Case No. S 161905
2d Civ. No. B 193092

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JACK L. SEGAL, M.D.,

Plaintiff and Appellant,

vs.

DUNCAN Q. McBRIDE, M.D. and REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants and Respondents.

From the Court of Appeal's Decision 02/11/08
Court of Appeal, Second Appellate District, Division Five

Appeal from Los Angeles Superior Court SC 082862
Hon. Lisa Cole Hart

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

I. NO GROUNDS EXIST FOR GRANTING REVIEW IN THIS CASE

Plaintiff, Jack Segal, M.D., has petitioned this Court for review of an unpublished Court of Appeal opinion that affirms a directed verdict in favor of defendant Duncan Q. McBride, M. D., in a medical malpractice action.[1] The Petition (Petn. p. 2) cites the standard grounds for review: "to secure uniformity of decisions [and] to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b).) In fact, neither ground is applicable.

Plaintiff's Petition attempts to formulate an issue relating to application of the rules laid down by this Court in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244-245 ("*Cobbs*"), regarding informed consent. However, plaintiff either misunderstands or mischaracterizes the *Cobbs* rules, and misstates the holdings of subsequent cases that applied those rules.

More significantly, the Petition totally ignores the decision of the Court of Appeal that plaintiff is asking this Court to review. Absent reference to any error made, or new road charted, or conflict created by the Court of Appeal decision in this case, plaintiff cannot demonstrate any cognizable ground for review. (Cal. Rules of Court, rule 8.500, subd. (b).)

To the contrary, the Court of Appeal decision (attached to plaintiff's Petition for Review) correctly analyzes and applies the well-settled rules

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[1] The Court of Appeals' decision is appended to the Petition For Review and will be referenced herein as the Slip Opinion.

governing informed consent set forth by this Court in *Cobbs* and followed in later cases. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191 ("*Arato*"); *Betterton v. Leichtling* (2002) 101 Cal.App.4th 749, 756 ("*Betterton*"); *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 534-535 ("*Morgenroth*"); *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 840 ("*Jambazian*").)

The Court of Appeal's determination that publication of its decision in this case was not warranted further confirms that the decision neither breaks new ground, nor gives rise to any conflict with prior relevant authority. (Cal. Rules of Court, rule 8.1105, subd. (c).) Review should therefore be denied.

II. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEAL CORRECTLY STATED AND APPLIED THE PRINCIPLES GOVERNING INFORMED CONSENT.

A. The *Cobbs* Formulation

Cobbs, supra, definitively delineated the scope of disclosure required of physicians, in order to satisfy the requirement that medical treatment be given only with the informed consent of the patient. *Cobbs* set forth two distinct types of required disclosure, subject to different standards of proof. First:

> [W]hen a given procedure inherently involves a *known* risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur.

(8 Cal.3d at p. 244, emphasis added.) Proof of duty with respect to this category of "minimal disclosure" is not dependent on the standard of practice and does not require expert testimony. (Slip Opin. p. 7.) However, *Cobbs* also established a secondary category of disclosure as to which it adopted a different standard of proof:

> *Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.*

(8 Cal.3d at pp. 244-245, emphasis added.)

In discussing the second tier "additional information" prong of the *Cobbs* formulation, *Arato,, supra*, reaffirmed this Court's adherence to the "standard of professional practice as the benchmark for measuring the scope of disclosure," declaring that it had "become an integral part of the legal standard in California for measuring the adequacy of a physician's disclosure in informed consent cases." (5 Cal.4th at pp. 1190-1191.) Although the specific issue before the Court in *Arato* was whether the trial court had erred in admitting expert evidence on the issue of second tier duty, *Arato* relied upon *Morgenroth., supra*, 54 Cal.App.3d at pp. 534-535, and *Vandi v. Permanente Medical Group* (1992) 7 Cal.App.4th 1064, 1071, both of which held that such evidence was not merely appropriate, but was, in fact, necessary to prove the existence of a duty to disclose second tier "additional information"under the "skilled practitioner" standard.

