2d Civil No. B065917

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEAN R. KERINS,

Plaintiff and Appellant,

vs.

JAMES GORDON, M.D., et al.,

Defendants and Respondents.

RESPONDENTS' BRIEF

[Accompanied by Appendix]

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INTRODUCTION

Ours is a society permeated by fears. We are afraid of freeway shootings, carcinogens in the air and in our food and drink, asbestos in our work places, toxic wastes, depletion of the ozone layer, terrorism, killer bees, and a host of other threats. Scarcely a day goes by without some new danger--and fear--emerging. During a two-day period in December 1992, the newspaper reported the earthquake peril in Southern California is worse than believed; North Korea is suspected to be building nuclear weapons; one of the worst rabies epidemics in history has invaded the East Coast; disposable contact lenses previously thought safe may cause ulcerative keratitis; vinyl

chloride, a cancer-causing gas, was discovered in houses near a landfill; and 40 million people will have AIDS by the year 2000.

Because ours is also a litigious society, people are turning to the courts to collect monetary compensation for their burgeoning anxieties. Increasingly the courts are being called upon to adjudicate disputes brought by people who fear contracting a disease they do not have and are unlikely to get. "Fear of AIDS" litigation has entered the courtroom with particular fervor, challenging the courts to serve as beacons of reason and rationality amid the ignorance and outright hysteria which often surrounds this dread disease. The trial court in the present case faced this challenge, and met it admirably.

Plaintiff, a lawyer, sued defendants to recover damages for "fear of AIDS." In 1986 she had undergone successful surgery performed by Dr. James Gordon. In 1988 she learned Dr. Gordon had AIDS. Plaintiff was immediately tested and found not to be infected. Nonetheless, she brought suit, theorizing that Dr. Gordon might have cut himself during surgery, thereby exposing her to HIV, the virus that causes AIDS. She alleged severe emotional distress due to a fear of contracting AIDS in the future, a fear so pervasive she could not work. Plaintiff has refused to be retested, even though, according to her own expert, more current tests could reveal her risk of developing AIDS is virtually nonexistent.

Defendants moved for summary judgment on the ground that plaintiff suffered no compensable injury. The undisputed evidence established Dr. Gordon did not cut himself during plaintiff's surgery and, therefore, plaintiff was never even exposed to HIV. The evidence also established that the extremely slight and purely hypothetical risk of a physician's transmitting HIV to a patient during surgery (it has never happened), coupled with the extreme unlikelihood that a person would develop AIDS despite testing negative for HIV eighteen months after suspected exposure, make plaintiff's risk of

developing AIDS as a result of the surgery exceedingly remote. In legal parlance, the trial court determined plaintiff's fear was unreasonable as a matter of law. Based on the absence of exposure, and plaintiff's infinitesimally small risk of contracting AIDS, the court entered summary judgment for defendants.

On appeal, plaintiff argues she is entitled to have a jury determine the reasonableness of her fear, since it cannot be said with absolute certainty she will never develop AIDS. (AOB 10, 19, 23.) (Ironically, she cites recent statistics in her opening brief which establish the odds of transmission during surgery are even lower than previously calculated.) She also argues that summary judgment was erroneously granted because she is entitled to recover under various intentional tort theories. As we demonstrate, none of these theories is available to plaintiff, for a variety of reasons; in particular, defendants cannot be liable for battery because plaintiff consented to the exact surgery that was performed and placed no condition on her consent; defendants cannot be liable for intentional infliction of emotional distress because Dr. Gordon's conduct was in complete conformance with professional guidelines extant at the time and, thus, was not conceivably "outrageous"; and defendants cannot be liable for intentional misrepresentation because no misrepresentations were made.

Without question, the summary judgment should be affirmed. No plaintiff should be permitted to recover damages solely for fear of contracting AIDS--or any disease--without showing, at the very minimum, exposure to the agent that has the potential to cause the disease, as well as a reasonable likelihood of contracting the disease. Absent such limits, the courts will be flooded with lawsuits like one recently reported, where a four-year old poked herself with a hypodermic syringe found in a rental car; after a six-day trial, the jury awarded damages for "traumatic fear of exposure to AIDS" to the child--and her mother and sister as well! (Daily Journal, Nov. 27, 1992, § 1, p. 12.)

AIDS is, as one court put it, "'the modern day equivalent of leprosy.'" (Jasperson v. Jessica's Nail Clinic (1989) 216 Cal.App.3d 1099, 1110.) Another perceptively observed:

> "'[T]he devastating effects of [AIDS] and widespread lack of knowledge about it have produced deep anxieties, and considerable hysteria, about the disease and those that suffer from it.
>
> "'But neither ignorance and fear nor the serious consequences of AIDS justify our departure from the carefully developed rules and procedures that govern [similar] cases. . . . Our task . . . is to determine [the issue] carefully and objectively . . . .'" (Raytheon Co. v. Fair Employment & Housing Com. (1989) 212 Cal.App.3d 1242, 1252.)

While some of the fear surrounding AIDS is rationally based, much of it is unreasonable and exaggerated beyond anything suggested by existing medical knowledge. The trial court in this case wisely recognized the need to distinguish between the two and put the brakes on highly speculative claims such as plaintiff's. A published appellate decision affirming the judgment would go a long way toward discouraging lawsuits based on nothing but unsubstantiated fears, thereby conserving the precious resources of our already overburdened judicial system for those individuals suffering from more than fear alone.

STATEMENT OF THE CASE

1. The Complaint And Theory Of The Case.

The operative First Amended Complaint For Damages was filed by plaintiff Jean Kerins on August 17, 1989, naming as defendants physicians James Gordon, Marki Knox, and Karen Blanchard, and Women's Medical Group.[1/] (Joint Appendix ["JA"] 1.)

The complaint set forth causes of action for negligence (medical malpractice), battery, intentional misrepresentation, infliction of emotional distress (intentional and negligent), breach of contract and breach of implied covenant of good faith and fair dealing. (JA 1.) All causes of action were based on a single set of allegations. These were, in relevant part, that plaintiff underwent gynecological surgery performed by Dr. Gordon and Dr. Blanchard on November 5, 1986, that plaintiff was not informed that Dr. Gordon had "been infected by the HIV," that no mention was ever made to plaintiff whether Dr. Gordon cut or otherwise punctured himself during the operation (JA 5), that plaintiff believed it is common knowledge that surgeons' gloves are frequently cut or punctured (JA 6), and that on April 20, 1988 (eighteen months after the surgery) plaintiff learned from a television broadcast that Dr. Gordon had earlier contracted AIDS (JA 8).

1/ The complaint was later amended to add as defendants Karen Blanchard, M.D. and Associates, Inc. and Marki Knox, M.D., Inc. Drs. Blanchard and Knox, as individuals only, were subsequently eliminated as parties. (JA 30-31.)

Plaintiff sought compensatory damages for emotional distress and lost earnings, and punitive damages.[2/] (JA 21.)

2. The Undisputed Evidence Establishing Plaintiff Suffered No Compensable Injury.

After both sides conducted extensive discovery, defendants moved for summary judgment on the theory that plaintiff had suffered no legally-cognizable injury and, thus, could not prove the "damage" element of any of her alleged causes of action. (JA 34, 175.)

The undisputed evidence established that as soon as plaintiff learned Dr. Gordon had AIDS--eighteen months after her surgery--she immediately had an HIV blood test, which was negative (JA 80, 216);[3/] that 95 percent of HIV-infected individuals will test positive for antibodies to HIV within six months of the date of transmission (JA 81, 216); that the risk of HIV transmission from percutaneous (through the skin) exposure to the

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2/ Punitive damages are unavailable to plaintiff because she failed to comply with Code of Civil Procedure section 425.13, requiring plaintiffs in suits against health care providers to establish "a substantial probability" that punitive damages will be recovered. (See also Central Pathology Service Medical Center, Inc. v. Superior Court (1992) 3 Cal.4th 181, 192 [section 425.13 applies to all causes of action directly related to the provision of professional services, including intentional torts].)

3/ HIV (Human Immunodeficiency Virus) is the agent which causes AIDS. When a person becomes infected with HIV, the body manufactures antibodies to the virus; and it is these antibodies that blood tests detect. (Barlow v. Ground (9th Cir. 1991) 943 F.2d 1132, 1137-1138.)

blood of an HIV-infected individual is approximately .3 percent (JA 81, 125, 217);[4/] that Dr. Gordon did not cut himself during plaintiff's surgery (JA 275 [Interrog. No. 27], 335-336; 276 [Interrog. No. 29], 375; 298 [RFA No. 17], 358; 102-104); and that there is no known instance of a medical doctor transmitting HIV to a patient, in surgery or otherwise (JA 82, 217-218).

Plaintiff submitted portions of the deposition of her expert, Dr. William O'Connor, stating that if plaintiff tested negative for HIV for the next 25 years, there would be a "reasonable probability" that she had not been infected, but "there is no 100 percent." (JA 487-488.) Dr. O'Connor also declared that the then-current tests for HIV were 99.8 percent accurate. (JA 486 [deposition taken August 26, 1991].) Plaintiff, however, refused to be retested for HIV after her initial testing in 1988, although she underwent blood tests for other purposes. (JA 89.)[5/]

4/ Plaintiff stated that the evidence supporting this issue was "disputed, but irrelevant" on the ground that the sample on which it was based was "too small to be meaningful." (JA 216-217.) Plaintiff did not, however, dispute the accuracy of the .3 percent figure; indeed, she hardly could do so since it was also contained in her own submitted evidence. (JA 262.) Moreover, the article to which plaintiff cited did not state the sample was "too small to be meaningful." Rather, it stated the small sample made it difficult "to define precisely the risk of HIV transmission" from medical workers to patients. (JA 263; emphasis added.)

There was no dispute that the .3 percent figure was the most accurate available at the time the summary judgment motion was filed. Significantly, more recent studies have demonstrated the risk is far less than earlier believed, as plaintiff's own brief acknowledges. (Appellant's Opening Brief ("AOB") at 25.)

