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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

COLLEEN KAZNOWSKI et al.,

Plaintiffs and Respondents,

v.

RITA BIESEN-BRADLEY et al.,

Defendants and Appellants.

C063872

(Super. Ct. No. 07AS00741)

In this medical malpractice action following premature delivery of twins, the jury found that the obstetrician, defendant Dr. Rita Biesen-Bradley, was *not* negligent, but her medical corporation, defendant Rita Biesen-Bradley, M.D., Inc., or RBBI, *was* negligent. RBBI appeals from the judgment in favor of plaintiffs Colleen Kaznowski and her twin children (referred to herein as twin A and twin B).¹ RBBI contends it cannot be

¹ The twins sued through a guardian ad litem, their maternal grandmother, Nancy Sandra Hopkins. Colleen Kaznowski’s husband, Thomas Kaznowski, was also a named plaintiff in the lawsuit, but the jury awarded no damages for him, and he is not a party to this appeal. Our references to “plaintiff” in the singular refer to Colleen Kaznowski.

vicariously liable for conduct of its employee, Dr. Biesen-Bradley, because the jury found Dr. Biesen-Bradley not negligent, and no expert evidence supports an independent theory of liability against RBBI. We conclude that, although the focus of plaintiffs' case was on Dr. Biesen-Bradley, substantial evidence supports liability of RBBI for conduct of other agents of the medical corporation. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2007, plaintiffs filed a complaint alleging medical malpractice, professional negligence, intentional misrepresentation, negligent misrepresentation, negligent infliction of emotional distress, and loss of consortium.

Evidence at trial included the following:

In July 2005, plaintiff became pregnant through in-vitro fertilization. Plaintiff had high risk factors because of her age and medical history.

Plaintiff's obstetrician, Dr. Biesen-Bradley, practices as the only member of a professional medical corporation, RBBI.

On October 28, 2005,² an ultrasound showed plaintiff had an "incompetent cervix" or "cervical insufficiency," meaning her cervix was prematurely shortening, which indicated a risk of premature delivery. Plaintiff was hospitalized.

On October 30, 2005, Dr. Biesen-Bradley performed an urgent medical procedure called a modified Shirodkar cerclage -- placing a suture around the plaintiff's cervix to cinch it closed. During the procedure, Dr. Biesen-Bradley identified a tear or thinning in the cervical tissue but did not tell plaintiff. Dr. Biesen-Bradley did not stitch the tear because she believed it was in the mucus membrane (mucosa) rather than in the substance of the cervix (stroma), such that stitching the tear would create an unnecessary risk of the cerclage failing.

² All events giving rise to this lawsuit occurred in 2005.

Plaintiffs' expert, Dr. Jeffrey Phelan, testified that the tear Dr. Biesen-Bradley had identified occurred in the substance of the cervix (stroma) rather than the mucosa, and it should have been stitched.

Two weeks after returning home, plaintiff began leaking fluid. The leaking liquid did not smell like urine. Plaintiff testified that she believed she first called RBBI about leaking fluid on November 15 -- three days before plaintiff's November 18 birthday. She called RBBI during office hours but, as usual, "got [RBBI's] answering machine." Plaintiff left a message, but no one at RBBI called her back. She called twice on November 16 and left voice mail messages. Her husband also left a voice mail message on November 16 and requested a callback. On November 17, plaintiff, her husband, and her mother called RBBI several times during office hours beginning with plaintiff's call in the morning before 8:30 a.m. Each of them left messages about plaintiff's leaking fluid and asked for a callback. While plaintiff and her husband left voice mail messages on November 17, plaintiff's mother testified that she actually spoke to a person twice sometime during that day. She informed the person with whom she spoke that plaintiff was leaking fluid and Dr. Biesen-Bradley had told them to contact the office if there were any problems. No one returned their calls.

At 5:07 p.m. on November 17, plaintiff again called RBBI. The RBBI office closes at 3:00 p.m., so she was referred to RBBI's exchange service and left a message. RBBI's records show that a message from a patient who was five months' pregnant and who reported a "strange discharge" was relayed to the "on-call" doctor at 5:08 p.m.

The on-call doctor at the time was Dr. Freed.³ Plaintiff testified a Dr. Freed came into her room with Dr. Biesen-Bradley on October 29, before Dr. Biesen-Bradley performed the cerclage the following day. At that time, Dr. Biesen-Bradley said "she

³ The record on appeal does not disclose Dr. Freed's first name.

wouldn't be able to treat me but that this doctor would treat me." Dr. Biesen-Bradley did not explain, and plaintiff never understood why Dr. Freed was there. Plaintiff had a discussion with Dr. Freed at that time, which she described as "small talk." Dr. Freed introduced himself by name and said he did not want to be there on his day off. He also said he was there for Dr. Biesen-Bradley.

Dr. Biesen-Bradley testified that Dr. Freed was not present when she visited plaintiff. She did not ask him to see plaintiff and had not told him about plaintiff or plaintiff's care, but he was "on call for our group" and on-call doctors make hospital rounds. Dr. Biesen-Bradley acknowledged that Dr. Freed made notes on the medical record for October 29 and issued an order that day that is reflected in the records.

Dr. Freed did not testify at trial. Plaintiff testified she received a call within a half-hour after leaving the November 17 message on Dr. Biesen-Bradley's exchange service. The call was from a male who did not identify himself, but who said he was the doctor on call for Dr. Biesen-Bradley. As we have noted, the on-call doctor was Dr. Freed. Plaintiff told him about the cerclage procedure she had undergone and told him she was leaking fluid. She asked if she should go to the emergency room. He said she did not need to go to the emergency room, but that she should go to Dr. Biesen-Bradley's office the next morning.

The following morning, November 18 at 9:00 a.m., plaintiff went to RBBI's office. Nurse Rita Shapiro was expecting plaintiff. Plaintiff testified she reported to Nurse Shapiro that she had been feeling wet for *more than* 24 hours. Nurse Shapiro examined plaintiff and saw that a bulging bag of liquid had slipped from the cervix (i.e., a prolapse of the amniotic sac into the vagina). Nurse Shapiro phoned Dr. Biesen-Bradley and then called an ambulance to take plaintiff to the hospital, where she was hospitalized around 11:00 a.m. At the hospital, plaintiff was kept in an upside-down position (a steep Trendelenburg) in an effort to cause the prolapsed membranes to retreat. The hospital

began antibiotics immediately as a precaution, but did not immediately test the amniotic fluid for infection.