B. Background Facts Relating To Plaintiff's Contentions Regarding Defendant's Duty Of Disclosure.

Plaintiff's lawsuit was predicated on the theories that he developed post-surgical scar tissue, following back surgery, as a result of defendant's use of a morphine based paste at the surgery site, for the purpose of reducing plaintiff's post-surgical pain; and that defendant did not obtain plaintiff's informed consent to the surgery, because defendant failed to inform him that he would be using the paste. (Slip Opin. p. 2.) At trial, plaintiff contended that defendant was not only required to advise him of defendant's intention to use the paste, but also to advise him of its component properties, its mode of preparation in the operating room, and that its use was non-essential. (3RT 422-424, 434-435.)

The trial court found that disclosure of the use of the paste was "additional information" under the second tier of the *Cobbs* formulation; that any duty to disclose, therefore, depended on the practices of skilled practitioners of good standing; and that these were matters beyond lay knowledge which could be proved only through expert evidence. (Slip Opin. p. 2.) Plaintiff has never claimed that the trial court erred in finding that such disclosure fell within the "additional information" tier of the *Cobbs* formulation. Rather, he contends that expert evidence was not necessary to establish the practices of skilled practitioners with respect to use of the paste, or disclosure of its use. (Petn. pp. 4-5.)

Defendant, who had designated himself as an expert witness, testified that it was "an accepted school of thought among neurosurgeons," at the time of plaintiff's surgery, to use the morphine paste. (3RT 187-188,

276.) Defendant had read medical literature on the practice of using the paste, and had engaged in a risk-benefit analysis in deciding to use the paste in his practice. The literature he consulted reported no higher rate of infection with use of the paste, and no case of a hyper-allergenic reaction to use of the paste. Defendant regarded the risk of using it as "mighty low." He had used it hundreds of times with no adverse effects. (Slip Opin. p. 4; 3RT 188-189, 191-193.) He had never before seen formation of the type of scar tissue plaintiff exhibited in patients on whom he had used the paste. No issues relating to formation of scar tissue appeared in the medical literature defendant had consulted relating to the paste. He had seen such tissue form on patients on whom he had *not* used the paste. Defendant further testified that the standard of practice does not require disclosure of use of the paste or of its component elements. (Slip Opin. pp. 4-5; 3RT 187, 205-206, 244, 266, 292.)

Plaintiff called three expert witnesses, none of whom testified as to the standard of practice with respect to use of the paste, as to any risks associated with its use, or as to a duty to disclose its use. Instead, plaintiff asserted that expert evidence was not necessary to establish a duty to disclose second tier "additional information." (Slip Opin. p. 8.)

C. The Court Of Appeal's Application Of The Governing Rules

The Court of Appeal decision correctly analyzes the significance of this Court's selection of the "skilled practitioners" standard of practice as the measure of required disclosure of "additional information." (*Cobbs, supra*, 8 Cal.3d at pp. 244-245). The Court concludes that expert evidence

was required to prove the existence of a duty of disclosure with respect to the morphine paste, citing *Morgenroth's* observation (54 Cal.App.3d at pp. 534-535) that it could see no "other rational interpretation" of *Cobbs* adoption of the skilled practitioner standard. (Slip Opin. p. 7.) The Court of Appeal decision draws further support from *Jambazian*, *supra*, and from *Betterton*, *supra*. (Slip Opin. pp 7-8.) *Jambazian* held that expert testimony was required to prove a second tier duty. (25 Cal.App.4th at pp. 840, 849-850.) *Betterton* held that *only* expert evidence is relevant to prove a duty to disclose matters "beyond the general knowledge of lay people." (101 Cal.App.4th at p. 756.)

Plaintiff attempts to rebut the need for expert testimony by citing language in *Arato*, relating to the limited role of expert testimony in informed consent cases. (Petn. p.4.) The citation is deliberately misleading, ignoring the immediately preceding language in *Arato* that affirms the significance of the "skilled practitioner" standard for second tier disclosures, and recognizes the need for expert testimony to establish that standard. (5 Cal.4th at pp. 1190-1191.)