5/ Plaintiff suggests on appeal that testing for HIV would be "possibly professionally damaging" to her. (AOB 20.) HIV testing is confidential. (Health & Safety Code, §§ 199.20 et seq.) It is filing a lawsuit that is public.

3. Summary Judgment Is Granted On The Grounds That Plaintiff Was Not Exposed To The AIDS Virus And Plaintiff's Claimed Emotional Distress Is Unreasonable As A Matter Of Law.

Defendants' motion for summary judgment was argued on December 17, 1991. (RT 1-29.) The court entered a minute order granting the motion. (JA 499.)

Plaintiff moved for reconsideration. (JA 500, 553.) After another extensive hearing (RT 30-51), the court denied the motion (RT 51), finding there was no issue of material fact as to any cause of action, for the following reasons: "[U]nder Thing v. LaChusa (1989) 48 Cal.3d 644, plaintiff's fear of acquiring AIDS is unreasonable as a matter of law, based on evidence in support of defendants' Undisputed Material Facts Numbers 7, 8, 9, 10, 11, 12, and 13 [JA 80-83], and Plaintiff's List of Exhibits . . ., Exhibit "I", Responses to Interrogatories Nos. 27 and 29 [JA 335-336], and Exhibit "H", Response to Request for Admission No. 17 [JA 358]. The Court further finds that there is no battery as a matter of law under the authority of Cobbs v. Grant (1972) 8 Cal.3d 229, since the evidence in support of defendants' Undisputed Material Facts Nos. 3 and 4 [JA 79] establishes that Dr. Gordon performed the agreed upon procedure." (JA 574-575.)

4. Contentions On Appeal.

Plaintiff contends the trial court erred in deciding her fear was unreasonable as a matter of law, in that reasonableness should be a question of fact for the jury. (AOB 15.) She also claims the court erred in finding there was no battery, since her consent

was "expressly conditioned" on defendant's good health. (AOB 30.)[6/] Finally, she claims that there were triable issues with respect to her causes of action for intentional infliction of emotional distress (AOB 43) and intentional misrepresentation (AOB 48), and that public policies require physicians to disclose their HIV status (AOB 39) and tort victims to be compensated (AOB 46).[7/]

6/ Plaintiff claims that before surgery she asked Dr. Gordon about his health and he responded he went to the gym regularly and ran every morning. (JA 474.)

7/ Plaintiff's brief contains a number of inaccuracies and statements wholly outside the record. For example, plaintiff states "Dr. Gordon took T-cell panel tests ongoing between November 3, 1985 and November 10, 1986. . . ." (AOB 6); however, the evidence established he tested on November 3 or November 6 and received the results on November 10. (JA 275, 284, 309.) Plaintiff states Dr. Gordon exhibited "grave" concern for a "close friend" who had contracted AIDS (AOB 6); however, the evidence established the person was not a close friend, but an acquaintance whom Dr. Gordon did not know well, and that none of Dr. Gordon's close friends were diagnosed with AIDS at the time. (JA 435-437, 340-341.) Plaintiff states she "suffered so much stress that she could not function fully at school" (AOB 8); however, the evidence established that after plaintiff learned that Dr. Gordon had AIDS, she switched from a part-time evening program to a full-time day program, which allowed her to graduate and pass the Bar sooner than she would have otherwise. (JA 539-540, 566, 406, 412.)

Further, contrary to plaintiff's assertion, there was no evidence whatsoever that the amount of blood during plaintiff's surgery made "it difficult for [Dr. Gordon] or anyone else to conclusively tell if he cut himself" (AOB 6); that the test results Dr. Gordon received on November 10 revealed he was in "a late stage in the infection cycle" (AOB 7); that "[t]here are unknown numbers of people who will never test positive for the HIV virus, who in fact have AIDS" (AOB 8-9); or that "the [HIV] virus will not show any signs of being there until some environmental factor triggers the release of the virus from hiding" (AOB 22).

LEGAL DISCUSSION

I.

SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE, AS A MATTER OF UNDISPUTED FACT AND LAW, PLAINTIFF EXPERIENCED NO COMPENSABLE INJURY.[8/]

A. The Undisputed Facts Established That Plaintiff Was Not Exposed To HIV Since There Was No Mingling Of Her Blood And Dr. Gordon's.

1. Background.

The theory of plaintiff's case is that she might have been exposed to the AIDS virus because it was "common knowledge" that surgeons frequently cut themselves during surgery. (JA 5, 6.) She stated she "was informed that doctors frequently cut themselves during surgery" and "knew that if Dr. Gordon cut himself during my lengthy four hour surgery that it would be highly probable that I would be infected." (JA 567.) However, the undisputed evidence conclusively negated the possibility that Dr. Gordon cut himself during plaintiff's surgery: he had not cut himself in surgery since his training,

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8/ We note preliminarily that plaintiff devotes a great deal of her brief to the issues of whether Dr. Gordon knew or should have known his HIV status on the date of plaintiff's surgery and whether his failure to inform her constituted a lack of informed consent. These issues, however, were irrelevant in the summary judgment proceedings and are irrelevant on appeal, where the essential question is whether plaintiff suffered any legally compensable injury--regardless of any questions of duty or informed consent.

For this reason, it is not necessary--nor is there any basis in the record--for this court to determine whether Dr. Gordon should have revealed any known or suspected HIV status to plaintiff. We point out, however, that in 1986, the year of plaintiff's surgery, no such duty existed. (See discussion below, p. 45-46.)

and had been cut by another physician only once, by Dr. Blanchard in 1981--five years before the surgery in this case (JA 275, 335-336, 276, 375, 298, 358); Dr. Gordon's detailed operative report of plaintiff's surgery did not mention any cuts (JA 102-104).

Ignoring the undisputed evidence, plaintiff now argues--for the first time on appeal--that, because "Dr. Gordon's hands were in a bloody field, i.e., his gloves were covered with blood for the entire surgery," it was "difficult for him or anyone else to conclusively tell if he cut himself." (AOB 6.) There is no support whatever for this assertion--nor does plaintiff offer any.[9/]

Contradicting her theory below, plaintiff also argues on appeal that her "damages are not predicated on whether or not she was in fact exposed to the virus during surgery," and that her "causes of action [are] maintainable absent proof of any 'untoward event' or breach of control procedures during surgery." (AOB 10.) But, as we demonstrate below, this theory has been wisely rejected by every jurisdiction which has considered it. The cases hold, and public policy dictates, that absent proof of exposure to HIV, there can be no recovery for fear of contracting AIDS. Since uncontroverted evidence established Dr. Gordon did not cut himself during plaintiff's surgery, plaintiff was not exposed to HIV, and therefore cannot recover.

9/ Even if plaintiff had made this argument below (she did not), it could not have defeated the summary judgment motion, since it simply attacked Dr. Gordon's credibility, i.e., his statement that he did not cut himself during plaintiff's surgery. A party opposing summary judgment cannot merely attack the moving party's credibility. (Code Civ. Proc., § 437c, subd. (e).) A summary judgment motion may not be denied simply because a jury conceivably might disbelieve the uncontradicted evidence. (Imperial Casualty & Indemnity Co. v. Sogomonian (1988) 198 Cal.App.3d 169, 181; cf. Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal.App.3d 476, 483 [it is not an abuse of discretion to grant summary judgment on the basis of evidence the credibility of which cannot be controverted]; Golden West Baseball Co. v. Talley (1991) 232 Cal.App.3d 1294, 1305-1306 [same].)

2. In order to recover damages for the fear of developing a disease in the future, all jurisdictions require, at the very least, that the plaintiff have been exposed to the causative agent of the disease.

a. The "fear of AIDS" cases.

Although the question whether a plaintiff may recover emotional distress damages based on a fear of developing AIDS is one of first impression in California, this court is not without guidance. Every jurisdiction which has considered the matter has persuasively determined that actual exposure to HIV is a prerequisite to recovery. Multiple cases so hold:

(1). *Johnson v. West Virginia University Hospitals, Inc.* (1991) 186 W.Va. 648, 413 S.E.2d 889. (Appendix, Exhibit A.)[10/]

A hospital security guard bit by an AIDS patient was permitted to recover damages for emotional distress; it was undisputed the patient's AIDS-infected blood came into contact with the guard's blood. (Id. at 893.) The Supreme Court held that "before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be exposure to the disease. If there is no exposure, then emotional distress damages will be denied." (Ibid.)

10/ For the court's convenience, the Appendix volume accompanying this brief contains copies of many of the out-of-state decisions and the articles cited.

(2). *Funeral Services by Gregory, Inc. v. Bluefield Community Hospital* (1991) 186 W.Va. 424, 413 S.E.2d 79. (Appendix, Exhibit B.)

A mortician who had embalmed the body of an AIDS patient sued the hospital where the patient died for not informing him the patient had AIDS. The Supreme Court held that although the mortician had come into contact with the patient's bodily fluids, "there is no evidence indicating he was actually exposed to a disease-causing agent." (Id. at 82.) The court noted that the mortician was "wearing proper protective gear" and "did not recall sticking himself or puncturing his gloves during the embalming procedure." (Id. at 82-83.) The court distinguished Johnson on the ground that the plaintiff in that case had actually been exposed to the blood of an AIDS patient, whereas in the present case, there was no exposure. (Id. at 83.) The court concluded that "if a suit for damages is based solely upon the plaintiff's fear of contracting AIDS, but there is no evidence of an actual exposure to the virus, the fear is unreasonable, and this court will not recognize a legally compensable injury." (Id. at 84.)

(3). *Hare v. State of New York* (1991) 570 N.Y.S.2d 125, 173 A.D.2d 523. (Appendix, Exhibit C.)

A hospital technician bit by an inmate was later told the inmate may have AIDS. The appellate division held the technician could not recover for emotional distress resulting from fear of contracting AIDS since there was no proof the inmate had AIDS or that the technician was likely to get it.