Infection complicates treatment. As will appear, there was conflicting evidence as to whether plaintiff had any infection when she was admitted to the hospital on November 18.

On November 22, Dr. Biesen-Bradley went on vacation for six days. Dr. Les Heddleston, a perinatologist, testified as a nonretained expert. He stated that he had first examined plaintiff in the hospital on November 22. He planned to refer plaintiff to Dr. Michael Katz for a rescue abdominal cerclage. However, Dr. Katz was willing to perform the procedure only if the amniotic fluid was not infected. On November 23, Dr. Heddleston performed an amniocentesis, which showed an early infection in the amniotic sac of twin A. The plan of care was to continue with rotating antibiotics and, if twin A appeared to be delivering spontaneously, the doctor would try to be prepared to deliver that baby and then put in another cerclage for the second baby.

When Dr. Biesen-Bradley returned from vacation on November 28, plaintiff fired her. Plaintiff asked Dr. Heddleston to take over.

The infection that began in twin A ultimately progressed to twin B and to plaintiff herself, precipitating premature delivery by Cesarean section on December 27 and resulting in medical complications for the twins. Both twins were born with intra-amniotic infection syndrome (IAIS). Plaintiff presented extensive evidence of damages.

Regarding breach of the standard of care and causation, plaintiffs' retained obstetrics expert, Dr. Jeffrey Phelan, reviewed the medical records and depositions and opined that on November 17, plaintiff had "weeping of the membranes," indicating that the amniotic sac of twin A prolapsed (slipped) into the vagina, probably on November 17. A prolapse results in premature delivery. "The problem is that once the bag is exposed to the vaginal bacteria, that localized area of the bag tends to break. . . . And what happens is the bacteria move in, even if you give them antibiotics,

even if you sterilize the area, they will still get a localized infection and then you will have a broken bag in about three to seven days.” Dr. Phelan testified, “I think it was a *fait accompli* when [plaintiff] showed up on the 18th.”

Dr. Phelan opined that the membranes of the amniotic sacs had *not* ruptured at the time plaintiff was admitted to the hospital on November 18, and she herself was not experiencing any signs of infection before her November 18 admission to the hospital. When asked if a pregnant woman can leak fluid without having a prolapse, Dr. Phelan said, “they can rupture membranes, many people call them high leaks, and not have a prolapsed bag. But when you see the weepiness, watery mucous coming out, that means the bag is coming through. And in my experience it is pretty close to 100 percent. [¶] So when she called in on the 17th, and not knowing yet when I had reviewed the records that she had had the prolapse and then they examined her in the office on the 18th, I knew on the 17th she had a prolapsed bag and that bag was at the opening. That was confirmed with the speculum exam [on November 18]. It was confirmed by subsequent examiners. [¶] So if you have a watery, mucousy discharge, and this is just perinatal safety, you need to go in and be evaluated by your doctor.”

Plaintiffs’ attorney asked what Dr. Phelan would have advised had he been the on-call doctor who received the message that the client was losing fluid -- so much it was filling a menstrual pad. The defense objected that the question was irrelevant, and the trial court sustained the objection. Plaintiffs’ attorney then asked whether or not the on-call doctor’s advice to wait until the next day was appropriate advice. The defense objected that the question was irrelevant, and the trial court, after an unreported sidebar, sustained the objection. The transcript does not reveal the reason for the rulings.

Dr. Phelan opined that *during* plaintiff’s hospitalization from November 18 *onward*, plaintiff “received all appropriate care that could be provided for someone in her situation.” He did not testify that plaintiff received appropriate care from November 15 through 17 when her repeated calls to RBBI were ignored and the on-call doctor told her

not to go to the emergency room. Nor did he testify that the “fait accompli” related back earlier than the 18th.

Dr. Phelan opined the tearing of the stitch and the failure to correct it contributed to or caused the premature delivery of the twins.

Dr. William Patrick Joseph, plaintiffs’ retained expert in infectious diseases, testified it was not possible to say exactly when the infection started, but he opined it was already present when plaintiff was admitted to the hospital on November 18, and from his experience, that type of infection usually becomes manifest in one or two days, so he suspected that the infection started November 16 or 17. Usually an infection occurs after a breakdown of the cervix; it is not usual that an infection causes a breakdown of the cervix. He opined plaintiff had cervical incompetence but no infection on October 28. After she left the hospital on October 31, she developed IAIS inside the amniotic sac of first one, and then both, twins.

Dr. Joseph stated it was “clinically apparent” (i.e., by plaintiff’s elevated white blood count, elevated pulse rate, and abdominal tenderness) that the infection was present in plaintiff and twin A when plaintiff was admitted to the hospital on November 18. If the cervix membranes that are supposed to be up inside the uterus “either prolapse or bulge through or get exposed to vaginal bacteria, the bacteria will actually penetrate through the outside and cause an infection. [¶] So the most common cause of intra[amniotic] infection is vaginal bacteria going right up through the cervix or touching the membranes if they’re prolapsing through, and bacteria will penetrate the membranes. [¶] So with the whole picture of [plaintiff], that is she clearly had a proven infection later on, and on the 18th she had membranes that were not supposed to be exposed to vaginal bacteria under normal circumstances, that represents the usual cause of this infection.” The fact that plaintiff had leaking fluid was not a *diagnostic* factor but was a *risk* factor for infection.

Dr. Joseph was aware the perinatologist opined plaintiff was not leaking amniotic fluid. Dr. Joseph testified:

“Q. If bacteria penetrates the amniotic sac and causes inflammation that results in compromising the sac, is there any length of time, standard length of time that you’re aware of that that occurs? How long does it take to compromise the sac?”

“A. [Dr. Joseph:] I don’t know. In my experience, the incubation period, that is from the time the bacteria entered the sac until mom gets tenderness and mom gets a high white count is one to two days. Now, what happens after that really depends upon the circumstances of treatment. [¶] In this case, [plaintiff] had access to hospital care, was put in a hospital right away and so her sequence of events, that is the course of her infection, would be different from someone who did not have access to health care.”

Dr. Joseph opined plaintiff’s infection was controlled during her hospital stay, in that it did not get worse. However, things changed about five weeks later. The infection got worse despite the antibiotic therapy.