Also inapposite is plaintiff's reliance on *Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 805. (Petn. p. 6.) *Berkey* antedated *Cobbs* and therefore cannot constitute authority as to the standard of proof of second tier disclosures, a category that did not exist until *Cobbs* defined it.

D. Plaintiff Has Improperly Conflated The Standard Of Proof As To "Duty" With The Standard Of Proof As To "Causation" To Support His Argument.

In addition to delineating the scope of the physician's duty with respect to informed consent, *Cobbs* also defined the plaintiff's burden of proof with respect to establishing a causal connection between nondisclosure and harm, holding:

> There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given.

(8 Cal.3d at p. 245.) *Cobbs* held that weighing the risks of treatment against the individual subjective fears of the patient is not an expert skill. (8 Cal.3d at p. 243.) Therefore, the patient-plaintiff can testify as to what his subjective decision as to consent would have been, had disclosure been made, for purposes of establishing causation. The jury is then required to measure the plaintiff's credibility under an objective prudent person standard. (*Id.* at 245.)

Here plaintiff did testify that had disclosure been made, he would not have consented to use of the morphine paste, because he was concerned about two of its components. (Slip Opin. p. 4 .) That testimony was properly admitted as to the issue of causation. (*Cobbs, supra*, 8 Cal.3d at p. 245.) It was not relevant on the issue of duty.

Plaintiff was not permitted to testify as an expert about the properties of the paste for purposes of establishing a duty to disclose, because he had not qualified as an expert. (Slip Opin. pp. 5-6, 8-9.)

Plaintiff cites language from *Jambazian*, *supra*, 25 Cal.App.4th at pp. 847-848, for the proposition that his own testimony as to his subjective

feelings should have sufficed to defeat the motion for directed verdict. (Petn. p. 5.) However, the language plaintiff quotes deals with the issue of *causation*, not with duty. (Petn. pp. 4-5.) Plaintiff ignores *Jambazian*'s discussion on the issue of duty which holds that expert testimony is necessary to establish the standard of skilled practitioner's with respect to disclosure of second tier "additional information." (25 Cal.App.4th at pp. 849-850.) The Court of Appeal in this case is the same court that decided *Jambazian*, and was fully conversant with its holding on the need for expert testimony. Its reliance on *Jambazian* was well-placed. (Slip Opin., pp. 7-8.)

III. THE COURT OF APPEAL PROPERLY REJECTED PLAINTIFF'S CONTENTION THAT THE PRUDENT PERSON STANDARD SHOULD NOT APPLY TO HIM BECAUSE HE IS A PHYSICIAN.

Although not properly formulated as an issue for review (Petn. p. 3), plaintiff argues that he was entitled to more extensive disclosure than a lay person would have been entitled to, because he was a physician. (Petn. pp. 12-14.) Plaintiff cites no authority that supports this argument. The Court of Appeal rightly rejected the argument, as it runs counter to the basic rationale *Cobbs* employed in adopting the rules governing informed consent. (Slip Opin. pp 8-9.)

IV. PLAINTIFF HAS FAILED TO FORMULATE ANY ISSUE RELATING TO EXCLUSION OF HIS EXPERT TESTIMONY THAT WOULD BE APPROPRIATE FOR REVIEW.

Plaintiff argues that he should have been allowed to testify as an expert, even though he was not designated as one. (Petn pp. 14-16.) Again, plaintiff has failed to formulate this contention as an issue for review (Petn. p. 3), and has failed to cite any authority to support it. The Court of Appeal properly rejected it. (Slip Opin. pp. 9-11.)

CONCLUSION

Plaintiff having presented no issue that meets the criteria for review his Petition For Review should be denied.

Dated: April ___, 2008 Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **Answer to Petition for Review** contains 2,075 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: April ___, 2008

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Barbara S. Perry

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