(4). *Ordway v. County of Suffolk* (1992) 583 N.Y.S.2d 1014. (Appendix, Exhibit D.)

A New York trial court granted summary judgment against a surgeon who sued a hospital for failing to inform him that a patient on whom he had operated was HIV-positive. The court found that the operations were not "in any way remarkable. There was no broken glove, pierced skin, patient bite, etc., which distinguishes the operations in question from any other. . . . [T]he surgical operations performed on the patient were traumatic only in retrospect. . . . Absent any allegation of an unusual occurrence during the operations themselves or indicia of legitimacy in plaintiff's postoperative condition, the claim asserted herein is insufficient as a matter of law . . . ." (Id. at 1016-1017.)

(5). *Burk v. Sage Products, Inc.* (E.D. Pa. 1990) 747 F.Supp. 285. (Appendix, Exhibit E.)

The plaintiff was a paramedic stuck by a needle protruding from a container for disposing of used syringes. He sued the manufacturer of the container, claiming that several AIDS patients were seen in the area where he was using the container. The court granted the manufacturer's motion for summary judgment in part "[b]ecause plaintiff has failed to establish exposure to the AIDS virus. . . ." (Id. at 286.) The court observed it was "unable to locate a single case, from any jurisdiction, which has permitted recovery for emotional distress arising out of a fear of contracting disease when the plaintiff cannot prove exposure to the agent which has the potential to cause the disease." (Id. at 287.)

(6). *Rossi v. Estate of Almaraz* (1991) WL (Westlaw) 166924 (Md. Cir. Ct.) and *Faya v. Estate of Almaraz* (1991) WL 317023 (Md. Cir. Ct.). (Appendix, Exhibits F and G.)

Two patients of a surgeon who later died of AIDS sued his estate for fear of contracting the disease.[11/] Although the patients tested negative for HIV, they asserted causes of action for negligence, lack of informed consent, intentional infliction of emotional distress, battery, fraudulent misrepresentation, and breach of contract. (Rossi at p. 1; Faya at p. 1.) The court dismissed the complaints, finding no compensable injury, and "[w]ithout a compensable injury, all counts must fail as a matter of law." (Id. at p. 3.) The court observed the plaintiffs could not support their allegations that they were exposed to AIDS, noting there was no claim that the surgeon had failed to use proper barrier techniques or that "any incident or accident occurred during surgery that would have caused Dr. Almaraz's blood to enter her body." (Id. at p. 4.) Citing Burk, supra, the court held that "without proof of exposure, that is, without a positive HIV test, the plaintiff cannot present compensable damages." (Ibid.)

b. Other "fear of disease" cases.

The rule barring recovery for fear of developing a disease, without a showing of exposure to the agent which could potentially cause the disease, is also well established outside the context of AIDS. Indeed, proof of exposure is the minimum threshold required by every jurisdiction, including California. (See, e.g., Coover v. Painless Parker,

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11/ Rossi and Faya have been appealed to the Maryland Court of Appeals and were still pending as of the date this brief was filed.

Dentist (1930) 105 Cal.App.110, 115 [plaintiff recovered for emotional distress due to fear of cancer based on overexposure to dental x-rays]; Barth v. Firestone Tire And Rubber Co. (N.D. Cal. 1987) 661 F.Supp. 193, 195 [plaintiff allowed to seek damages for fear of cancer based on alleged exposure to benzene and other toxins]; Wetherill v. University of Chicago (N.D.Ill. 1983) 565 F.Supp 1553, 1556 [plaintiff allowed to recover emotional distress damages regarding possibility of developing cancer due to exposure in utero to DES]; Jackson v. Johns-Manville Sales Corp. (5th Cir. 1986) 781 F.2d 394, 396 [damages awarded for fear of cancer resulting from exposure to asbestos].)

Indeed, many courts require more than "mere exposure" to disease-causing agents. They require either that the plaintiff have the disease or demonstrate a substantial likelihood of contracting it in the future. (See, e.g., Ball v. Joy Technologies, Inc. (4th Cir. 1991) 958 F.2d 36, 38 ["mere exposure of the plaintiffs to toxic chemicals" is not sufficient]; Adams v. Johns-Manville Sales Corp. (5th Cir. 1986) 783 F.2d 589, 593 [plaintiff failed to establish injury from exposure to asbestos products]; Plummer v. Abbott Laboratories (D.R.I. 1983) 568 F.Supp. 920 [no recovery despite ingestion of DES]; cf. Miranda v. Shell Oil Co. (filed Jan. 4, 1993) 93 Daily Journal D.A.R. 197, 200 [toxic-tort plaintiff must prove more than fact of exposure to collect medical monitoring costs].) A fortiori, where there has been no exposure, there can be no compensation.

In addition, public policy dictates that the mere fear of acquiring a disease should not be actionable absent a showing of exposure to the disease's causative agent. In our society, diseases and dangers--and the fears they engender--are ubiquitous. We simply do not have the resources to compensate individuals who not only are not injured at all, but who will never become injured because they were not even exposed to the thing they claim to fear. In our complex society, allowing "fear of disease" lawsuits, without significant limits, could quickly result in flooding the already overburdened court system with frivolous claims, making recovery even more difficult for the truly injured.

All available authorities agree, and public policy strongly mandates, that there can and should be no recovery, under any theory, for emotional distress based on a fear of developing a disease--be it AIDS, cancer, or any other--where the plaintiff was not actually exposed to the agent which has the potential to cause the disease. Since plaintiff in this case was never exposed to Dr. Gordon's blood, she was never exposed to HIV--the agent which causes AIDS. There is no possibility--even a remote one--that HIV was transmitted to plaintiff during surgery. Therefore, plaintiff suffered no compensable injury, and she cannot, as a matter of law, recover on any cause of action.

B. The Undisputed Facts Established That Plaintiff's Fear Of Developing AIDS Is Unreasonable As A Matter Of Law, Since The Theoretical Risk That A Patient Of An HIV-Infected Surgeon May Develop AIDS Despite Testing Negative For The Virus Eighteen Months After Surgery Is Virtually Nonexistent.

Although the absence of exposure should alone be dispositive of this appeal, the summary judgment must be affirmed on another ground as well--the unreasonableness of plaintiff's fear, as a matter of law.

1. To support a claim for damages for emotional distress, the distress must be objectively reasonable.

Since emotional distress is an "unavoidable aspect of the 'human condition,'" the "overwhelming majority of 'emotional distress' which we endure . . . is not compensable." (Thing v. La Chusa (1989) 48 Cal.3d 644, 666-667.) The Supreme Court has made clear that "bright lines" are needed to limit what would otherwise be

unbridled recovery for this intangible injury. (See, e.g., Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 446-447 [denying recovery for loss of parent-child consortium and emphasizing that money damages do not provide true compensation for emotional distress]; Elden v. Sheldon (1988) 46 Cal.3d 267, 276-277 [refusing to permit recovery of bystander emotional distress by unmarried cohabitants]; Christensen v. Superior Court (1991) 54 Cal.3d 868, 875, 885 [limiting class of plaintiffs who may recover for NIED due to mishandling of remains to close family members aware of funeral services].)

One essential threshold limitation is that recovery is permitted only for emotional distress that is objectively reasonable given the facts of the particular case. The Supreme Court has defined such distress as "a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (Thing v. La Chusa, supra, 48 Cal.3d at 668 [citing with approval Rodrigues v. State (1970) 52 Hawaii 156, 173 ("serious mental distress may be found where a reasonable [person] reasonably constituted would be unable to adequately cope with the mental distress engendered by the circumstances of the case")]; Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 397 ["distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it"]; Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1487 [standard is "how reasonable people might view such conduct, excluding from that category those either overly sensitive or callous"].)

This objective "reasonableness" requirement is distinct from, and serves a different purpose than, the subjective "genuineness" requirement. The latter simply presents an issue of cause-in-fact, i.e., whether the plaintiff actually suffered severe emotional distress attributable to the defendant's conduct, which is most often a matter of proof to be presented to the trier of fact. (Molien v. Kaiser Foundation Hospitals (1980) 27

Cal.3d 916, 930.) The requirement of objective reasonableness, on the other hand, serves an important screening function and, where the fear of acquiring a disease in the future is involved, depends upon the objective scientific data about the risks, if any, entailed.[12/] (Mitchell v. Superior Court (1984) 37 Cal.3d 591, 608.)

Plaintiff argues the trial court erred by not letting the question of reasonableness go to the jury. (AOB 18.) Not so. The issue of objective reasonableness of claimed emotional distress may be decided as a matter of law, just as the trial court did here. (Fletcher v. Western National Life Ins. Co., supra, 10 Cal.App.3d at 397 [court should determine in the first instance "'whether on the evidence severe emotional distress can be found,'" quoting Rest.2d Torts, § 46, com. j.]; Fuentes v. Perez (1977) 66 Cal.App.3d 163, 172 [same]; Caputo v. Boston Edison Co. (1st Cir. 1991) 924 F.2d 11, 14 [same; purpose of rule is to weed out claims at the summary judgment stage]; Commercial Cotton Co. v. United California Bank (1985) 163 Cal.App.3d 511, 517 [evidence insufficient as a matter of law to sustain award for emotional distress]; cf. Tresemer v. Barke (1978) 86 Cal.App.3d 656, 665 [where "reasonable minds can draw only one conclusion . . . the question becomes a matter of law"].)

12/ Plaintiff's confusion of these two separate requirements accounts for her argument on appeal that the issue of "reasonableness" is linked to the element of "outrageous conduct" in the tort of intentional infliction of emotional distress--that is, if defendants' actions can be characterized as outrageous, then plaintiff's emotional distress may not be deemed unreasonable. (AOB 25-30.)