Dr. Joseph opined plaintiff either had “an explosion or a worsening of her underlying infection or the original infection went away and she got a second infection because the membranes were still exposed. That’s not possible to say.” At that point, plaintiff’s health was in jeopardy.

Dr. Joseph had no opinion on whether the infection necessitated the delivery on December 27, but he opined to a degree of reasonable medical probability or medical certainty that the infection that spread to twin B and to plaintiff was the result of the prolapsed membranes being exposed to vaginal bacteria.

Defense expert, Dr. Ruth Haskins, testified cerclages fail even in the best of hands. Dr. Heddleston agreed.

Dr. Haskins testified that Dr. Biesen-Bradley had acted within the standard of care for an obstetrician/gynecologist. Dr. Haskins would not have sent plaintiff to the emergency room on November 17 had she been the on-call doctor because leaking fluid

in a pregnant woman is usually urine. However, Dr. Haskins admitted you cannot tell over the phone whether the leaking fluid is urine or vaginal transudate or amniotic fluid. When asked if it would be appropriate for a doctor to call back a patient who reported fluid leakage for several days, Dr. Haskins said, “That’s a difficult question to answer. Most calls come during the work day and are triaged by the office staff and would land on the primary physician’s desk and a call would be made in a reasonable period of time, especially if a patient called two days in a row with the same complaint and the physician is aware that that complaint, documented, came to the office two days in a row ‘I am still having this problem.’ ”

Defense obstetrics expert, Dr. Maurice Druzin, opined plaintiff received excellent care.

Dr. Biesen-Bradley also testified that leaking fluid may be urine, but she would have told a patient in plaintiff’s situation to go directly to the hospital, because one cannot tell whether it is urine or amniotic fluid without checking it.

On August 11, 2009, the jury returned a special verdict finding:

1. Dr. Biesen-Bradley was *not* negligent, but RBBI *was* negligent.
2. Dr. Biesen-Bradley did not cause injury to plaintiffs, but RBBI did.
3. Neither Dr. Biesen-Bradley nor RBBI made an intentional misrepresentation.
4. Dr. Biesen-Bradley did not make a negligent misrepresentation. RBBI did make a negligent misrepresentation but had reasonable grounds for believing it to be true when it was made.
5. Dr. Biesen-Bradley did not intentionally conceal an important fact. RBBI did intentionally conceal an important fact but did not intend to deceive plaintiffs.
6. Plaintiff suffered serious emotional distress, but defendants’ negligence was not a substantial factor in causing the distress.
7. Plaintiff’s husband did not suffer loss of consortium damages.
8. The jury awarded damages to plaintiff and the premature twins.

RBBI filed a motion for judgment notwithstanding the verdict (JNOV) and a motion for a partial new trial, arguing the jury's finding of no negligence by Dr. Biesen-Bradley precluded the finding of liability against RBBI, and there was no independent basis for liability against RBBI.

Plaintiffs opposed the motions and submitted juror declarations attesting they found Dr. Biesen-Bradley performed negligently. However, according to the declarations, the jury returned a verdict against the corporation instead of Dr. Biesen-Bradley as an individual because of the instruction that stated, "a corporation is responsible for harm caused by the wrongful conduct of its employees/agents/principals while acting within the scope of their employment/authority."

RBBI objected to the jurors' declarations as inadmissible evidence of their thought processes, in violation of Evidence Code section 1150.

On November 16, 2009, the trial court entered judgment pursuant to the jury verdict.

On December 17, 2009, the trial court denied RBBI's motions for JNOV and for a partial new trial. The minute order stated, "There is substantial evidence in the record regarding negligent conduct by employees and agents of the corporation to support this verdict." Citing Evidence Code section 1150, the trial court expressly disregarded the juror declarations. The court said, "The determination of corporate liability is not hopelessly inconsistent with the finding that Dr. Biesen-Bradley was not personally liable. The Court is not persuaded the verdict shows the jury was hopelessly confused."

On December 30, 2009, RBBI filed a notice of appeal from the judgment and the postjudgment order denying the JNOV motion.⁴

⁴ RBBI's appellate brief also claims that irreconcilable inconsistency of the verdict entitles RBBI at a minimum to a partial new trial. Since we find no inconsistency in the verdict, we need not address this issue.

On May 11, 2010, the trial court issued an amended judgment nunc pro tunc.

DISCUSSION

I. Standard of Review

This appeal challenges the sufficiency of the evidence to support the jury's verdict against RBBI and the trial court's denial of RBBI's motion for JNOV. Both are reviewed under the substantial evidence test.

“In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision” (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203 (*Beck Development*).

In ruling on a JNOV motion, the trial court “ ‘must accept as true the evidence supporting the jury's verdict, disregarding all conflicting evidence and indulging in every legitimate inference that may be drawn in support of the judgment. The court may grant the motion only if there is no substantial evidence to support the verdict.’ [Citation.]” (*Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280, 289.) “On appeal, we apply the same standard and must uphold the trial court's denial of the motion unless there is no substantial evidence to support the verdict. [Citation.]” (*Ibid.*)

Insofar as RBBI claims the trial court made errors of law in denying the motion for a partial new trial, such claims on questions of law are reviewed de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858-860.)

II. RBBI Liability for Negligence of other Agents

RBBI argues the jury's finding that Dr. Biesen-Bradley was *not* negligent, which we must accept on appeal, renders fatally inconsistent the jury's verdict finding RBBI liable. RBBI cites authority that the employer's liability is wholly derived from the liability of the employee. (*Lathrop v. HealthCare Partners Medical Group* (2004)

114 Cal.App.4th 1412, 1423.) “There can be no vicarious liability in a medical malpractice action without the underlying liability of the medical practitioner.” (*Id.* at p. 1426.) A judgment that holds the principal liable and exonerates the agent is self-stultifying and must be reversed. (*Davison v. Diamond Match Co.* (1935) 10 Cal.App.2d 218, 222; 3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 167, p. 211 & cases cited therein.) RBBI argues the verdict is against the law and can be explained only by the jury’s confusion, bias, or unwillingness to follow the instructions.

