661-662.) The appellate court relied on MICRA's legislative history in reaching its conclusion. "MICRA was our Legislature's response to this [medical malpractice] crisis. As adopted in 1975, the idea was to reduce malpractice judgments in order to reduce insurance rates, thereby ensuring available and affordable health care. To those ends, several substantial changes were made in the law governing medical malpractice actions. The period of limitations during which a medical malpractice action could be brought was limited. [Citation.] The collateral source rule was abolished. [Citation.] Periodic payments of future damages were allowed without the plaintiff's consent. [Citation.] Contingency fee arrangements

were regulated. [Citation.] Arbitration clauses in medical services contracts were authorized. [Citation.] And, 'perhaps most significantly,' a $ 250,000 cap was placed on noneconomic losses by the enactment of [Civil Code] section 3333.2. [Citations.] [¶] The cap on noneconomic damages is an integral part of MICRA. In medical malpractice litigation, noneconomic damages typically account for a large part of a total damage award and, therefore, a large part of the insurance carriers' expense. Accordingly, the Legislature adopted section 3333.2 'to calm insurance companies and assure them that they would not have to face huge pain and suffering payments[,] . . . to induce insurance companies to reduce their premiums[, and] to prevent plaintiffs and their lawyers from inflating damage awards.' [Citations.] As one commentator has summed it up, 'the Legislature's intended goal was to bring down premiums so that doctors could continue to practice medicine in California, and charge reasonable prices.' [Citation.] [¶] . . . [¶] But there is nothing in the legislative history generally, or with regard to section 3333.2 specifically, to suggest that the Legislature intended to extend the $250,000 limitation to intentional torts. . . . [¶] If section 3333.2 is in fact the most significant limitation created by MICRA, it is also one of the most Draconian. When as a matter of legislative fiat the courts are required to reduce awards of noneconomic damages to $250,000 without regard to the result of a health care provider's negligence—notwithstanding brain damage, paralysis, and other equally devastating injury—the scope of that fiat must be limited to its terms. By its plain language, the cap imposed by section 3333.2 applies only in actions 'based on professional negligence,' not (like Code of Civil Procedure section 425.13) to actions for 'damages arising out of professional negligence.' Whatever argument there may be to support a broad construction of 'arising out of,' we do not think it applies to a statute in which those words were not used. [Citations.] As [the plaintiff] points out, there is nothing in the legislative history of MICRA or section 3333.2 to suggest the Legislature intended to exempt intentional wrongdoers from

liability by treating such conduct as though it had been nothing more than mere negligence." (*Perry v. Smith*, *supra*, at pp. 667-669, fn. omitted.)

The court in *Perry v. Smith* was quick to note, however, that its holding was limited to the specific facts presented by the case: "Although we sometimes refer to 'intentional torts' generally (the common shorthand phrase adopted by the literature and the cases discussing MICRA), we emphasize that our holding is limited to the type of battery that occurred in this case." (*Perry v. Smith*, *supra*, 88 Cal.App.4th at p. 668, fn. 4.)

None of plaintiffs' claims in this case was denominated "professional negligence" or "medical malpractice." But neither does the present case involve a "classic" intentional tort, like battery, that is well "beyond the scope of professional negligence." (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 977-978 [criminal conviction for felony elder abuse removes later civil case from scope of MICRA].)

As explained *ante*, willful misconduct is an aggravated form of negligence. Although it is aggravated, it does not rise to the level of an intentional tort. Minnis's acts or omissions occurred "in the rendering of professional services" and were a proximate cause of plaintiffs' damages. (Civ. Code, § 3333.2, subd. (c)(2).)

JFK was also found liable for committing adult dependent neglect. Welfare and Institutions Code section 15657, subdivision (b) addresses the limitations on damages for claims of adult dependent neglect: "Where it is proven by clear and convincing evidence that a defendant is liable for . . . neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law: [¶] . . . [¶] (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, *the*

damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code." (Italics added.)