We demonstrate elsewhere that there was nothing "outrageous" about defendants' conduct. (See below, pp. 45-46.) Here, we simply note that the outrageous nature of a defendant's conduct has been linked to the genuineness requirement for severe emotional distress, not the reasonableness requirement. (Molien v. Kaiser Foundation Hospitals, supra, 27 Cal.3d at 927 ["it is the outrageous conduct that serves to insure that the plaintiff experienced serious mental suffering and convinces the courts of the validity of the claim"]; Levy, Golden Sacks, California Torts (1992), § 44.01[2][a], p. 44-7 [the requirement of outrageous conduct provides "an assurance that emotional distress for which compensation is allowed is both substantial and genuine"].) The genuineness of plaintiff's emotional distress is not an issue in this appeal.

Heeding these principles, and the scientific data produced by the parties, the trial court concluded that plaintiff's fear of acquiring AIDS in the future was unreasonable as a matter of law and, thus, her emotional distress was not compensable. As we now demonstrate, the undisputed facts show the court reached the correct result.

2. When a patient of an HIV-infected surgeon tests negative for HIV eighteen months after surgery, the purely theoretical possibility of her subsequently developing AIDS has been calculated as ranging between one in 300,000 to one in several millions.

Plaintiff accuses defendants of engaging in "higher math" to calculate the odds against plaintiff's developing AIDS from having been operated on by Dr. Gordon. (AOB 20.) But that is the way to determine the objective reasonableness of plaintiff's claimed fear--a fear she asserts is so debilitating that she has been unable to work since learning of Dr. Gordon's infection. (Cf. Mitchell v. Superior Court, supra, 37 Cal.3d at 608 [action for intentional infliction of emotional distress based on fear of developing future diseases following exposure to pesticide DBCP; held: principal measure of reasonableness is whether a plaintiff's fear of developing a disease in the future "squares with scientifically proven or suspected" facts].)

To calculate the odds that a patient may acquire AIDS through surgery performed by an HIV-infected physician, when that patient tests HIV-negative eighteen months after surgery, it is necessary to take into account several different factors: the chance that during surgery the surgeon suffered a percutaneous injury (cut or poke) which drew blood; the chance that the surgeon's blood came in contact with the patient's blood; the chance the surgeon transmitted HIV to the patient; and the chance the patient may

develop AIDS despite testing negative for HIV. To the extent these factors are independent variables, they must be multiplied together to arrive at the ultimate result.[13/]

The statistical evidence supporting the motion for summary judgment uncontrovertably established that the risk someone in plaintiff's position may develop AIDS is exceedingly remote. Plaintiff has cited additional statistics in her opening brief which demonstrate the risk is even more remote. As we now explain, even under the most conservative estimates, the odds that plaintiff may get AIDS as a result of having undergone surgery by Dr. Gordon are so infinitesimally small that her claimed fear is unreasonable as a matter of law.

a. The risk of developing AIDS despite a negative HIV test ranges from one in 20 to one in 500, depending on the test employed.

The first factor to examine is the chance a person will eventually test positive for HIV and develop AIDS sometime in the future even though he or she tests negative for antibodies to HIV. Defendants presented evidence that 95 percent of HIV-infected individuals will test positive within six months after transmission. (JA 81, 216.) In other words, there is a five percent (or one in 20) chance that an individual will become HIV-positive (or "seroconvert") more than six months after transmission.

13/ The multiplication principle is explained as follows: "If two events are independent in the sense that the outcome of one event has no influence on the outcome of the other, then the probability that they both occur is computed by multiplying the probabilities of the individual events. For example, the probability of obtaining two heads in two flips of a coin is $1/2 \times 1/2 = 1/4$, since of the four equally likely possibilities--tail, tail; tail, head; head, tail; head, head--one is a pair of heads." (J. Paulos, Innumeracy: Mathematical Illiteracy and Its Consequences (1988), p. 20.)

Plaintiff claims she is entitled to be compensated for emotional distress because she fears she may be among that five percent and because "[f]ive percent is an unusually high statistic for medical predictions." (See, e.g., AOB 22.) Yet she fails to take into account her own expert's testimony that another test (which was available before the summary judgment motion was filed) was 99.8 percent reliable, i.e., the chance of seroconversion after a negative test was only .2 percent, or 1 in 500. (JA 486.) Plaintiff has refused to take such a test. (JA 89; cf. Doe v. Doe (1987) 136 Misc.2d 1015, 1520, 519 N.Y.S.2d 595, 599 [denying "fear of AIDS" claim of plaintiff who refused to be tested: "A test could either validate or disaffirm her fears"]; Appendix Exhibit H.)[14/]

Another factor to consider is that the five percent statistic measured the chance of seroconversion in a person who tested negative within six months after suspected transmission. It stands to reason that, as each additional month passes, additional individuals in the original five percent group will have seroconverted, and the percentage of "false negatives" will have become progressively smaller with each passing month. Here, plaintiff tested negative eighteen months after her surgery; thus, the chance of developing AIDS despite a negative test would be considerably less than five percent. Our research has revealed no instance where seroconversion has taken place after that long an interval; indeed, a medical journal article defendants submitted in support of their summary judgment motion states the possibility of such delayed detection is "unlikely," and notes that, in a study of health care workers exposed to HIV, no delayed recognition of infection was seen in persons followed up for 24 months. (JA 123.)

14/ As the trial court observed in the present case, "I suspect the only reason [plaintiff] hasn't been retested . . . is that [] the only thing that can prove [is] things that are bad for her [case], namely, she still doesn't have H.I.V. and that is what she doesn't want the jury ever to know." (RT 24-25.)

Additionally, the Centers for Disease Control ("CDC") recommends that patients exposed to the bodily fluids of an HIV-infected health care worker should undergo HIV testing for 12 months after exposure. (Estate of Behringer v. The Medical Center At Princeton (1991) 249 N.J. Super. 597, 628, fn. 8, 592 A.2d 125; Appendix, Exhibit I.) In Burk v. Sage Products, Inc., supra, 747 F.Supp. at 288, the plaintiff, who claimed exposure to HIV via a needle stick, tested negative more than a year later. The court concluded:

> "[P]laintiff can now be confident, to a high degree of medical certainty, that he will not contract AIDS as a result of the needle-stick injury. The court is reluctant to allow someone to recover for fear of contracting a disease after it has become substantially likely that he will not develop the illness."[15/]

The low risk of plaintiff's becoming HIV positive or developing AIDS despite a negative HIV test would not justify compensation for emotional distress even if that were the only factor to be considered. (Burk v. Sage Products, Inc., supra, 747 F.Supp. at

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15/ On appeal, plaintiff suggests that even a five percent risk (of seroconversion after a negative test) is not reassuring because of a newspaper report of "'mystery' cases of people who are currently sick and dying from AIDS who have not tested positive for HIV. . . ." (AOB 9, 19.)

This court, of course, may not properly consider any evidence that is not part of the record (Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal.App.3d 621, 627) or a proper subject of judicial notice. However, in the interest of comprehensiveness, we note that the so-called "mystery virus" theory was subsequently debunked both in the popular press and a leading medical journal. (Steinbrook, AIDS Experts Strongly Doubt New Virus Exists (August 15, 1992) Los Angeles Times, Part A, p. 1, col. 4; Goldsmith, Still A Mystery But "Not Likely" A Virus (September 9, 1992) Journal of the American Medical Association, 268:1235-1236.) (See Appendix, Exhibits K and L.)

There is no evidence plaintiff is infected with anything, let alone a "mystery virus," even if such entity existed. Indeed, since Dr. Gordon was infected with HIV, not a "mystery virus," plaintiff's concern is irrelevant to any concerns relating to the surgery.

288 ["It is extremely unlikely that a patient who tests HIV-negative more than six months after a potential exposure will contract the disease as a result of that exposure"]; Rossi v. Estate of Almaraz, supra, 1991 WL 166924 at p. 4 [same]; Faya v. Estate of Almaraz, supra, 1991 WL 317023 at p. 3 [same]; Funeral Services by Gregory, Inc., supra, 413 S.E.2d at 82 [same].) However, as we now explain, other variables render plaintiff's risk infinitely lower than the one in 20 or one in 500 chance that a negative test result would indicate. These variables, coupled with the exceedingly low risk following a negative test, establish as a matter of law that plaintiff's fear of AIDS is unreasonable and noncompensable.

b. The theoretical risk that an HIV-infected surgeon will transmit HIV to a patient ranges from one in 15,000 to one in 48,000.[16/]

Assuming that, based on the tests available in 1988, five percent of individuals exposed to HIV did not test positive within six months of exposure, it still is not true that

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16/ This risk is purely hypothetical, since there is no known case of HIV being transmitted by a physician to a patient--in surgery or otherwise--and no known case of any health care worker transmitting HIV to a patient during surgery. (JA 82, 217-218.)

A Florida dentist is believed to have transmitted AIDS to five patients. (JA 217-218, 262.) The CDC, after exhaustive investigation, has been unable to pinpoint how the transmission occurred. According to a leading authority on AIDS, "Something clearly went awry in the practice of Dr. Acer. His infection control procedures were badly flawed--he used the same pair of gloves for different patients and he failed to properly sterilize his equipment. The dentist also continued to practice after he became seriously ill, indicating that he was highly viremic and more capable of transmitting the infection. Since the Florida case appears so unusual it would be unfair to base public policy on the assumption that HIV could be easily transmitted in a dental practice." (Gostin, CDC Guidelines on HIV or HBV-Positive Health Care Professionals Performing Exposure-Prone Invasive Procedures (1991) 19 Law, Medicine & Health Care 140, 141; see Appendix, Exhibit M.)

each individual in the five percent group had an overall five percent chance of seroconverting and developing AIDS sometime in the future. Rather, in order to determine an individual's overall risk, one must factor in the risks associated with the suspected means of transmission. For example, a person who tests negative despite having had repeated unprotected anal intercourse with someone suffering from AIDS--an activity which involves a direct exposure to HIV and, thus, bears a very high risk of transmission--is far more likely to fall within the five percent group than a person who tests negative after undergoing surgery performed by an infected doctor.