We see no basis for reversal. We do accept the jury’s finding that Dr. Biesen-Bradley was not negligent. We reject plaintiffs’ view that the jury believed Dr. Biesen-Bradley was negligent but misunderstood the instructions as requiring it to find her not personally liable if her medical corporation was liable. This argument is grounded on inadmissible evidence of juror thought processes. Consideration of that evidence would be in violation of Evidence Code section 1150, subdivision (a).⁵ Therefore, we are compelled to disregard it.

Nevertheless, Dr. Biesen-Bradley was not the only RBBI agent whose conduct was criticized by plaintiffs in their complaint,⁶ in the evidence adduced at trial, and in

⁵ Evidence Code section 1150, subdivision (a) provides, in pertinent part:

“ . . . No evidence is admissible to show the effect of [any] statement, conduct, condition, or event [in the jury room] upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

⁶ Plaintiff asserted in her complaint that her calls to Dr. Biesen-Bradley’s office were not returned and she also complained about the advice given by the on-call doctor. She further complained that defendants “negligently and carelessly failed to respond to [plaintiff’s] need for medical care,” “negligently failed to . . . timely diagnose [plaintiff’s] condition” and “negligently and carelessly provided follow[.]up care” to plaintiff after the cerclage.

closing argument to the jury. The judgment can be sustained on the ground that the evidence and the jury instructions supported an implied finding that RBBI was liable for negligence of its on-call doctor (who told plaintiff to wait rather than go to the emergency room) and RBBI's office staff (who failed to return plaintiff's phone calls during office hours).

A. Agency

RBBI argues liability against RBBI could not be predicated on the conduct of the on-call doctor, who told plaintiff to wait until the next morning rather than go to the emergency room, because there was no evidence he was RBBI's agent and no jury instruction asking the jury to determine his agency status. RBBI also argues no expert was critical of Nurse Shapiro, a point with which we have no quarrel but which is immaterial to this appeal.

In its reply brief, RBBI for the first time argues liability cannot be predicated on RBBI's office staff for failing properly to handle plaintiff's repeated phone calls. This belated argument about office staff should have been made in the opening brief. The complaint included allegations that RBBI staff failed to return calls, the evidence adduced at trial supported those allegations, plaintiffs' closing argument to the jury included argument to that effect, and in ruling on the motion for JNOV, the trial court stated, "There is substantial evidence in the record regarding negligent conduct by employees and agents of the corporation to support this verdict." We need not address points raised for the first time in a reply brief (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 (*Garcia*)), but we will briefly explain why the contention fails.

RBBI notes the only instruction on standard of care related to the skill and care required of an obstetrician/gynecologist: "You must determine the level of skill, knowledge, and care that other reasonably careful obstetrician/gynecologists would use in similar circumstances based only on the testimony of the expert witnesses[,] including Rita Biesen-Bradley, M.D.[,] who have testified in this case."

However, RBBI provided obstetric/gynecologic care through its agents, and the jury instructions and the evidence allowed the jury to conclude that the on-call doctor and office staff were RBBI's agents.

The jury received instruction that "A corporation is responsible for harm caused by the wrongful conduct of its employees, agents, principals while acting within the scope of their employment/authority." The trial court also instructed the jury, "In this case, Rita Biesen-Bradley, M.D., is the employee/agent of Rita Biesen-Bradley, M.D., Inc." However, the trial court did not instruct the jury that Dr. Biesen-Bradley was the *only* employee/agent of RBBI.

These jury instructions allowed the jury to find that the on-call doctor and office staff were RBBI's agents. Though agency was not defined for the jury, the common understanding of agent is consistent with Civil Code section 2295: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

In its reply brief, RBBI claims the on-call doctor was an independent contractor and therefore was not RBBI's agent. Even assuming RBBI did not forfeit this point by failing to raise it in its opening brief (*Garcia, supra*, 16 Cal.4th at p. 482, fn. 10), the contention fails. Although the general rule is that a person is not vicariously liable for the negligent acts of an independent contractor who exercises freedom in performing his duties (*Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1008), the jury was not instructed on this principle of law or on the definition of independent contractor. Had RBBI wanted such instruction, it should have requested it. If a jury instruction (such as the instruction allowing this jury to find RBBI liable for conduct of its agents acting within the scope of their authority) is legally correct but is too general, lacks clarity, or is incomplete, the party claiming a deficiency forfeits the matter if he failed to object and request a clarifying instruction in the trial court. (*Lund v. San*

Joaquin Valley Railroad (2003) 31 Cal.4th 1, 7, citing *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520.)

RBBI does not claim it requested and was denied such instruction. Instead, RBBI blames *plaintiffs* for supposedly failing to request jury instructions as to agency status of any individual person. RBBI says, “[i]n fairness to plaintiffs,” there was no reason to request such instruction because the focus was on Dr. Biesen-Bradley herself, and supposedly there was no standard of care opinion offered against anyone else.

However, the jury instructions did tell the jury that RBBI was responsible for the conduct of its employees and agents acting within the scope of their employment or authority.

Had defendants introduced evidence supporting the claim that the on-call doctor was an independent contractor and requested a jury instruction that independent contractors are not agents, plaintiffs may have requested a jury instruction on ostensible agency. (Civ. Code, § 2300 [agency is ostensible when the principal, by want of ordinary care, causes a third person to believe another to be his agent]; Civ. Code, § 2324 [principal is bound by acts of ostensible agent to persons who have in good faith, and without want of ordinary care, incurred a liability upon the faith thereof].) In the medical context, vicarious liability has been extended to independent contractors based on ostensible agency, e.g., a hospital entity may be liable under a theory of ostensible agency for the acts of nonemployee physicians who perform services on hospital premises. (See, e.g., *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 505 [evidence did not support trial court’s implied finding that physicians were not ostensible agents of hospital]; *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453-1460 [trial court erred in granting hospital a nonsuit on issue of ostensible agency, since there was no evidence the plaintiff knew or should have known that radiologist was not an agent of the hospital].)