Therefore, the trial court erred in failing to apply the provisions of Civil Code section 3333.2 to plaintiffs' noneconomic damages against JFK. We do not, in this opinion, address whether any noneconomic damages awarded against Palo Verde in a retrial of the claim for fraudulent concealment would be subject to the limitations of MICRA.

C.

Proposition 51

JFK argues that it is entitled to an apportionment of liability for the noneconomic damages awarded to plaintiffs. The jury awarded plaintiffs a total of $4,301,000 in noneconomic damages against JFK. The jury also awarded 70 percent of the responsibility for plaintiffs' damages to individuals affiliated with JFK.[10]

Proposition 51 provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." (Civ. Code, § 1431.2, subd. (a).) However, a defendant who commits an intentional tort against a plaintiff is not entitled, under Proposition 51, to a reduction in the judgment because the plaintiff's injuries also resulted from the negligence of a third party. (*Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105, 1111.) As explained *ante*, the causes of action for which JFK was found liable were not intentional torts, and

[10] The jury found Dr. Fink responsible for 10 percent of the damages, Dr. Vinh responsible for 32.5 percent, and Minnis responsible for 27.5 percent.

apportionment under Proposition 51 was therefore required. On remand, the trial court shall modify the award of noneconomic damages against JFK as appropriate.

D.

Setoff for Dr. Thakur's settlement

Before trial, plaintiffs settled with Dr. Thakur for $475,000, and with Dr. Vinh for $29,999. The trial court gave JFK a setoff of $29,999. JFK contends that it was entitled to a setoff of $504,999. Plaintiffs do not dispute that JFK was entitled to a setoff of the full amount of both settlements.

"Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater." (Code Civ. Proc., § 877, subd. (a).) On remand, the trial court shall grant JFK a credit or setoff in the total amount of $504,999.

E.

Sufficiency of the special verdict forms

JFK argues that the special verdict forms were insufficient to support the judgment against it. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) We review the correctness of a special verdict form de novo. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th

1083, 1092; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) """The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . .''" [Citations.] [¶] A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue. [Citations.]" (*Saxena v. Goffney*, *supra*, at p. 325.) "A court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency [in a hopelessly ambiguous verdict] is between two questions in a special verdict. [Citation.] 'Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.' [Citations.] . . . [¶] If a verdict is not 'hopelessly ambiguous,' the court may '"interpret the verdict from its language considered in connection with the pleadings, evidence and instructions."' [Citations.]" (*Zagami, Inc. v. James A. Crone, Inc.*, *supra*, at p. 1092.)

JFK identifies 11 issues that it claims are essential questions left unanswered by the special verdict forms. What JFK fails to do, however, is to provide any legal authority as to why any of those questions was a controverted issue, or any factual basis for claiming those issues were not fully resolved.

JFK contends the special verdict forms failed to explain what conduct formed the basis for the jury's attribution of certain percentages of responsibility to Drs. Fink and Vinh;[11] whether the conduct of Drs. Fink and Vinh was negligence, or

[11] In one of the special verdict forms, the jury was asked to determine the percentage of responsibility of certain individuals or entities for plaintiffs' damages. The jury made the following findings: "David Conejo 0% [¶] Anjani Thakur, M.D. 10% [¶] Donald Fink, M.D. 10% [¶] Quy Vinh, M.D. 32.5% [¶] Nancy Montigny, R.N. 0% [¶] Linda Minnis, R.N. 27.5% [¶] American Medical Response (AMR) 20%."

something else; and whether the conduct of Drs. Fink and Vinh was within the scope of their agency with JFK. We cannot determine that any of those was a controverted issue.

