Filed 7/7/23 Elizondo v. Riverside Community Hospital CA4/2

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| AYANI ELIZONDO, a Minor, etc., | |
| Plaintiffs and Appellants, | E075162 |
| v. | (Super.Ct.No. RIC1610439) |
| RIVERSIDE COMMUNITY HOSPITAL et al., | OPINION |
| Defendants and Respondents. | |

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV, Judge. Affirmed.

Law Office of Martin Stanley, Martin Louis Stanley and David Martin for Plaintiffs and Appellants.

Horvitz & Levy, Dean A. Bochner, Mark A. Kressel; Dummit, Buchholz & Trapp, Craig S. Dummit and Harmon B. Levine for Defendant and Respondent, Riverside Community Hospital.

LaFollette, Johnson, De Haas, Fesler & Ames, Dennis K. Ames and David J. Ozeran for Defendant and Respondent, Sudha Moola, M.D.

Schmid & Voiles, Denise H. Greer and Lawrence D. Wong for Defendant and Respondent, Herman Carstens, M.D.

Cole Pedroza, Kenneth R. Pedroza, Cassidy C. Davenport, Amy E. Rankin; Tyson & Mendes and Margaret M. Holm for Defendant and Respondent, Harbinder S. Brar, M.D.

## I. INTRODUCTION

Plaintiff and appellant Ayani Elizondo was born on November 6, 2015, at Riverside Community Hospital (RCH), with severe brain injuries. In this action, Ayani, through her mother and guardian ad litem, Janeka Elizondo, sued defendants and respondents, RCH and three physicians, Herman Carstens, M.D. (Dr. Carstens), Harbinder S. Brar, M.D. (Dr. Brar), and Sudha Moola, M.D. (Dr. Moola). Janeka alleged Ayani's brain injuries were caused by defendants' negligent treatment of Janeka and Ayani during the days and hours before and at the time Ayani was delivered at RCH by Caesarian section (C-section) on November 6.[1]

A 41-day jury trial began in October 2019 and concluded in February 2020. In a special verdict, the jury found that each defendant was not negligent in the treatment each defendant rendered to Janeka and Ayani. The verdicts were 9 to 3 in favor of RCH and Dr. Brar, 11 to 1 in favor of Dr. Carstens, and 12 to 0 in favor of Dr. Moola. Janeka

[1] For ease of reference and to avoid confusion, we refer to Ayani and Janeka by their first names, intending no disrespect by the informalities.

moved for a new trial on several grounds, including juror misconduct during voir dire and during the polling of the jury on its 9 to 3 verdict finding that RCH was not negligent. The motion was denied.

In this appeal from the judgment, Ayana raises (1) multiple claims of evidentiary error, including errors in limiting Janeka's cross-examination of Dr. Moola's expert witness, Leonard Kessler, M.D. (Dr. Kessler); (2) instructional error in giving BAJI No. 6.03 instead of CACI 506; and (3) juror misconduct during jury voir dire and in the polling of the jury on the 9 to 3 verdict in favor of RCH. We affirm the judgment.

## II. FACTS AND PROCEDURE

### A. *Janeka's Prenatal Care and Treatment by Drs. Carstens, Brar, and Their Nurses*

In 2015, Janeka was pregnant with Ayani and was scheduled to deliver Ayani by C-section on December 8. Janeka was a high-risk patient due to several factors: she was 35 years old, overweight, and had three children delivered by C-section. Janeka's regular obstetrician, Dr. Carstens, referred Janeka to a perinatologist and maternal-fetal medicine specialist, Dr. Brar, who helped Janeka manage her risk factors and complications. Dr. Brar had assisted Janeka with her earlier pregnancies. In August, following a diabetes test at Dr. Carsten's office, Dr. Brar determined that Janaka had gestational diabetes, another high risk factor. Janeka began visiting Dr. Brar's office for "fetal surveillance" on a weekly basis.

In gestational diabetes cases, two tools are used to test the well-being of the fetus: nonstress tests (NSTs) and biophysical profiles (BPPs). An NST measures the baby's heart rate and movement, and determines whether there are any contractions or other

signs of preterm labor. A BPP is a type of ultrasound that tests four to five fetal functions: (1) heart rate and rhythm, (2) breathing motions, (3) muscle tone, (4) body movements, and (5) the amount of amniotic fluid around the baby. Each function is given two points, and points are deducted for abnormal readings in a given function. A normal BPP score, when five functions are measured, is "10 out of 10." When four functions are measured, a normal BPP is eight out of eight.