The evidence in this case supports an implied finding that the on-call doctor was RBBI's agent. On November 17, plaintiff called RBBI at 5:07 p.m. complaining of an unusual discharge, and the message was referred to the on-call doctor. Dr. Biesen-Bradley testified RBBI has an oral agreement with other doctors to be in a "call group" -- a group of physicians who cover for each other when a physician is occupied, off duty, or otherwise unavailable. There are basically two call groups for obstetricians/gynecologists who practice at Mercy San Juan Hospital. One call group is comprised of doctors who are all in business together; the other call group -- the purple group -- is comprised mainly of doctors, like Dr. Biesen-Bradley, who each have their own private practice. The on-call doctor is responsible for taking care of the patients of call-group physicians who are unavailable and also for providing care if those patients come to the emergency room. The on-call doctor determines what is necessary for the patient while s/he is "in charge" of that patient. There is no protocol for the on-call doctor to consult with or even to call the primary doctor. Dr. Biesen-Bradley testified that she expects the on-call doctor to handle the situation. She further testified that she trusts the on-call doctors to take care of her patients when she is not available and trusts that they will do it properly. When asked if the on-call group is her representative when she is absent, Dr. Biesen-Bradley said, "The people in my call group are all board certified and I trust their judgment, that's why I'm in a call group with them." When asked again if they can represent her when she is not there, she said, "They can do what they think is necessary to take care of the patient." Dr. Biesen-Bradley never expressly denied that the on-call doctors represent her in her absence.

Plaintiff, when asked if she assumed the on-call doctor was a member of the call group, testified: "I didn't specifically know [Dr. Biesen-Bradley] had a call group. I just knew [the male on-call doctor] was a doctor that was working with her. I assumed, I didn't know. I assumed it was a doctor that worked with her and that they were speaking." Plaintiff knew that no other doctor worked in Dr. Biesen-Bradley's office, but

her perception was that the doctors called in, checked in with each other, and helped all the time. As we have previously noted, plaintiff testified that when the male on-call doctor returned her call on November 17, he said he was the doctor on call for Rita Biesen-Bradley.

Dr. Heddleston testified that all obstetricians at Mercy San Juan Hospital belong to a call group. He thought hospital policy requires it.

The return phone call was not Dr. Freed's first entry into the picture. As we have noted, plaintiff testified that a Dr. Freed was present with Dr. Biesen-Bradley during a visit a day before the cerclage, and at that time, he told plaintiff that he was there for Dr. Biesen-Bradley. The medical records reflect notations by Dr. Freed on that same day.

In closing argument, plaintiffs' attorney complained about the on-call doctor as well as the office staff who did not return plaintiff's calls:

“[O]nce the bags prolapsed, Dr. Patrick Joseph, an infectious disease specialist, testified to a reasonable degree of medical certainty that an infection would occur in the lower twin as a result of the exposure of the bags, membranes to the vaginal flora. . . .

“Every medical expert who spoke about this issue said that infection will absolutely follow. It's not if, it's when, and that deliver [*sic*] thereafter is certain. . . .

“Dr. Joseph said it usually takes about two days for infection to show up after it's present in the amniotic sac of the twin. This is significant to show that the failure of the - to repair the tear led to the defect. The defect led to the prolapse in the patient at that point in time, that the prolapse resulted in certain infection in the lower twin, that eventually spread to the mother and to the upper twin [¶] . . . [¶]

“And the premature delivery of [plaintiff's] twins at 24 weeks['] gestation was stated to directly result from the infection which resulted from the tear

“Dr. Phelan testified to a -- reasonable degree of medical certainty that the infection ultimately impacted [plaintiff] and her twins and that this occurred because of the defect in the weakened area of the cervix. [¶] . . . [¶]

“Dr. Joseph opined to a degree of reasonable medical certainty that by the time [plaintiff] was admitted on November 18th she was already infected. . . . [T]he damage was already done. The outcome was inevitable.”

In rebuttal closing argument to the jury, plaintiffs’ attorney argued:

“There was discussion by defense counsel whether -- why there was so much testimony about whether or not [plaintiff] was leaking amniotic fluid. But every physician asked the question testified there is no way to know whether the fluid is urine or amniotic fluid over a telephone call.

“Dr. Biesen-Bradley testified . . . that she would have told the patient to go immediately to the emergency room. But that didn’t happen.

“And there was no leaking at the hospital because [plaintiff] was placed in a deep [T]rendelenburg, upside down, to bring the sac back up into the cervix and stop the leaking from coming out.

“Dr. Phelan described it best, he stated there was probably weeping of the membranes. So it is not so important whether it was urine or amniotic fluid on November 17th and 18th, but rather what the doctors testified to that that fluid represented a compromise in the bag of waters and it would indicate a prolapse was either about to occur or had occurred. It was a warning sign, just like you get warning signs of a headache or warning signs of cancer. It tells you something has to be done, not to take an aspirin and call me in the morning.

“Regardless of the time that [plaintiff’s husband] called the doctor’s office, the point is -- in bringing that testimony is not to say that Dr. Biesen-Bradley is a bad person or to try to criticize her for something she did. The point is no one called him back.”

The jury could find the on-call doctor was an agent of RBBI acting within the scope of his authority.

The jury could also find members of RBBI’s office staff were agents or employees of RBBI, and that they were responsible for the delayed response. RBBI argues in its

reply brief that there was no evidence the office staff were employees. There was certainly evidence that the office staff were agents of RBBI. Dr. Biesen-Bradley testified RBBI relied on its office staff to deal with phone calls from patients.

B. Standard of Care and Breach

RBBI argues there was no expert evidence of the standard of care or breach of the standard of care with respect to the on-call doctor. However, RBBI's opening brief on appeal ignores the potential liability of RBBI for the RBBI office staff's failure to respond to plaintiff's repeated phone calls to the RBBI office between November 15 and 17. RBBI's opening brief acknowledges that the judge, in denying the posttrial motions, said "There is substantial evidence in the record regarding negligent conduct by employees^[7] and agents of the corporation to support this verdict." RBBI says the trial court did not explain. RBBI pretends the employee evidence related only to Nurse Shapiro's interaction with plaintiff upon her first becoming a patient of Dr. Biesen-Bradley and Nurse Shapiro's examination of plaintiff on November 18. RBBI then knocks down this straw man, arguing that since no one criticized Shapiro, there could be no liability based on RBBI's employees. RBBI's opening brief also says plaintiff's expert, Dr. Phelan, offered no criticism of RBBI.

However, RBBI's opening brief fails to address the office staff and plaintiff's unanswered phone calls to RBBI between November 15 and 17. That Dr. Phelan did not testify about these calls is inconsequential. He was not the only expert. In addition to the designated experts on both sides, the treating physicians were experts. There was testimony about the duty to respond to phone calls from patients and about time being of the essence in this situation because an infection will develop within days of a prolapse.