The evidence presented below established that the odds of a patient acquiring HIV from an infected surgeon is approximately one in 15,000.[17/] This figure is the product of the risk of percutaneous injury (the surgeon's cutting or poking himself during surgery) (6.9 percent, or one in 14.49), the risk that the surgeon will bleed into the patient (32 percent, or one in 3.12), and the risk of the transmission of HIV to the patient (.3 percent, or one in 333). (JA 81, 125, 216, 262-263, 494-495.) While not disputing these figures, plaintiff argued below that they were based on too small a sample. (JA 216-217.) However, she presented no evidence to the contrary. Indeed, her own brief indicates that more recent studies, presumably based on larger samples, assess the chance of transmission from an HIV-infected surgeon to a patient to be far slimmer, i.e., one in 48,000. (AOB at 25.)

17/ The figure is hypothetical because there is no known case of transmission through surgery. The exceedingly remote and purely theoretical chance of any patient contracting AIDS from an HIV-infected surgeon makes plaintiff's emotional distress unreasonable as a matter of law even during the period she was awaiting her test results. Learning the results only made the chance even more remote.

Although, on appeal, plaintiff now seems to suggest she should be entitled to some damages for emotional distress during that two-week period (AOB 2, 3, 21), she pointedly declined to make that claim below. (RT 32:14-33:6.)

Either way, plaintiff's overall risk of developing AIDS is the product of the risk of surgical transmission (no more than 1/15,000) and the risk of seroconverting despite a negative test (no more than 1/20); in other words, the risk is approximately one in 300,000. If plaintiff had taken the more recent and accurate test mentioned by her own expert, her overall risk would be dramatically less--about one in seven and a half million (1/15,000 x 1/500). If the more recent transmission figures were used, and plaintiff had taken the more recent test, her overall risk would be about one in 24 million (1/48,000 x 1/500)![18/]

The exceedingly slight chance of a patient's contracting AIDS during surgery, coupled with the very low risk of developing AIDS despite having tested negative for HIV more than a year after surgery, has led the only court which has issued an opinion on the matter to reject the patients' claims of "AIDS phobia" as a matter of law. (Rossi v. Estate of Almaraz, supra, 1991 WL (Westlaw) 166924; Faya v. Estate of Almaraz, supra, 1991 WL 317023). (See discussion above, p. 15.) The Maryland court concluded in Rossi and Faya that these were cases where "the injury claimed by the plaintiff is the fear that something that did not happen could have happened. This court cannot, as a matter of law, allow recovery for that fear." (Rossi at p. 5; Faya at p. 4.)

Plaintiff argues that Molien v. Kaiser Foundation Hospitals, supra, 27 Cal.3d 916, supports a different result. (AOB 21 ["potential of exposure to the AIDS virus" is "as

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18/ Plaintiff compares apples and oranges in stating "Defendant calculates the odds of infection to be 1 in 301,962 . . . Others calculate the chance of infection to be 1 in 48,000 . . . Experts are required to determine which statistics can be relied upon." (AOB 25.) The flaw in plaintiff's reasoning lies in the fact that the 300,000 figure was the product of the chance of infection through surgery and the chance of seroconversion despite a negative test, i.e., plaintiff's overall risk. The 48,000 figure refers to the chance of infection through surgery alone; it must be multiplied by the chance of seroconverting after a negative test to determine plaintiff's overall risk--an infinitesimally small number, as shown above.

worthy" of emotional distress damages as "mere communication of a false diagnosis of syphilis"].) But plaintiff completely misses the point. Molien did not involve any claim for damages regarding a possible future injury. There, the defendants misdiagnosed the plaintiff's wife and told her to inform the plaintiff she had syphilis. The plaintiff had to undergo tests to determine whether he had contracted syphilis and was the source of his wife's purported infection. (Id. at 919). He became distressed by the implication that he had engaged in "a particularly noxious infidelity." (Id. at 923.) The misdiagnosis caused tension and hostility between the plaintiff and his wife and led to the breakup of their marriage. (Id. at 920.) Under these unique facts, the Supreme Court concluded the husband could seek recovery for his alleged serious emotional distress.

Molien is entirely inapposite here. The plaintiff in Molien was permitted to recover because his wife was mistakenly told she actually had a serious disease, and the implication she had contracted it from the plaintiff led to the breakup of their marriage. Molien did not authorize recovery for distress about the possibility of contracting a disease at some unknown time in the future.

Here, given the absence of exposure, coupled with the virtually nonexistent risk that plaintiff would ever become infected with HIV and develop AIDS as a result of her surgery, the trial court correctly determined that her claimed emotional distress did not meet the requirement of objective reasonableness, and properly granted summary judgment.

3. Just because plaintiff cannot be guaranteed with 100 percent certainty she will never develop AIDS from the surgery, she is not entitled to recover for emotional distress.

Plaintiff argues she is entitled to present her case to a jury because she cannot be guaranteed, with 100 percent certainty, that she will not contract AIDS as a result of her surgery. (AOB 10, 19; RT 23.) According to plaintiff's reasoning, her fear cannot be deemed unreasonable as a matter of law so long as there exists any degree of risk, no matter how small. Although the appellate courts in California have not addressed this issue in the context of a tort suit seeking damages for "fear of AIDS," they have had occasion to consider the low--but not nonexistent--risk of contracting AIDS in other settings, and the role that unreasonable fear plays in the AIDS epidemic. The courts' conclusions are instructive here.

In Raytheon Co. v. Fair Employment & Housing Com., supra, 212 Cal.App.3d 1242, Division Six of this court held that an employer may not fire an employee solely because he has AIDS. "Any other conclusion about the transmissibility of the HIV virus would have been pure speculation unsupported by any reasonable medical judgment or knowledge. Raytheon's failure to reinstate Chadbourne to his job was based upon an irrational and unsupported belief he posed a risk to the health and safety of other workers. It was certainly not based upon any reasonable medical knowledge available in early 1984." (Id. at 1251-1252; see also Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal. App.3d 1110 [school district may not exclude HIV-infected student].)

On occasion, trial courts have lost sight of the fact that the lack of complete certainty in medical science does not render a fear reasonable, and the appellate courts have set the law straight. In Jasperson v. Jessica's Nail Clinic, supra, 216 Cal.App.3d

1099, the trial court had ruled that the refusal of a nail salon to give a pedicure to an AIDS victim did not violate a city ordinance prohibiting discrimination against persons with AIDS because the risk of transmitting AIDS during a pedicure, "'however minimal, cannot be acceptable or tolerable.'" (Id. at 1108.) The Court of Appeal reversed, citing the plaintiff's extensive expert evidence demonstrating the very low risk of transmission of AIDS through a pedicure. (Id. at 1104-1106.) For example, the court noted evidence that "99.999 percent of the blood cells of an infected person do not carry the virus, rendering it statistically unlikely that a single drop of blood would infect." (Id. at 1105.)

Similarly, the Ninth Circuit has addressed the issue of a low but potential risk of transmission of AIDS in the case of an infected teacher reassigned to an administrative job. (Chalk v. U.S. Dist. Court Cent. Dist. of California (9th Cir. 1988) 840 F.2d 701.) The district court had denied the teacher's motion to be reinstated to classroom duties; although it acknowledged transmission was "unlikely," the probability of harm "minimal," and the risk "not great," it found, if the disease were transmitted, "'the result is horrendous.'" (Id. at 707.) The district judge observed that "'we simply do not know enough about AIDS to be completely certain.'" (Ibid.; emphasis in original.) In reversing, the Court of Appeals stated the district court had imposed an "impossible burden of proof" on the teacher, since "[l]ittle in science can be proved with complete certainty. . . ." (Ibid.) The appellate court concluded that there was "no significant risk," and that it could not base its decision on "'pernicious mythologies' or 'irrational fear.'" (Id. at 711.) The concurring judge noted:

> "No doubt the possible catastrophic consequences of a substantial alteration of the current truth unduly influenced the district judge. His calculus was impermissibly flawed, however. . . . Confronted with some uncertainties about scientific truth, judges, perhaps above all others, should act on the basis of

that which is known, or, where this is not possible, on the basis of that which those best qualified to a speak say is known." (Id. at 712; emphasis in original.)

Numerous other cases are precisely to the same effect.[19/]

In dealing with AIDS, courts must necessarily analyze medical and statistical data, and it is not in the nature of medical science to categorically preclude all possible or potential risks. Courts are duty bound to evaluate the evidence objectively and not be influenced by unsubstantiated fears of catastrophe. Commendably, that is precisely what the trial court did in this case, and precisely why its judgment should be affirmed, even though medical science may not be able to say with absolute certainty that the risk of plaintiff's developing AIDS as a result of the surgery is zero percent.

19/ See, e.g., Thomas v. Atascadero Unified School Dist. (C.D.Cal. 1987) 662 F.Supp. 376, 380 ["Any theoretical risk of transmission of the AIDS virus by Ryan in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District"]; Ray v. School Dist. of DeSoto County (M.D. Fla. 1987) 666 F.Supp. 1524, 1535 [rejecting the "future theoretical harm" of transmission of the AIDS virus in the classroom as "unsupported by the weight of medical evidence"]; District 27 Community School Bd. v. Board of Educ. (Sup.Ct. 1986) 130 Misc.2d 398, 502 N.Y.S.2d 325 [transmission of the AIDS virus was "a mere theoretical possibility"]; Glover v. Eastern Neb. Com. Office of Retardation (D.Neb. 1988) 686 F.Supp. 243, 251, aff'd (8th Cir. 1989) 867 F.2d 461 [risk of transmission is "minuscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero"]; Robertson v. Granite City Com. Unit School D.9 (S.D.Ill. 1988) 684 F.Supp.1002, 1006 ["no significant health threat"; "this problem must be dealt with in a rational fashion . . . based on reasonable medical certainty"]; Doe v. Dolton Elementary School Dist. No. 148 (N.D.Ill. 1988) 694 F.Supp. 440, 448 [risk is "indeed minimal"].