On October 22 and 28, 2015, Janeka sought treatment in the emergency room at RCH, expressing concerns that she was in preterm labor. On both occasions, Janeka was not seen by a physician. Dr. Carstens telephonically discharged Janeka after consulting with nurses who examined her at RCH. Janeka was not in preterm labor, and the October 22 and 28 incidents were "false alarms." Dr. Brar saw Janeka on October 2, 5, 19, 23, and 30. On these dates, the BPP test results were normal, and there was no tachycardia (high fetal heart rate).

On November 4, 2015, Dr. Carstens transferred coverage of his patients, including Janeka, to Dr. Moola for the period of November 6 through 9. In transferring coverage, Dr. Carstens did not discuss Janeka's case with Dr. Moola. On November 4, there was no reason to believe Janeka would require special treatment during November 6 to 9, even though Janeka was a high-risk patient. At this time in 2015, Dr. Carstens had around 800 pregnant patients, including around 200 with multiple risk factors.

On November 5, 2015, Janeka went to Dr. Carstens's office and was examined by a nurse practitioner, Nurse Beresford. Ayani's heart rate, movement, and other measurements were normal, and there were no signs of preterm labor.

Around 3:40 p.m. on November 6, 2015, Janeka arrived at Dr. Brar's office for a routine, fetal-surveillance visit. A registered nurse, Nurse Brown, performed an NST, which involved attaching leads to Janeka's abdomen to measure Ayani's heart rate, movement, and any contractions Janeka may have been having, for signs of preterm labor. The results of an NST are displayed on "strips." The NST strips showed that Ayani's heart rate was 170 to 180, which is tachycardic or higher than the normal fetal heart rate of 120 to 160. The NST strips were also "nonreactive," meaning the fetal heart rate was not increasing in response to movement; that is, Ayani was not responding to her surroundings. Next, Nurse Brown took Janeka to the ultrasound room to take a BPP, placing Janeka ahead of other patients waiting for ultrasounds. The ultrasound technician scored the BPP as eight out of eight, a normal score.

After receiving the normal BPP results, Nurse Brown paged Dr. Brar and informed him of the two abnormal test results—the tachycardia and nonreaction to movement on the NST strip—and the normal, eight out of eight BPP score. Dr. Brar instructed Nurse Brown to tell Janeka to go "right away" to the labor and delivery room at RCH for continuous monitoring, and Nurse Brown did so. Nurse Brown gave Janeka an envelope to take to RCH that included the NST strip, showing the tachycardia and nonreaction to movement; the envelope did not include the eight of eight BPP test results. Janeka left Dr. Brar's office around 4:25 p.m.

At some point, Nurse Brown called the labor and delivery department at RCH and told them that the BPP score was eight of eight, but the NST strip showed the tachycardia and nonreaction to movement. After sending Janeka to RCH, Nurse Brown also called

Dr. Carstens's office and told them about the nonreactive strip and elevated heart rate. Dr. Carstens's office had no record of the call. Before November 6, 2015, all of Ayani's BPPs and NSTs were normal.

B. *Janeka's Care and Treatment on November 6 by RCH Nurses and Dr. Moola*

Janeka arrived at the emergency room at RCH at 4:50 p.m. on November 6. At 5:09 p.m., Janeka was assigned to Nurse Williams, a nurse in the labor and delivery department at RCH. Around 5:11 p.m., Nurse Williams connected Janeka to a fetal heart monitor. Janeka stayed on the fetal heart monitor until 11:05 p.m., with the exception of around a one-hour period between 9:00 and 10:00 p.m., when a BPP was taken.

Around 5:20 p.m., Nurse Williams charted information she had received from Dr. Brar's office and from speaking with Janeka. This included Janeka's history and high risk factors, and the NST readings showing tachycardia and nonreaction to surroundings. Nurse Williams noted that Ayani's heart rate was "borderline normal to very minimally tachycardia," and that Janeka reported mild, irregular contractions for weeks but no ruptured membranes or leaking fluid. This information, considered with the mild tachycardia, indicated that Janeka was not in labor. Thus, Nurse Williams did not perform a sterile vaginal examination, another means of determining whether a patient is in labor. Nurse Williams also did not speak with anyone from Dr. Brar's or Dr. Carstens's office on November 6.