⁷ Since the jury found Dr. Biesen-Bradley was not negligent, our reference to "employees" in this opinion refers to RBBI employees other than Dr. Biesen-Bradley.

Even Dr. Biesen-Bradley testified about phone call protocol, and indicated she would have sent plaintiff to the hospital immediately upon the first report of leaking.

An appellant challenging sufficiency of the evidence to support a judgment must specify how the evidence fails to support the verdict and, if the appellant fails to do so, the reviewing court may treat the matter as forfeited and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*)). Substantial evidence review is also forfeited if the appellant fails to cite evidence favorable to the judgment. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman & Clark Corp.*)).

In its reply brief, RBBI argues for the first time that there was no expert evidence of the standard of care or breach of the standard of care by RBBI office staff. We need not address points raised for the first time in a reply brief. (*Garcia, supra*, 16 Cal.4th at p. 482, fn. 10.) RBBI was on notice that it needed to address office staff, because there was evidence about the unanswered phone calls, and the trial court, in denying RBBI's motions for JNOV or partial new trial, stated there was substantial evidence regarding negligence by "employees" (plural) and agents of RBBI to support the verdict.

We conclude RBBI has forfeited any challenge to the judgment with respect to RBBI's office staff. (*Garcia, supra*, 16 Cal.4th at p. 482, fn. 10; *Stanley, supra*, 10 Cal.4th at p. 793; *Foreman & Clark Corp., supra*, 3 Cal.3d at p. 881; *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1074 (*Holmes*)).

Accordingly, any challenge regarding the on-call doctor is inconsequential. We will nevertheless speak to RBBI's contentions regarding standard of care and breach.

"The standard of care in a medical malpractice case requires that medical service providers exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances. The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required

by the particular circumstances is within the common knowledge of laymen. [Citation.]” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 (*Alef*).

“Even where expert testimony is required, however, it may be circumstantial in nature, and the jury is entitled to draw reasonable inferences from it in finding the standard of care [citations]” (*Keen v. Prisinzano* (1972) 23 Cal.App.3d 275, 280 (*Keen*).

Plaintiffs’ retained expert, Dr. Jeffrey Phelan, testified, “So if you have a watery, mucousy discharge, and this is just perinatal safety, you need to go in and be evaluated by your doctor.”

RBBI points out that the trial court sustained defense objections precluding Dr. Phelan from answering direct questions about whether the on-call doctor gave bad advice. RBBI claims the reason the trial court sustained the objections was that there was no evidence the on-call doctor was an agent of RBBI. However, the transcript does not support this assertion. The record merely shows the trial court sustained objections made on the ground of relevance, with an unreported sidebar that was not later memorialized on the record. Defense counsel attested in connection with the motion for JNOV that plaintiffs’ expert witness disclosure did not disclose that Dr. Phelan would testify regarding standard of care for the on-call doctor. In any event, there was sufficient evidence that the on-call doctor breached the standard of care in Dr. Phelan’s testimony “you need to go in and be evaluated by your doctor,” together with the testimony of other doctors. As was pointed out by plaintiffs’ attorney during closing argument, nonretained experts (treating physicians) also testified at trial.

Dr. Biesen-Bradley herself testified that when a patient calls at 19 weeks’ pregnant with fluid running down her leg after a cerclage procedure, “I would tell her to go to the hospital” because the leaking could signify a prolapsed bag, and even though it may also have been urine, there was no way to know without checking. Although Dr. Biesen-Bradley’s individual standard does not necessarily define the standard of care for

malpractice liability (*Spann v. Irwin Memorial Blood Center* (1995) 34 Cal.App.4th 644, 655 [professional standard of care is established by the accepted industry practice, not the opinion of a single expert]), there was other evidence in this case.

Defense expert Dr. Haskins testified she would not have sent plaintiff to the emergency room because the fluid is usually urine, but Dr. Haskins also acknowledged one cannot tell over the phone whether fluid is urine or vaginal transudate or amniotic fluid. Various doctors testified that, if the liquid is *not* urine, it indicates a prolapsed bag, which in a matter of days will lead to infection.

As to the office staff not returning patient phone calls, even assuming this matter required expert testimony, there was expert testimony on this issue. When asked if it would be appropriate for a doctor to call back a patient who reported fluid loss for several days, Dr. Haskins said, “That’s a difficult question to answer. *Most calls come during the work day and are triaged by the office staff and would land on the primary physician’s desk and a call would be made in a reasonable period of time*, especially if a patient called two days in a row with the same complaint and the physician is aware that that complaint, documented, came to the office two days in a row ‘I am still having this problem.’ ” Also, as indicated, Dr. Biesen-Bradley admitted that if a patient called at 19 weeks’ pregnant with fluid running down her leg after a cerclage procedure, she would have told the patient to go to the hospital because the leaking could signify a prolapsed bag, and even though it may also have been urine, there was no way to know without checking.

The evidence that RBBI failed to return plaintiff’s multiple phone messages between November 15 and November 17 about leaking fluid established a breach of the standard of care. Dr. Biesen-Bradley testified she did not even know about plaintiff’s November 17 phone call until the afternoon of November 18, after plaintiff was hospitalized. She apparently did not know about any earlier calls plaintiff or her family had made.

RBBI claims that defense witness Dr. Druzin testified that the response to plaintiff's phone calls was within the standard of care. However, contrary to RBBI's position, that evidence was contradicted by the aforementioned testimony. In substantial evidence review, we disregard evidence that conflicts with the judgment. (*Beck Development, supra*, 44 Cal.App.4th at p. 1203 [we resolve all evidentiary conflicts and draw all reasonable inferences in favor of the decision].)

Moreover, RBBI mischaracterizes Dr. Druzin's testimony. Defense counsel, without mentioning plaintiff's unanswered phone calls to RBBI during office hours, asked:

"Q. I would like you to assume next on November 17th, the patient called the obstetrician's office, after office hours, was connected or given a message including the option to call an exchange if the patient wanted to speak with a doctor. The patient called an exchange and was advised -- she called the exchange because of some unusual discharge.