C. There Should Be No Recovery For Emotional Distress Due To Fear Alone Of Acquiring AIDS--Or Any Disease--Without Proof Of The Probability Of Developing The Disease.

Although it need not do so to affirm the judgment, this court should consider adopting a rule that a plaintiff may not recover for alleged emotional distress based on the fear alone of contracting a disease in the future unless the plaintiff can demonstrate--as a threshold issue--the chance of contracting the disease is probable, i.e., more likely than not. Such a rule would permit recovery only by those plaintiffs whose exposure to the AIDS virus presents a realistic threat of future disease. In those circumstances, liability would be imposed only where it is probable--i.e., the chance is greater than 50/50--that AIDS will materialize in the future. By the same token, if a plaintiff cannot meet the threshold burden of establishing, through expert testimony, that it is more likely than not that AIDS will directly result from the defendant's conduct, recovery should not

be permitted. The California Supreme Court is currently considering whether to adopt such a bright-line rule in "fear of cancer" cases.[20/]

1. Applying a "more likely than not" standard in "fear of AIDS" cases is entirely consistent with standards applied under California law in similar contexts.

A "more likely than not" standard is consistent with the rule that prospective damages are permitted only where "detriment" is "certain to result in the future." (Civ. Code, § 3283; Caminetti v. Pacific Mut. Life Ins. Co. (1943) 23 Cal.2d 94, 103 [the statute is satisfied by a showing of "reasonable certainty" that detriment will occur]; United States Liability Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal.3d 586, 597 ["mere threat of future harm, not yet realized, is not enough"]; Jones v. Ortho Pharmaceutical

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20/ The Court has granted review in Potter v. Firestone Tire & Rubber Co. (1990) 9 Cal.App.4th 881 (rv. gr. 2-28-91, S018831) and Akins v. Sacramento Utility District (1992) 6 Cal.App.4th 1605 (rv. gr. 8-20-92, S027664).

In Potter, plaintiffs whose water supply had been contaminated with toxic chemicals were permitted to recover for fear of cancer. In granting the defendant's petition for review, the Supreme Court requested briefing on a number of questions, including whether the plaintiffs had suffered any "'physical injury' for which parasitic damages for emotional distress may be recovered"; whether, in the absence of physical injury, a plaintiff may recover "damages for emotional distress (or fear of cancer) suffered on learning that the plaintiff has ingested a toxic chemical"; and if so, whether a plaintiff must "prove that his or her emotional distress was caused by knowledge that the likelihood of future physical injury or illness as a direct result of that exposure is substantial." (Barclays California Supreme Court Service, Weekly Report (Feb. 17, 1992), pp. 59-60.)

In Akins, the plaintiffs claimed they were exposed to radiation emitted by a nuclear power plant and feared developing cancer. Summary judgment in favor of the defendant was granted and affirmed on the ground that the undisputed facts showed the plaintiffs were not exposed to harmful levels of radiation. The Supreme Court has not designated any specific questions for briefing.

Corp. (1985) 163 Cal.App.3d 396, 402-403 [no recovery where "there is only a mere possibility the defendant's negligence caused the wrong"].) Applying these principles in a products liability context, the Court of Appeal has held the plaintiff could not recover for emotional distress due to fear of a future injury where the injury had not occurred. The court rejected the notion that "one's fear something may happen in the future is, without more, actionable." (Khan v. Shiley, Inc. (1990) 217 Cal.App.3d 848, 856, 857, fn. 12.)

In Jones, the plaintiff failed to establish a reasonable causal connection between her injury and the use of a suspected drug. (163 Cal.App.3d at 404.) The court emphasized the need for scientific testimony based on probability:

> "'If the experts cannot predict probability in these situations, it is difficult to see how courts can expect a jury of laymen to be able to do so. [T]he scientific theory must be more than a possibility to the scientists who created it. For to the scientific mind, all things are possible. And with all things possible, citizens would have no reasoned protection from the speculations of courts and juries.'" (Id. at 403-404.)

Because "fear of AIDS" claims are based on a present fear linked to a potential future event, they involve similar concerns about undue speculation. To be actionable, such claims must be anchored in a sufficient likelihood that the future event will occur. The situation is analogous to medical malpractice cases alleging a delay in diagnosis, where there can be no recovery for a "lost chance" of survival resulting from medical malpractice unless it was probable (i.e., more likely than not) that the malpractice actually caused the patient's death. (Dumas v. Cooney (1991) 235 Cal.App.3d 1593, 1603, 1608 [allowing recovery for a mere possibility of injury would "encourage a proliferation of defensive medicine, an escalation of medical costs, and an unwarranted

expansion of liability exposure"].) Expressing similar concerns, the Court of Appeal recently held that parents who administer an overdose of medication to their child based on a pharmacist's incorrect instructions cannot recover damages for emotional distress unless the child suffered serious injury or death. "To allow recovery to a person who merely learns after the fact about 'what could have been' would lead to liability out of all proportion to the degree of fault." (Huggins v. Longs Drug Stores California, Inc. (filed Dec. 4, 1992) 92 Daily Journal D.A.R. 16420, 16426.)

Regardless how genuine the plaintiff's distress, the tort system should not be subjected to the burdens of purely speculative lawsuits and should not award compensation, absent a reliable indicator that the distress is grounded in a likely course of future events. Requiring proof of future injury based on probability strikes a fair and practical balance. Any other rule--i.e., one allowing recovery for a mere possibility of future injury or illness--would subject the court system to a rash of speculative litigation under circumstances where defendants are afforded "no reasoned protection from the speculations of courts and juries." (Jones, supra, 163 Cal.App.3d at 404.) The already overburdened court system would be swamped with new waves of lawsuits, with every person claiming to be fearful of getting a disease in the future trying to hit the litigation jackpot and, thus, reap a large recovery, without any likelihood that the disease will materialize.

2. The Supreme Court has emphasized the importance of an effective screen against speculative claims and potentially unlimited liability in cases seeking recovery of damages for emotional distress.

The Supreme Court has emphasized the need to limit liability in cases where the plaintiff seeks to recover damages for negligently inflicted emotional distress without an accompanying physical injury. In Elden v. Sheldon, supra, 46 Cal.3d 267, the Supreme Court rejected the "bystander" claim of an unmarried cohabitant, recognizing that the "'multiplication of actions and damages' that would result from such an extension of liability would place an intolerable burden on society." (Id. at 275, 277.)

Similarly, in Thing v. La Chusa, supra, 48 Cal.3d 644, 664, another "bystander" case, the Supreme Court reiterated that "policy considerations justify restrictions on recovery for emotional distress notwithstanding the sometimes arbitrary result, and that the Court has an obligation to establish those restrictions." Quoting Elden, the Court emphasized that "'[a] bright line in this area of the law is essential,'" and observed that a contrary result would engender "limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread." (Ibid.)[21/]

The prudent limitations imposed by the Supreme Court stand in stark contrast to the far-reaching extension of liability that would follow if plaintiff's theory were to prevail

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21/ Other examples include Baxter v. Superior Court (1977) 19 Cal.3d 461, 463 [precluding suit by parent for loss of a child's consortium, citing "the intangible nature of the injury and the danger of multiplication of claims and liability"] and Borer v. American Airlines, Inc., supra, 19 Cal.3d 441, 446-447 [precluding suit by child for loss of a parent's consortium; "[n]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere"; "strong policy reasons argue against extension of liability to . . . an intangible, nonpecuniary loss"].

in this case. In our society, fear of AIDS is rampant. Occasionally that fear is rationally based, such as when it arises from having had unprotected sex with an AIDS sufferer. Yet a great deal of the fear of AIDS in our society is irrational, such as the fear that AIDS can be transmitted in the classroom, the workplace, or a nail salon or, as here, the fear that AIDS can be contracted by someone who was not exposed to its causative agent, and has already tested negative for HIV. Although both fears may be quite real, one is based in reason and the other is not. Free-floating anxiety without any rational basis presents great potential for unleashing a current of litigation with windfall recoveries to a lucky few. The potential for open-ended and purely speculative liability in "fear of AIDS" cases underscores the need for a "bright line" test. In order to promote the important public policy objectives endorsed by the Supreme Court, defendants urge this court to require that, absent a positive HIV test, plaintiffs seeking to recover for emotional distress over the possibility of developing AIDS in the future must prove, as a threshold matter, that the disease is more likely than not to occur.[22/]

3. A rule based on probability is consistent with cases in other jurisdictions that have rejected open-ended liability in "fear of disease" cases.

A number of courts in other jurisdictions have rejected open-ended liability for emotional distress of the kind in question. (See, e.g., Manzi v. H.K. Porter Co. (1991) 402 Pa. Super 595, 601-602, 587 A.2d 778, 781 [plaintiff who had no manifest asbestos-related injury could not recover for concern that he might contract cancer from exposure

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22/ As discussed earlier (at pp. 26-27), Molien v. Kaiser Foundation Hospitals, supra, 27 Cal.3d 916, does not compel a different result because it did not involve a claim for damages based solely on the possibility of contracting a future disease.

to asbestos]; Rabb v. Orkin Exterminating Co. (D.S.C. 1987) 677 F.Supp. 424, 428 [excluding evidence regarding "fear of future disease" that is not reasonably certain to occur]; Plummer v. Abbott Laboratories, supra, 568 F.Supp. at pp. 922, 925-26 [no recovery for distress about possibility of contracting cancer following ingestion of DES because no physical manifestation of disease].)

In In re Hawaii Federal Asbestos Cases (D.H. 1990) 734 F.Supp 1563, 1569, the court rejected the argument that the plaintiffs could recover by casting their claim in terms of presently existing distress about a possible future injury:

> "Although plaintiffs claim fear of cancer in the present, such fear relates to future events which may or may not have had their genesis in the defendants' alleged wrongdoing in the past. This fear relates to a specific event which may or may not occur in the future. Such fear can hardly be characterized as general mental anguish for harm caused in the past by the defendants."