Between 5:09 and 6:00 p.m., the fetal monitoring strips showed that Ayani's heart rate ranged between 165 and 170 beats per minute, a "very mild tachycardia," and an improvement, or slight lowering, from the 170 to 180 beats per minute recorded in Dr.

Brar's office around 4:00 p.m. that day. The first hour of monitoring also showed improvements in the variability of the heart rate; the heart rate was increasingly stable. There were also no "decelerations"—sudden drops in the heart rate—which meant that Ayani was not in acute distress and immediate intervention was not required. The strips showed no decelerations through 11:06 p.m., when Janeka was taken off of the fetal heart rate monitor for the C-section delivery.

At 6:25 p.m., Nurse Williams called Dr. Moola, who had assumed primary care of Janeka from Dr. Carstens for November 6 to 9, 2015. Nurse Williams gave Dr. Moola a description of Janeka's history and condition. During the telephone call, Dr. Moola ordered an intravenous bolus of fluids, a BPP, a urine test, and a sterile vaginal examination. Dr. Moola believed that, if the "nonreactive tracing" was due to Janeka's dehydration, then hydrating Janeka with fluids would resolve the nonreactivity and tachycardia. Most importantly, there were no decelerations or other signs that Ayani was in acute distress. If there were, Dr. Moola would not have ordered the fluids to hydrate Janeka; she would have immediately "go[ne] towards a delivery."

The bolus of fluids was started at 6:42 p.m. and took 30 to 60 minutes to infuse. After the bolus was infused, it could take four to five hours to determine whether the tachycardia and nonreactivity would respond favorably to the fluids. While the bolus was being infused, the fetal heart rate monitor continued to show mild tachycardia with no decelerations or other indications of acute distress. For that reason, Dr. Moola did not see the need to perform an immediate C-section delivery. Further, Ayani, was not due for another month, and her lungs would have more time to mature if she were delivered at

full term on December 8, rather than at 34-weeks gestation. Dr. Moola was trying to "gain more time" safely so that Ayani could be delivered "a little more towards term."

Dr. Moola did not order the BPP on an expedited basis because, if she believed the baby was in acute distress, she would have proceeded with an immediate C-section delivery rather than order hydration or a BPP. Dr. Moola never ordered BPPs for patients in acute distress because a BPP is not an emergency order or a means of determining whether a baby is in acute distress. The BPP would give Dr. Moola information about the fluid around the baby and help Dr. Moola determine the next course of action, if hydration did not resolve the nonreactivity and tachycardia. Even though Dr. Moola did not request the BPP to be expedited, Nurse Williams placed a priority on the BPP.

The BPP was started at 9:08 p.m., it was completed around 9:45 p.m., and a BPP report was generated at 9:57 p.m. Shortly after 10:00 p.m., the BPP result was communicated to Dr. Moola. The BPP score was six out of ten, an " 'equivocal' " result, meaning that the treatment options included further evaluation or an immediate C-section delivery. Around 10:23 p.m., while on her way to RCH, Dr. Moola ordered RCH nurses to prepare for a possible C-section delivery. Around 10:30 p.m., Dr. Moola arrived at RCH, reviewed Janeka's chart, and spoke with Janeka about the BPP results and Janeka's options. Dr. Moola told Janeka there had been no change in the fetal heart rate despite the fluids and rehydration, the BPP score was equivocal, there were no decelerations, and the situation was not urgent, but it might be better to deliver the baby that night, given that the tachycardia could not be explained and could worsen. Janeka consented to an immediate C-section.

Around 11:00 p.m., Dr. Moola performed a history and physical examination of Janeka. As part of this examination, Dr. Moola performed a sterile vaginal examination and concluded that Janeka was not in labor. Ayani's tachycardia and variability had improved slightly since they were monitored at Dr. Brar's office around 4:00 p.m.