"I would like you to assume further that the on-call physician directed the patient to come in to her obstetrician's office early the following morning. That the patient came into the obstetrician's office early the following morning or about ten o'clock and was examined by a nurse midwife, that the obstetrician was at a continuing medical education course that morning. That the nurse midwife found that there was a prolapsed amniotic sac into the vagina. That the nurse midwife contacted the obstetrician . . . [who] directed the nurse midwife to have the patient transferred to the hospital from the medical office via ambulance.

"Is that within the standard of care for the obstetrician/gynecologist *who was the patient's physician?*

"A. Yes." (Italics added.)

This testimony does not exonerate the on-call doctor or the RBBI office staff. First, the discharge was not described with any particularity in the hypothetical question.

It was only characterized as “some unusual discharge.” Second, the focus of the hypothetical question was not the on-call doctor or the office staff, but the “obstetrician/gynecologist who was the patient’s physician.”

RBBI notes plaintiffs’ counsel stated in closing argument that “there’s been no testimony in this case that the failure to return a single phone call would give rise to damages.” However, plaintiff did complain about the failure to return multiple phone calls, and there is substantial evidence supporting a finding that the failure to return the multiple phone calls delayed plaintiff’s treatment.

We conclude RBBI fails to show grounds for reversal based on standard of care and the breach thereof by the on-call doctor and office staff.

C. Causation

RBBI argues there is no evidence of causation. Again, RBBI’s opening brief on appeal begins with the phone conversation with the on-call doctor and says nothing about plaintiff’s prior calls to RBBI, which went unanswered. Not until RBBI’s reply brief does RBBI talk about the prior phone calls. RBBI pretends it is merely responding to an argument made by plaintiffs in their respondents’ brief. However, as we have seen, *ante*, RBBI was on notice that those calls were at issue, because there was testimony about the calls and about the importance of returning such calls, and the trial court, in denying the posttrial motions, stated that substantial evidence regarding the employees’ conduct supported the verdict. RBBI’s point that the trial court did not specify the evidence does not justify RBBI’s failure to discuss the point in its opening brief. We conclude RBBI has forfeited any challenge to sufficiency of the evidence of RBBI liability for its office staff. (*Garcia, supra*, 16 Cal.4th at p. 482, fn. 10; *Stanley, supra*, 10 Cal.4th at p. 793; *Foreman & Clark Corp., supra*, 3 Cal.3d at p. 881; *Holmes, supra*, 191 Cal.App.4th at p. 1074.)

We will nevertheless discuss the matter.

“In a medical malpractice action, a plaintiff must prove the defendant’s negligence was a cause-in-fact of injury. [Citation.] ‘The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical “probability” and a medical “possibility” needs little discussion. There can be many possible “causes,” indeed, an infinite number of circumstances [that] can produce an injury or disease. A possible cause only becomes “probable” when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]’ ” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118, original italics; see *id.* at pp. 1112, 1120 [trial court properly struck expert opinion which failed to articulate why or how it was more likely than not that bacteria, after multiplying without any clinical symptoms that ordinarily accompany peritonitis, migrated from the peritoneal cavity through the sutured peritoneal wall, settling into the subcutaneous tissue, while leaving the wall intact and leaving no trail of inflamed tissue evidencing the migration].)

As we have noted, “Even where expert testimony is required, however, it may be circumstantial in nature, and the jury is entitled to draw reasonable inferences from it in finding the standard of care [citations] and in determining proximate cause [citations].” (*Keen, supra*, 23 Cal.App.3d at p. 280.)

“In a medical malpractice action, the evidence must be sufficient to allow the jury to infer that in the absence of the defendant’s negligence, there was a reasonable medical probability the plaintiff would have obtained a better result. [Citations.]” (*Alef, supra*, 5 Cal.App.4th at p. 216.)

In *Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, the Court of Appeal reversed a judgment of nonsuit in a medical malpractice action arising from the

plaintiff's being born with brain damage. The appellate court found sufficient evidence of causation to go to the jury in the testimony of the plaintiff's experts that "there was substandard monitoring which failed to recognize and promptly respond to fetal distress, and although plaintiff should have been delivered when those signs occurred, that delivery was delayed. There was further expert testimony that the events which occurred during the period of delay were a substantial factor and contributing cause to plaintiff's brain damage. [¶] On this record, . . . the jury could have concluded that the negligent monitoring resulted in a failure to deliver plaintiff in time to prevent permanent brain damage." (*Espinosa, supra*, at p. 1315.)

Here, the jury was properly instructed that, to establish the malpractice claim, plaintiff had to prove defendants' negligence was a substantial factor in causing plaintiff's harm, and "[a] substantial factor in causing harm is a factor that a reasonable person would have considered to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct. [¶] To recover in a professional negligence case, it is necessary to prove that an alleged failure to exercise the care and skill required under the circumstances was a substantial factor in bringing about the harm for which damages are sought. Causation must be proven by a reasonable medical probability upon competent expert opinion. Mere possibility alone is not sufficient. Do not award a party damages for a harm for which there is no expert testimony proving a causal connection between defendant's [*sic*] conduct and the harm."

Dr. Phelan was not the only expert in this case. In addition to the designated experts on both sides, the treating physicians, including Dr. Biesen-Bradley herself, were also experts qualified to render opinions.

There was sufficient expert evidence from which the jury could infer that, in the absence of negligence by RBBI's agents -- the office staff and the on-call doctor -- there was a reasonable medical probability plaintiff would have obtained a better result. Dr. Phelan opined the prolapse probably occurred on November 17, because plaintiff had weeping of the membranes, which indicated the bag had prolapsed (slipped) to "near the opening of the door" to the vagina.⁸ Though he did not recall the ambulance report, his testimony was consistent with the November 18 ambulance report, which said, "Patient states she had a prolapsing uterus starting at 1500 hours yesterday [3:00 p.m. November 17],⁹ getting progressively worse. Patient states she has history of twin similar pregnancy complications. . . ."

When asked if a pregnant woman can leak fluid without having a prolapse, Dr. Phelan testified, "they can rupture membranes, many people call them high leaks, and not have a prolapsed bag. But when you see the weepiness, watery mucous coming out, that means the bag is coming through. And in my experience it is pretty close to 100 percent. [¶] So when she called in on the 17th, and not knowing yet when I had reviewed the records that she had had the prolapse and then they examined her in the office on the 18th, I knew on the 17th she had a prolapsed bag and that bag was at the opening. That was confirmed with the speculum exam [on November 18]. It was

⁸ It is not clear whether Dr. Phelan considered plaintiff's phone calls on November 15 and 16. He testified he reviewed plaintiff's depositions, but Dr. Phelan did not specifically address the phone calls made before November 17.