JFK also contends the special verdict forms failed to address whose conduct was the basis for the jury's finding that JFK was negligent in Camargo's diagnosis and treatment. Again, JFK fails to offer any authority as to or analysis of why that is a controverted issue. Even if it were, the jury clearly found that Minnis committed willful misconduct, which is an aggravated form of negligence. If Minnis committed willful misconduct, she necessarily also committed negligence.[12] Therefore, at a minimum, the jury's special verdict forms found that Minnis's conduct was the basis for the negligence finding against JFK. (JFK does not dispute that Minnis was its employee and agent for purposes of this analysis.)

JFK further contends that the jury failed to make a finding as to what share of the responsibility for negligence in Camargo's diagnosis and treatment should be apportioned to JFK. After the jury was instructed, but before it began deliberations, the trial court ordered the names of JFK and Palo Verde removed from the special verdict form regarding the allocation of fault: "I wasn't anticipating the names of the hospitals, just anticipating the names of the individuals. I mean, the individuals are found to be liable of a certain percentage of responsibility. Then if there's a finding of agency or employee on the part of those individuals, then it goes to that hospital. But you can't make a finding with respect to the hospital and a finding with respect to the individuals. That would be— [¶] . . . [¶] . . . —competing." The special verdict form listed only the names of the individual doctors and nurses at Palo Verde and JFK, as well as AMR, the ambulance company.

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[12] If plaintiffs were correct that willful misconduct was an intentional tort, rather than an aggravated form of negligence, JFK would be correct in arguing the special verdict forms did not address how JFK was negligent.

However, the special verdict forms were inconsistent with the jury instructions on that subject. The jury was instructed with two different ways that JFK or Palo Verde could be negligent *other than* due to the professional negligence of one of its agents or employees. First, the jury was instructed: "If you find that either Palo Verde Hospital or JFK Memorial Hospital violated Health and Safety Code section 1317 and/or 1317.2, and that the violation was a substantial factor in bringing about the harm, then you must find that Palo Verde and/or JFK Memorial were negligent. [¶] If you find that Palo Verde Hospital and/or J[FK] Memorial Hospital did not violate this law, or that the violation was not a substantial factor in bringing about the harm, then you must still decide whether Palo Verde Hospital and/or JFK Memorial Hospital was negligent in light of the other instructions." Second, the jury was instructed: "A hospital is negligent if it does not use reasonable care towards its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients."

By failing to allow the jury to allocate fault to one or both of the hospitals based on these theories, while requiring that the jury's allocation of fault equal 100 percent, the special verdict form failed to obtain a true finding by the jury as to the allocation of fault in this case.[13] That error was harmless in this case, however. The only cause of action for which Palo Verde was found liable was fraudulent concealment by Dr. Thakur. The jury allocated a percentage of the overall fault to Dr. Thakur. If Palo Verde had been separately listed on the special verdict form for allocation of fault, the allocation could not have changed. If JFK had been listed on the special verdict form,

[13] The jury was instructed: "If you find that the negligence or fault of more than one person, including JFK Memorial Hospital and/or Cosme Camargo, Jr., and/or Anjani Thakur, M.D. and/or Quy Vinh, M.D. and/or AMR was a substantial factor in causing plaintiff's harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent. [¶] . . . [¶] 'Person' can mean an individual or a business entity."

one of three things might have changed. First, the jury might have assigned no separate percentage of fault to JFK, leaving the result the same. Second, the jury might have reassigned some of the fault allocated to JFK-related individuals to JFK, which would end up in a "push" for purposes of determining how much JFK was ultimately liable for in damages. Third, the jury might have reassigned some of the fault allocated to non-JFK-related individuals or entities to JFK, which would have increased the amount of damages for which JFK was liable.

JFK also contends that the special verdict form was insufficient for failing to specify whether the adult dependent neglect committed by an unnamed employee of JFK was within the scope of that employee's employment. In the special verdict form for adult dependent neglect, the jury found, "one or more of JFK Memorial Hospital's employees fail[ed] to use that degree of care that a reasonable person in the same situation would have used in providing medical care for physical needs of Cosme Camargo, Jr." That verdict can be reasonably read to apply only to those JFK employees providing medical care, within the context of their employment. To be sure, there was no evidence or argument at trial that any JFK employee who was not authorized or licensed to provide medical care to Camargo did so.