Shortly after 11:00 p.m., Janeka was taken off the fetal heart monitor and sent to the operating room. Dr. Moola began performing the C-section at 11:36 p.m., and Ayani was delivered at 11:46 p.m. Ayani's apgar scores, which measure breathing, heart rate, and appearance, were normal at five and ten minutes after birth.

Dr. Moola ordered an umbilical cord gas test because Ayani was preterm and she was not reacting to stimuli. An umbilical cord gas test determines whether a baby's blood is acidotic, which would show the baby was oxygen-deprived shortly before birth. The umbilical cord gas test was within normal limits. It was later determined that Ayani was born with acute profound hypoxia ischemia, a severe brain injury due to lack of oxygen and blood flow to the brain. At the time of trial, Ayani was four years old and unable to walk, speak, or eat independently.

C. *The Disputed Cause and Timing of Ayani's Brain Injury*

At trial, the parties agreed that Ayani's brain injury was caused by a lack of oxygen and blood flow to the brain, but Janeka and defendants disagreed about the cause and timing of the brain injury. Janeka claimed that a clot formed in the umbilical cord around 20 minutes before birth. According to this theory, the injury would not have occurred if Ayani had been delivered at least 20 minutes earlier. Janeka claimed that

each defendant negligently caused delays in Ayani's delivery, and each delay was a substantial factor in the crucial 20-minute delay that caused the injury.

Defendants claimed that the umbilical cord was compressed for around 20 minutes sometime before Janeka arrived at Dr. Brar's office on November 6 for her weekly fetal monitoring appointment. Defendants claimed the cord compression could have occurred anytime between October 30, when Janeka had a normal BPP and a normal NST strip at Dr. Brar's office, and November 6, when the NST strip at Dr. Brar's office was nonreactive and showed tachycardia. Thus, defendants claimed that nothing any of them did or did not do on November 6 contributed to or was a substantial factor in causing Ayani's brain injury.

D. *Expert Medical Testimony*

Janeka's expert, Dr. Kadner, testified that each defendant's care and treatment of Janeka fell below the standard of care in multiple respects. A neuroradiologist testified that Ayani's brain injury occurred no earlier than 20 to 30 minutes before birth. Defendants called multiple experts who collectively testified that each defendant acted within the standard of care in all respects. Other defense experts testified that Ayani's brain injury occurred at least 24 hours before delivery.

E. *The Verdicts*

The jury returned a special verdict, answering "no" to the question, "Was any defendant negligent in the treatment rendered to Janeka or Ayani?" The verdicts were 9 to 3 in favor of RCH, 9 to 3 in favor of Dr. Carstens, 11 to 0 in favor of Dr. Brar, and 12

to 0 in favor of Dr. Moola. Following entry of judgment, Janeka moved for a new trial on several grounds. The motion was denied. Janeka timely appealed.

## III. DISCUSSION

### A. *Janeka's Claims of Evidentiary Error*

Janeka claims the court prevented her from "putting on a full and fair presentation of her case" by excluding evidence of defendants' "repeated lapses in the standard of care." More specifically, Janeka claims the court prejudicially erred in limiting her examinations of three witnesses: (1) her cross-examination of Dr. Moola's expert, Dr. Kessler, (2) her direct examination of Dr. Moola as an adverse witness (Evid. Code, § 776), and (3) her cross-examination of RCH's expert, Nurse Ann Taylor. As we explain, none of these claims have merit.

#### 1. Dr. Kessler's Expert Testimony

Dr. Kessler, a physician specializing in obstetrics and gynecology, testified as an expert solely for Dr. Moola, and opined that Dr. Moola's care and treatment of Janeka on November 6, 2015, met the standard of care. Dr. Kessler did not offer any opinions whether any of the other defendants' care and treatment of Janeka met the standard of care. Janeka claims the court prejudicially erred in limiting her counsel's cross-examination of Dr. Kessler in several respects.

##### (a) *Whether Dr. Kessler had testified for Dr. Carstens or other defendants*

Janeka first claims the court erroneously prevented her from asking Dr. Kessler on cross-examination whether Dr. Kessler had previously testified for Dr. Carstens or for any of the other defendants. We find no error in this ruling.

On direct examination, Dr. Kessler testified about his prior work in medical-legal cases, including his work for the law firms representing defendants. He had offered opinions in 350 to 400 medical-legal cases, he had been deposed 50 to 60 times, and he had testified in 15 to 20 trials. Around two-thirds of his medical-legal work had been for defendants and one-third had been for plaintiffs. Before this case, he had reviewed cases for the law firms representing RCH, Dr. Carstens, and Dr. Moola.