⁹ Plaintiff did not recall making this statement. The evidence does not reveal whether the word "prolapse" came from plaintiff or the paramedic's distillation of plaintiff's report of her condition. The jury was instructed generally that, "a statement by Colleen Kaznowski to her healthcare providers about her current medical condition may be considered as evidence of that medical condition." The ambulance report is evidence that plaintiff's condition worsened around 3:00 p.m. on November 17.

confirmed by subsequent examiners. [¶] So if you have a watery, mucousy discharge, and this just perinatal safety, you need to go in and be evaluated by your doctor.”

Dr. Biesen-Bradley testified she read the ambulance report indicating the prolapse occurred November 17. When asked if a patient can be wet or leaking fluid before an actual prolapse, Dr. Biesen-Bradley testified: “Well, in her case I believe she said there was wetness at her feet.^[10] And if you have prolapsed membranes and they are still prolapsed, they are still bulging out, that would be almost impossible because pressure enough to make the fluid go down to your feet would empty the sac. That’s not just like a high leak in which a little bit of fluid can come out.” When asked if a complaint of losing fluid at that level would indicate a prolapse, the doctor testified it could be urine, but there was no way to know for sure without checking it.

Dr. Phelan testified that a prolapse results in infection, which results in premature delivery. “The problem is that once the bag is exposed to the vaginal bacteria, that localized area of the bag tends to break. . . . And what happens is the bacteria move in, even if you give them antibiotics, even if you sterilize the area, they will still get a localized infection and then you will have a broken bag in about three to seven days.” Dr. Phelan opined the membranes of the amniotic sacs had *not* ruptured by the time plaintiff was admitted to the hospital on November 18, and plaintiff was not experiencing any signs of infection before her November 18 admission to the hospital. But he concluded “it was a *fait accompli* when [plaintiff] showed up on the 18th.”

Although Dr. Phelan believed plaintiff was not showing signs of infection before her November 18 admission to the hospital, Dr. Joseph opined infection was already

¹⁰ Nurse Shapiro’s notes of November 18 state, “The patient complained of increased pressure and vaginal discharge which has feet very wet times [*sic*] 24 hours, sterile speculum examination showed bulging bag of water. . . .”

present on November 18.¹¹ Dr. Heddleston stated that once infection is present in a prolapsed bag into the vagina, there is no real possibility of the infection going away even with antibiotic treatment. It does happen in rare cases, but “that’s pretty much where the membranes got back in and they put a stitch on. So there may be an occasional case where they did an amniocentesis, they had an early infection, they still did the cerclage and the infection resolved. But those are very rare cases.”

According to Dr. Heddleston, “Once the membranes prolapse in, then really all the bacteria is just battling, battling against the membranes and it is just a matter of time.” Dr. Heddleston opined that the infection precipitated the premature delivery by Cesarean section on December 27.

If a prolapse occurs, time is of the essence, because an infection will result in a matter of days -- three to seven days according to Dr. Phelan, one or two days according to Dr. Joseph -- which will preclude a rescue abdominal cerclage if the infection reaches

¹¹ RBBI’s reply brief claims the possibility of abdominal cerclage was already foreclosed when plaintiff entered the hospital on November 18, because she already had an infection. RBBI offers no citation to the record, in violation of California Rules of Court, rule 8.204(a)(1)(C), which says each brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” There were conflicting opinions as to whether plaintiff had an infection and, if so, where the infection was, when she entered the hospital. Doctors testified infections are complicated, and in this case, the logical progression was that bacteria from the vaginal area traveled into the uterus, causing infection, and the infection slowly ascended into the placenta and then around the babies. Dr. Heddleston testified it was “possible” an infection of the amniotic fluid was present on November 18, but plaintiff did not have symptoms suggestive of such infection, such as purulent discharge or a fever. He saw no evidence of “maternal infection” or infection of the placenta on November 24. He testified that, from the time he first saw plaintiff on November 22, she never appeared to be “clinically” infected until December 27, but the battle with infection was ongoing. Plaintiffs’ retained expert on infectious diseases, Dr. Joseph, opined the infection was present inside the amniotic sac on November 18, because plaintiff had an elevated white blood count and an elevated pulse rate and had abdominal tenderness and prolapse.

the amniotic sac, as indicated in Dr. Heddleston's testimony. Options exist to counteract a prolapse, including placing the patient in the upside-down Trendelenburg position; if the Trendelenburg does not cause the membranes to go back into the uterus, using a Foley bulb to try to gently push the membranes back in; giving medication to decrease the fluid and decrease pressure on the membranes; giving medication to suppress premature labor; and starting antibiotics.

RBBI argues there was no evidence that plaintiff's outcome would have been better had she gone to the hospital the night of the after-hours phone call. However, this argument assumes there was no negligence until the on-call doctor called plaintiff. Instead, the evidence showed that plaintiff began experiencing problems on November 15 and, had Dr. Biesen-Bradley known about the multiple phone calls by plaintiff and her family between November 15 and 17, Dr. Biesen-Bradley would have sent plaintiff to the hospital immediately, where it would have been determined there was a problem, and steps such as the Trendelenburg would have been taken to avoid the prolapse.

RBBI argues in its reply brief that there was no evidence a rescue abdominal cerclage would have been a success, since plaintiff was already infected on November 17, precluding such a cerclage. However, the testimony was that an infection *in the amniotic fluid* would have precluded a rescue cerclage. There was evidence that no such infection was present as of November 17.

The evidence supports an inference that, had RBBI properly handled the phone calls between November 15 and 17, plaintiff probably would have had a better outcome.

We conclude substantial evidence supports the jury verdict against RBBI based on conduct of its agents other than Dr. Biesen-Bradley.

D. Inconsistent Verdicts

We conclude RBBI fails to show grounds for reversal of the judgment. We need not address RBBI's argument that the jury verdict is irreconcilably inconsistent. We note, however, the cited record does not support RBBI's claim that the trial court, in

denying the posttrial motions, orally found the jury engaged in jury nullification. In any event, a trial court's oral comments are generally not subject to review. (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1385-1386.)

DISPOSITION

The judgment is affirmed. Plaintiffs will recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.