The court noted that decisions involving cases of mental anguish over past (as opposed to prospective) harm were distinguishable. (Id. at 1569.)

Other jurisdictions have recognized that a bright-line test in fear of future disease cases avoids the burdens of having to adjudicate speculative claims. As Maryland's highest court concluded, eliminating such safeguards would encourage "'anticipatory action[s]'" to recover for an injury that "'may manifest itself later on'" or may never occur, resulting in "the imposition of an unnecessary burden upon the judicial system." (Pierce v. Johns-Manville (1983) 296 Md. 656, 464 A.2d 1020, 1027; Eagle-Picher Industries, Inc. v. Cox (Fla.App. 1985) 481 So.2d 517, 528 ["Permitting an action for fear of cancer where there has been no physical injury from the [exposure] would likely devastate the court system . . ."]; Ball v. Joy Mfg. Co., (S.D.W. Va. 1990) 755 F. Supp.

1344, 1372 ["Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's being remediless"].)

This court should follow the lead of other jurisdictions which wisely deny recovery for emotional distress due to a fear of future disease unless, at the very least, there is a threshold showing of exposure, coupled with a showing of physical injury or a probability the disease will occur, and hold that such requirements apply to "fear of AIDS" cases.[23/]

II.

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE PLAINTIFF IS NOT ENTITLED TO RECOVER UNDER ANY THEORY OF LIABILITY.

In the previous section we demonstrated two independent reasons why plaintiff failed to satisfy the damage element of each alleged cause of action--(1) the undisputed evidence proved plaintiff was never exposed to the virus known to cause AIDS, and (2) even absent such proof, the risk of plaintiff's contracting AIDS as a result of the surgery, coupled with the risk of developing AIDS despite testing negative for HIV, is so minute as to make her fear unreasonable as a matter of law. Thus, the trial court properly granted summary judgment and dismissed the case in its entirety.

On appeal, plaintiff argues that summary judgment should have been denied because triable issues existed with respect to three alleged intentional tort theories of recovery--battery (AOB 30-43), intentional infliction of emotional distress (AOB 43-46) and intentional misrepresentation (AOB 48-49). Plaintiff's assertion is without merit.

23/ We emphasize that this case deals with "fear" only. Of course, a person who tests HIV-positive has suffered legally compensable damages and may sue on that basis.

A. All Plaintiff's Theories Of Recovery, No Matter What the Label, Are Barred Because She Suffered No Compensable Injury.

The first answer to plaintiff's contention is that the lack of exposure to HIV and lack of legally-cognizable emotional distress prevent plaintiff from recovering damages under any theory of liability, no matter what the label. (Cf. Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1039, 1045 ["to prevent creative pleading" courts must look behind labels to determine gravamen of action]; Central Pathology Service Medical Clinic, Inc. v. Superior Court, supra, 3 Cal.4th at 192 [labelling cause of action as "intentional tort" as opposed to "negligence" does not change nature of allegations against health care provider]; Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425, 433.) Since plaintiff claims a single injury (emotional distress and resulting lost income), the trial court properly determined, like every other court presented with a panoply of causes of action in a "fear of AIDS" case, that plaintiff could not recover under any theory. (See, e.g., Rossi v. Estate of Almaraz, supra, 1991 WL 166924 [lack of informed consent; negligence; loss of consortium; fraud-concealment; straight negligence; intentional infliction of emotional distress; breach of fiduciary duty; battery; held, without a compensable injury, all counts must fail as a matter of law]; Faya v. Estate of Almaraz, supra, 1991 WL 317023 [negligence (lack of informed consent); intentional infliction of emotional distress; fraudulent misrepresentation; breach of contract; held, all counts fail]; Burk v. Sage Products, Inc., supra, 747 F.Supp. at 286, 288 [negligence; breach of warranty; strict liability; held, plaintiff's emotional injuries cannot form the basis of any cause of action]; Doe v. Doe, supra, 136 Misc.2d 1015, 519 N.Y.S.2d at 596 [fraud, infliction of "AIDS-phobia"; held, both counts fail].

B. Each Of Plaintiff's Theories Is Defective For Additional Reasons.

The second answer to plaintiff's argument is that, in addition to her failure to establish the essential element of legally-cognizable damages, the undisputed evidence showed she cannot satisfy the elements of any of the asserted intentional tort causes of action. We explain.

1. Plaintiff cannot recover for battery because the uncontroverted evidence establishes she consented to the surgery that was performed and placed no express condition on her consent.

Plaintiff's complaint set forth a cause of action for battery, alleging that Dr. Gordon failed to obtain her informed consent by not disclosing crucial information to her, such as his "knowledge of, knowledge of great likelihood of, or notice to inquire as to the fact of" his HIV infection. (JA 11.) The trial court granted summary judgment under the rule of Cobbs v. Grant (1972) 8 Cal.3d 229, 240-241 (JA 575), which holds that a physician's failure to disclose a low-probability risk of a procedure sounds in negligence, not battery, and that a battery action lies only where the physician performs a substantially different treatment than the one consented to.

a. On appeal, plaintiff tries to resurrect her battery claim with a different argument, one based on the "express condition" theory of battery.[24/] She asserts her consent to surgery was expressly conditioned on Dr. Gordon's good health and, therefore, she stated a cause of action for battery under Grieves v. Superior Court (1984) 157 Cal.App.3d 159, and Ashcraft v. King (1991) 228 Cal.App.3d 604. (AOB 3, 30-35.)

Neither decision supports plaintiff's argument. In Grieves, the plaintiff told her physician she wanted a tubal ligation only if her baby was born without any abnormalities. The baby was born with a genetic disorder, yet the ligation was performed anyway. The baby died two months later. (157 Cal.App.3d at 162.) The Court of Appeal held the plaintiff had sufficiently alleged a cause of action for battery. The court noted that, although the plaintiff had consented to the ligation, her "consent was conditioned upon the delivery of a normal child." (Id. at 164; emphasis in original.) Since that condition did not occur, the tubal ligation was performed without her consent, and fell within the rule of Cobbs v. Grant, supra, 157 Cal.App.3d at 165.

Ashcraft v. King was similar. The family of a minor about to undergo surgery specified that only family-donated blood was to be used. During surgery, the child was transfused with non-family blood infected with HIV; she contracted AIDS. The Court of Appeal held sufficient evidence of battery had been presented under the "rule of

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24/ Plaintiff should not be permitted to switch theories on appeal. Where parties litigate their case on the assumption that a particular cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling or that other steps affecting the course of the proceedings are correct, neither party can change this theory for purposes of review on appeal. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 316, p. 327.) This doctrine, known as "theory of trial," applies to summary judgment as well as trial. (Steele v. Totah (1986) 180 Cal.App.3d 545, 551-552; cf. 580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal.App.3d 1, 18 [a plaintiff cannot defeat summary judgment by presenting evidence which supports a theory of recovery not pled, even if uncontradicted].)

conditional consent," which recognizes that a person may place conditions on a consent to surgery and, "[i]f the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (228 Cal.App.3d at 609-610.) The court observed that, since the patient had "expressly" conditioned her consent on the use of family-donated blood, she had a right to have that express condition observed. (Id. at 614.)[25/]

The present case is entirely distinguishable because plaintiff placed no express condition on her consent to surgery. She consented to removal of a fibroid tumor and that is precisely the procedure that was performed. Plaintiff, however, purports to find an "express condition" in her inquiry of Dr. Gordon about his health. (AOB 31, 37; JA 474.)[26/] Yet the question, "And how is your health?" scarcely qualifies as a condition, much less an express one.

An express condition must be stated precisely in an agreement, and is determined by the intention of the parties as disclosed in the agreement. (Schwab v. Bridge (1915) 27 Cal.App. 204, 207; Random House Dict. of the English Language (2d ed. 1987) p. 425 ["condition" defined as "a circumstance indispensable to some result; prerequisite; that on which something else is contingent"]; p. 683 ["express" defined as "clearly

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25/ The Ashcraft court cited several decisions where patients had imposed similar express conditions on their physicians. (228 Cal.App.3d at 610 [Keister v. O'Neil (1943) 59 Cal.App.2d 428, 434-435 [operation consented to but "'absolutely did not want . . . a spinal anesthetic'"]; Clark v. Miller (Minn. Ct. App. 1986) 378 N.W.2d 838, 847 [patient authorized surgical procedure only if doctor discovered arthritis or a malalignment]; Chambers v. Nottebaum (Fla. Dist. Ct. App. 1957) 96 So.2d 716, 717 [operation consented to, but patient "would not permit a spinal anesthetic"]; Moscicki v. Shor (1932) 107 Pa. Super. 192, 163 A. 341 [patient consented to extraction of some but not all defective teeth]; Rolater v. Strain (1913) 39 Okla. 572, 137 P. 96 [patient consented to operation upon "express condition that no bones should be removed from her foot"].)

26/ Plaintiff states in her brief she "asked defendant Gordon about his health and expressed concern that if there was any problem with his health that she should know about it so that she could make an informed decision whether to proceed." (AOB 37; emphasis added.) There is no support in the record for the underlined statement.

indicated; distinctly stated; definite; explicit; plain"]; see also Civil Code, §§ 1434, 1620.) Simply put, the question "And how is your health?" is not an express condition; it is not a clear, distinct, definite, explicit or plain statement that plaintiff's consent to surgery was contingent upon Dr. Gordon's good health.