On cross-examination, counsel for Janeka asked Dr. Kessler whether he had ever testified "for Dr. Carstens in the past" in Riverside County Superior Court. Counsel for Dr. Moola, joined by counsel for Dr. Carstens, objected on unspecified grounds, an unreported side bar conference was held, and the objection was sustained on the record. At the next break, counsel for Janeka argued that whether Dr. Kessler had ever testified for Dr. Carstens *or other defendants* was relevant to whether Dr. Kessler was biased in favor of defendants.

The court agreed that the evidence was relevant to bias (Evid. Code, § 780, subd. (f)) but excluded it on the ground its probative value on the question of bias would be substantially outweighed by the undue prejudice it would cause Dr. Cartstens or any defendants for whom Dr. Kessler had previously testified. (Evid. Code, § 352.) The court pointed out that it had granted a defense motion in limine to exclude evidence of prior lawsuits against defendants as inadmissible propensity evidence. (Evid. Code, § 1101, subd. (a).) The court also ruled that asking Dr. Kessler whether he had ever testified for Dr. Carstens would confuse the issues because Dr. Kessler was not testifying for Dr. Carstens in this case.

A court has discretion to exclude relevant evidence under Evidence Code section 352 "if 'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) We review rulings excluding evidence for abuses of discretion. (*Jane IL Doe v. Brightstar Residential Inc.* (2022) 76 Cal.App.5th 171, 176.) Reversal for evidentiary error is warranted only if a different result was probable absent the error. (*Evans v. Hood Corp*. (2016) 5 Cal.App.5th 1022, 1040; see Evid. Code, § 354; see also Code Civ. Proc., § 475.)

Here, the court did not abuse its discretion in refusing to allow the jury to hear that Dr. Kessler had previously testified for Dr. Carstens or the other defendants. First, the excluded testimony, though relevant to Dr. Kessler's possible bias in favor of Dr. Carstens or any other defendant in whose favor Dr. Kessler had previously testified, was of little probative value in light of other evidence of Dr. Kessler's possible bias—the evidence that Dr. Kessler had worked for the law firms representing three of the defendants, and that a sizable majority—two-thirds—of Dr. Kessler's medical-legal work had been for defendants, and only one-third for plaintiffs. This evidence indicated that Dr. Kessler might have been biased in favor of defendants generally in medical-legal cases.

Moreover, allowing the jury to hear that Dr. Kessler had testified for Dr. Carstens, or for any of the other defendants, would have been unduly prejudicial to those defendants. It would have suggested to the jury that the defendants acted below the

standard of care in Janeka's case, only because they were accused of medical malpractice in one or more previous cases. That was an impermissible inference for the jury to make, and the reason for the court's in limine ruling excluding evidence of prior lawsuits against defendants. (Evid. Code, § 1101, subd. (a); *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 924 [Evidence of a defendant's prior negligence in medical treatment is inadmissible to prove the defendant's negligence on another occasion.]; see *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 983.) Thus, the court properly refused to allow Janeka to ask Dr. Kessler whether he had ever testified for Dr. Carstens or other defendants. (Evid. Code, §§ 352, 1101, subd. (a).)

(b) *Whether a physician should have seen Janeka on October 22 and 28*

Janeka next claims the court erroneously prevented her counsel from asking Dr. Kessler, on cross-examination, whether Dr. Carstens met the standard of care by not seeing Janeka on October 22 and 28, 2015, before Dr. Carstens telephonically discharged Janeka from RCH on those dates. On this point, too, we find no error.

On cross-examination, counsel for Janeka asked Dr. Kessler when Janeka was last seen by a physician before Dr. Moola met with Janeka around 10:30 p.m. on November 6, 2015. Dr. Kessler responded that it had been around four weeks, and confirmed that a physician did not see Janeka at RCH on October 22 and 28 before Dr. Carstens telephonically discharged Janeka from RCH on those dates after speaking with RCH nurses. Counsel for Janeka next asked whether Dr. Kessler believed it met the standard of care for a physician not to see Janeka on October 22 and 28. Dr. Moola's objected on the ground the question called for testimony beyond the scope of Dr.