JFK also contends that the special verdict forms did not answer whether Minnis's willful misconduct was a cause of harm to plaintiffs. As explained *ante*, because willful misconduct is an aggravated form of negligence, and the jury found that JFK's negligence caused harm to plaintiffs, and Minnis was an employee of JFK, the special verdict forms were sufficient to support the judgment.

F.

The trial court did not err in instructing the jury regarding willful misconduct.

JFK argues that the jury instruction regarding willful misconduct was prejudicially erroneous. We review de novo whether a challenged jury instruction

correctly states the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) The challenged instruction reads as follows: "Willful or wanton misconduct travels under several names. Its aliases include serious and willful misconduct, reckless disregard, recklessness, and a combination[] of some or all of these. These terms are interchangeable because they all identify the same thing . . . an aggravated form of negligence differing in quality rather than degree from ordinary lack of care."

No instruction addressing willful misconduct is included in the CACI. The instruction used in this case was apparently created by the trial court and counsel, based on the language of various appellate court cases. The instruction accurately stated the meaning of willful misconduct for the jury, as described in those cases, and was not given in error. JFK argues that the instruction contains a tautology because it defines "willful misconduct" as "serious and willful misconduct." We disagree. The instruction identifies for the jury several different synonyms for the term "willful misconduct," one of which is serious and willful misconduct. We find nothing improper.

JFK also argues that the instructions were in error because they informed the jury that JFK's employees could be liable for willful misconduct if they "should have known" of a peril to Camargo, and should have known that injury was a probable result of the peril. As explained *ante*, proof of willful misconduct requires proof of actual *or constructive* knowledge of a peril, and actual *or constructive* knowledge that injury is a probable result. (*Berkley v. Dowds*, *supra*, 152 Cal.App.4th at p. 528.) We perceive no appreciable difference between instructing the jury that JFK's employees should have known something, and instructing that they had constructive knowledge of it. Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." (Black's Law Dict. (9th ed. 2009) p. 950, col. 2.)

JFK further argues the instruction was erroneous because it did not instruct the jury that it must find the other elements of negligence, specifically causation, in order to find JFK liable for willful misconduct. However, as noted *ante*, willful misconduct is simply an aggravated form of negligence. The jury was instructed regarding the elements necessary to prove negligence, and the jury found an agent or employee of JFK was negligent in diagnosing or treating Camargo, and the negligence was a substantial factor in contributing to Camargo's death. We conclude that the instructions, when considered together, properly instructed the jury. The jury's finding of causation applies to the finding of willful misconduct, which of course is just an aggravated form of negligence.[14]

The trial court's instructions regarding willful misconduct were not erroneous.

Disposition

The original judgment against JFK, entered April 28, 2011, is reversed with directions to the trial court to reduce the damages against JFK to an amount consistent with MICRA and Proposition 51, and to set off the amount of plaintiffs' settlements with Dr. Thakur and Dr. Vinh against the damages against JFK, but is otherwise affirmed as against JFK. The judgment vacating the original judgment against Palo Verde, entered on August 25, 2011, is reversed. The postjudgment order granting the motion for a new trial in favor of Palo Verde is affirmed in part and reversed in part, and the matter is remanded for a new trial on the cause of action against Palo Verde for fraudulent concealment. The postjudgment order denying an award of attorney fees is affirmed.

[14] If plaintiffs were correct in their argument that willful misconduct was a separate, intentional tort, then the instruction regarding willful misconduct would have been prejudicially erroneous for failing to instruct on all the elements of the cause of action, and the special verdict form would have been insufficient for failing to make findings on necessary elements. In that case, of course, we would be required to reverse the judgment against JFK in its entirety.

Because all parties prevailed in part on their various appeals, all parties shall bear their own costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.