Moreover, the context of the question makes clear plaintiff was not seeking assurance that Dr. Gordon would not transmit a disease to her. Rather, she sought to make sure Dr. Gordon would be present at the surgery and no other doctor would be substituted. (JA 474 ["And I said, 'Well, I--I was just worried. I was just worried about that. You know, I just want the best person possible to be there for my surgery and I'm just trying to think of all of the things that could go wrong'"]; emphasis added.)

b. Under the heading of battery, plaintiff also includes an argument that "public policy requires physicians to disclose their HIV status because of the patient's right to make informed decisions regarding treatment." (AOB 39-43.) The argument is irrelevant for a number of reasons. First, summary judgment was granted and must be affirmed because regardless of whether or not a physician is required to disclose his HIV status (the question of duty), plaintiff suffered no legally-compensable injury (the question of damages). Second, plaintiff's argument is based on guidelines issued in 1990--four years after plaintiff's surgery (AOB 41-42; In re Application of Milton S. Hershey Medical Center (1991) 407 Pa. Super. 565, 583, 595 A.2d 1290, 1300; Appendix, Exhibit J); in contrast, the recommendations prevailing in 1986, when the surgery in this case was performed, permitted physicians to perform surgery without revealing their known or suspected HIV status. (See discussion below, p. 45-46.) Third, plaintiff's argument does not support her contention that a physician's failure to reveal his HIV status could constitute a battery. Rather, such conduct, even if actionable and relevant, would be analyzed under negligence concepts, since it does not satisfy any theory of battery recognized under California law. Fourth, plaintiff cites no authority for

the proposition that an HIV-infected physician can be liable in damages to a patient to whom he did not reveal his HIV status, especially where, as here, the patient was never exposed to AIDS, does not contract AIDS, and suffers only an asserted "fear of AIDS."[27/]

In sum, for multiple reasons, plaintiff did not state a viable claim for battery; the undisputed evidence demonstrated she cannot recover under that theory.

2. Plaintiff cannot recover for intentional infliction of emotional distress because, as a matter of law, her fear was unreasonable and defendants' conduct was not outrageous.

Plaintiff asserts she should be allowed to proceed with her cause of action for intentional infliction of emotional distress ("IIED"). (AOB 43-45; see also 25-30.) She should not.

a. Plaintiff first argues that her IIED claim cannot be "lumped together" with her negligence claim because the two have different elements. (AOB 43.) But IIED, like negligent infliction of emotional distress, requires that the plaintiff's emotional distress be objectively reasonable, as well as severe (genuine). (Fletcher v. Western National Life Ins. Co., supra, 10 Cal.App.3d at 394, 397 ["'of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it'"]; Mitchell v. Superior Court, supra, 37 Cal.3d at 608-609

27/ Neither of the decisions plaintiff cites for this argument is a "fear of AIDS" case; in fact, neither was brought by a patient. In In re Application of Milton S. Hershey Medical Center, supra, 407 Pa.Super. 565, 595 A.2d 1290, the infected physician sued the hospital for breach of confidentiality for revealing his HIV status to patients. In Estate of Behringer v. The Medical Center At Princeton, supra, 249 N.J. Super. 597, 592 A.2d 1251, the physician sued the hospital for requiring him to reveal his HIV status to patients and suspending his privileges.

[measured by whether distress squares with scientifically proven facts].) Since (as we have shown, at pp. 17-30) plaintiff's emotional distress was unreasonable as a matter of law, she can no more recover for IIED than for negligence.

b. Plaintiff next implies that it is defendants' position--and presumably the trial court's--that emotional distress is not compensable in California without physical injury. (AOB 44-45.) That argument is a strawman. Defendants have argued, and the trial court agreed, that plaintiff could not recover for her alleged emotional distress as a matter of law because she was not exposed to HIV and because her risk of developing AIDS in the future is so minute that her allegedly severe distress is unreasonable as a matter of law. Neither defendants nor the trial court took the position that the reason plaintiff cannot recover is because she suffered no physical injury.

c. Further, plaintiff contends that defendants' conduct was sufficiently "outrageous" to satisfy that element of the tort of IIED. (AOB 45, 25-30.)[28/] She claims Dr. Gordon knew he was infected when he operated on her and disregarded her welfare by not informing her, for his own pecuniary interest. (AOB 28-29, 34.) Plaintiff necessarily implies--although she does not expressly say so--that such conduct was "'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (Christensen v. Superior Court, supra, 54 Cal.3d at 903; BAJI 12.74 ["Extreme and outrageous conduct is conduct which goes beyond all possible bounds

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28/ Plaintiff states--with no support in the record whatever--that plaintiff and defendants presented "opposing expert opinions on the question of the gravity of defendant's act of intentionally subjecting plaintiff to potential infection of a deadly disease, AIDS" and that "the experts in this case differ on the seriousness of defendant's conduct as to whether it meets the criteria of outrageous conduct." (AOB 26, 30.)

This is utter fabrication. Plaintiff's expert testified that it cannot be said with 100 percent certainty that plaintiff will not develop AIDS in the future. (JA 487-488.) Neither he nor any other expert expressed any opinion as to the "gravity" or "seriousness" of defendants' conduct.

of decency so as to be regarded as atrocious and utterly intolerable in a civilized community"].)

Dr. Gordon's conduct did not come close to meeting this standard; in fact, it was completely within the bounds of the only standards extant at the time. Specifically, on April 11, 1986, seven months before plaintiff's surgery, the CDC issued guidelines permitting "infected workers" to "continue all professional practice, including invasive procedures, as long as appropriate barrier precautions were used," in that "the risk of transmission to patients . . . was 'negligible.'" (Barnes, et al., The HIV-Infected Health Care Professional: Employment Policies and Public Health (1990) 18 Law, Medicine & Health Care 311, 313-314, citing Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus During Invasive Procedures, 35 Morbidity & Mortality Weekly Rep. 221 (April 11, 1986).) (See Appendix, Exhibit N.) Surely following the guidelines issued by our nation's eminent public health authority cannot conceivably be considered conduct beyond the bounds tolerated in a civilized society!

d. Finally, plaintiff suggests that Drs. Blanchard and Knox entered into a "conspiracy of silence" with Dr. Gordon to conceal Dr. Gordon's HIV status from plaintiff. (AOB 45.) However, the evidence was undisputed that Drs. Blanchard and Knox did not learn of Dr. Gordon's infection until after plaintiff's surgery. (JA 276, 284 [Interrog. No. 31]; 215 [Undisputed Material Fact No. 4].)[29/] This fact provides an additional reason why the Blanchard/Knox defendants cannot be found liable for IIED.

29/ The evidence was also undisputed that Dr. Gordon received the results of his HIV test on November 10, 1986--five days after plaintiff's surgery. (JA 275, 284 [Interrog. No. 24].) What was disputed (although not material for purposes of the summary judgment motion) was whether he was tested before or after the surgery. (Ibid.; RT 10.)

The trial court correctly concluded that plaintiff may not proceed on a theory of intentional infliction of emotional distress. Summary judgment on that cause of action--as on all others--was properly granted.

3. Plaintiff cannot recover for intentional misrepresentation because Dr. Gordon made no misrepresentations and because damages for emotional distress alone are not recoverable in actions for misrepresentation.

a. In her complaint, plaintiff alleged a cause of action for intentional misrepresentation, asserting that Dr. Gordon represented he would provide her information about "all risks known to him" regarding his performance of the surgery, and that this representation was false because he failed to inform her he was infected with HIV. (JA 12-14.) She relied on this theory of intentional misrepresentation in her opposition to the summary judgment motion (JA 193-194), her motion for reconsideration (JA 503-504), and her reply to defendants' opposition to the motion for reconsideration (JA 559-560).

As with her battery cause of action, plaintiff again changes theories on appeal, again violating the "theory of trial doctrine." (See p. 41, fn. 24, supra.) In her opening brief, she asserts the actionable misrepresentation was that Dr. Gordon "intentionally misrepresented the status of his health to Ms. Kerins by telling her that he worked out at the gym on a regular basis and went running every morning." (AOB 49.)

Plaintiff cannot recover for intentional misrepresentation under either theory. Dr. Gordon's alleged representation that he would provide plaintiff with information about all risks known to him concerning his performance of the surgery was true, not false. Neither Dr. Gordon nor the CDC "knew" or believed that a HIV-infected surgeon posed a

risk to patients. (JA 276, 336 [Interrog. No. 29]; 277, 337-338 [Interrog. Nos. 34, 35].) Dr. Gordon's alleged representation that he worked out regularly and ran every morning, likewise, was a true statement.

b. An additional factor prevents plaintiff from recovering damages for emotional distress based on a theory of intentional misrepresentation or fraud. She failed to satisfy the "damage" element of the tort because the sole injury claimed is emotional distress. Damages for emotional distress alone are not recoverable in an action for intentional misrepresentation. (Nagy v. Nagy (1989) 210 Cal.App.3d 1262, 1269.) As the Nagy court observed, "Although damages for emotional distress can be recovered in a fraud cause of action, such damages have been allowed only as an aggravation of other damages." (Ibid.; see also Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 433 ["mental suffering constitutes an aggravation of damages when it naturally ensued from the act complained of"]; Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 921 [pecuniary and emotional distress damages].)

There is no authority in California for permitting emotional distress damages for intentional misrepresentation where they are not an aggravation of other damages. Such a rule would effectively eliminate the damage element of the tort of intentional misrepresentation, since virtually anyone who is defrauded suffers emotional distress, whether or not they suffered more palpable pecuniary or other injury. Were this court to hold that the damage element of intentional misrepresentation is satisfied by a showing of mere emotional distress, it would be breaking new ground without any compelling justification.

Plaintiff failed to satisfy the elements of intentional misrepresentation, and the trial court acted properly in granting summary judgment on that cause of action as well.

CONCLUSION

In our society, where there is no shortage of things to fear, and new reasons to be afraid every day, "fear of disease" and "fear of AIDS" lawsuits pose a significant threat to the already overtaxed judicial system. If such claims are permitted without substantial limitations, i.e., proof of exposure and a reasonable likelihood the disease will occur, the system could easily be overwhelmed and undermined by claimants who do not have the feared disease and probably will never get it. People who previously assumed they just had to live with their fears would see an opportunity to pursue the litigation jackpot. Our courts' already strained and increasingly limited resources would be squandered adjudicating baseless claims, at the expense of those of the truly injured.

Defendants urge this court to affirm the judgment below, confirming that fear alone, however genuine, is not entitled to compensation.

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Respectfully submitted,

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