Kessler's direct examination, and the objection was sustained. (Evid. Code, §§ 761, 773.) Janeka claims this ruling was error.

Janeka has forfeited this claim because she has offered no legal authority or analysis to support it. (*Lee v. Kim* (2019) 41 Cal.App.5th 705, 721 (*Lee*).) " 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeited].' " (*In re A.C.* (2017) 13 Cal.App.5th 661, 672.) The claim also fails on its merits. Whether the standard of care required Janeka to be seen by Dr. Carstens or another physician at RCH on October 22 and 28 called for testimony beyond the scope of Dr. Kessler's direct examination. (*People v. Farley* (2009) 46 Cal.4th 1053, 1109.) Thus, Dr. Moola's beyond-the-scope objection was properly sustained.

Janeka suggests Dr. Kessler testified that Dr. Carstens's treatment of Janeka on October 22 and 28, 2015 "universally met the standard of care." This argument misstates the record. Dr. Kessler offered no opinion whether Dr. Carstens, or any defendant other than Dr. Moola, met the standard of care. Further, whether a physician should have seen Janeka on October 22 or 28 was irrelevant to Dr. Kessler's direct testimony that Dr. Moola met the standard of care in diagnosing and treating Janeka on November 6. Dr. Moola was not involved in Janeka's case before November 6, and regarding Janeka's October 22 and 28 visits to RCH, Dr. Kessler testified only that the visits did not suggest that Janeka would require medical care on November 6. None of Dr. Kessler's direct testimony indicated that whether a physician saw Janeka on October 22 or 28 had any bearing on Dr. Kessler's opinion that Dr. Moola met the standard of care on November 6.

(c) S*afety issues and charting errors*

At the beginning of trial, the court granted RCH's motion in limine to preclude Janeka from presenting any evidence or argument based on the "reptile theory"—that is, asking jurors to base their decisions on concerns about their own safety and the safety of the community rather than the applicable standard of care. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598-599 [closing argument remarks telling jury its function was to keep the community safe were improper]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796 [Arguments appealing to the self-interests of jurors are improper because they tend to undermine juror impartiality.].)

Janeka does not claim that the in limine ruling prohibiting "reptile theory" evidence and argument was erroneous. Rather, she claims that, based on the ruling, the court erroneously prevented her counsel from cross-examining Dr. Kessler and other unspecified defense experts about the bases of their opinions that each defendant met the standard of care. Janeka argues the court prevented her from exploring "safety issues in order to prove that the standard of care set forth by the defense was more dangerous to the patient than that set forth by [Janeka]—in effect precluding any analysis into the justification for the standard of care and precluding any consideration as to whether the standard of care espoused by the defendants was as safe as that espoused by [Janeka] or safe at all . . . ."

In support of this claim, Janeka points to rulings sustaining defense objections to her counsel's cross-examination of Dr. Kessler and to her counsel's direct examination of Dr. Moola as an adverse witness. (Evid. Code, § 776.) Janeka does not point to any

sustained objections to her counsel's questions of other defense experts, even though she couches her claim as applying to all defense expert opinion testimony. Thus, Janeka has forfeited her claims of error regarding her cross-examinations of unspecified defense experts. (*Lee*, *supra*, 41 Cal.App.5th at p. 721.) We limit our analysis to the points Janeka raises concerning her counsel's questioning of Dr. Kessler and Dr. Moola.

Janeka claims she was prevented from asking Dr. Kessler whether he noted that RCH nurses made any errors in "charting" and whether Dr. Kessler "assumed [there were] any errors" by RCH nurses in the distinct labor and delivery "flow chart" for Janeka. The court initially sustained RCH's objections to these questions as calling for testimony that was both irrelevant and beyond the scope of Dr. Kessler's expert designation and direct examination. But counsel for Janeka rephrased the questions by asking Dr. Kessler whether he had noted or assumed any errors in the RCH chart or in the RCH labor and delivery flow chart *for purposes of Dr. Kessler's opinion* that Dr. Moola met the standard of care. The rephrased questions were allowed.

Thus, counsel for Janeka was not prevented from asking Dr. Kessler whether he had noted or had "fe[lt]" or "assume[d]" there were any charting errors, or labor and delivery flow chart errors, in forming his opinion that Dr. Moola met the standard of care. Indeed, on cross-examination, Dr. Kessler identified two "glaring" errors in the November 6 RCH chart for Janeka: one, that the C-section delivery was an emergency (it was not), and two, that the decision to perform the C-section delivery was made at 10:00 p.m. (it was made when Dr. Moola arrived at RCH and spoke with Janeka after 10:30 p.m.). Dr. Kessler indicated that these two charting errors did not affect Dr. Moola's

diagnosis and treatment of Janeka, including her performance of the C-section delivery. In forming his opinion that Dr. Moola's care and treatment of Janeka met the standard of care, Dr. Kessler testified he saw no errors in the labor and delivery flow chart for Janeka.

Apart from counsel's cross-examination questions about charting errors, Janeka complains that Dr. Kessler "was able to still state [on direct that] he and [Dr.] Moola were 'community OB-GYNs' in violation of the court [in limine] order," but when her counsel "attempted to bring that up in closing, he was immediately shut down after objection by the defendants." This argument mischaracterizes the record, including counsel for Janeka's improper argument.

At the beginning of Dr. Kessler's direct examination, counsel for Dr. Moola asked Dr. Kessler whether he was a community OB-GYN and what that meant. Dr. Kessler affirmed that he was a "community OB-GYN," meaning he was " a physician who's been in private practice . . . at a community hospital in Santa Monica . . . ." He also testified that he understood that Dr. Moola was also "a community OB-GYN."

In closing argument, Janeka's counsel attempted to appeal to the jurors' concerns for community safety in determining the standard of care. Counsel argued: "The question is, what's the standard of care in this community? . . . [B]ecause you heard the witnesses and you get to make the call. But if you check "no" in the first question [whether each defendant was negligent], the defense walks out of here and goes and celebrates with their paid experts who provided the excuses that they needed. Of course, now they have a stamp of approval from you saying the way they treated Ayani is

acceptable in this community. The doctors can practice this way, and if a person gets hurt, well, too bad. We'll get away with it. Folks, that scares me. It's scary to think that not only could medical providers we trust our lives to in this way hurt a person, shove it under a rug, deny they did anything wrong, and get their experts to back them up and make excuses for them, but also that there's community support for that. That's scary, and that's why your verdict is so important, because this is a community-based medicine case." At this point, counsel for Dr. Moola objected that the argument was improper, and the court sustained the objection. The argument was improper: it asked the jury to determine the standard of care based, not on the evidence and the law, but on the jurors' concerns for their own safety and the safety of the community. (*Regalado v. Callaghan*, *supra*, 3 Cal.App.5th at pp. 598-599.)

Janeka claims *Flores v. Liu* (2021) 60 Cal.App.5th 278 (*Flores*) supports her claim that a physician's standard of care is to be determined "based on the safest methods" of care or based on concerns for community safety. This argument misreads *Flores.* In *Flores*, the court recognized that, as applied to physicians, " 'the general duty of each person to exercise . . . reasonable care for the safety of others,' " "imposes a duty 'to use such skill, prudence and diligence as other members of his profession commonly possess and exercise.' " (*Id*. at p. 290.) The standard of care for a physician is not determined based on the safest method of care or concerns for community safety. (*Ibid*.)

2. Nurse Ann Taylor's Expert Testimony

Janeka claims the court erroneously allowed RCH's nursing expert, Ann Taylor, to testify beyond the scope of her expertise. Janeka argues Ms. Taylor was "allowed to give

opinions regarding the condition of the fetus at certain times based on the readings of the fetal heart monitoring strip—clearly an opinion reserved for a physician specializing in prenatal medicine." We find no merit to this claim.

At trial, Janeka advanced the theory that Ayani would not have suffered a brain injury if she had been delivered at least 20 minutes earlier. Ms. Taylor testified that nothing on Janeka's November 6 fetal heart monitoring strips (NST strips) would have indicated to a reasonable labor and delivery nurse that there was "an emergency situation involving the fetus." Ms. Taylor also testified that the mild tachycardia and heart rate variability were improving while Janeka was on the heart rate monitor at RCH on November 6.

Early during Ms. Taylor's testimony, counsel for Janeka objected when Ms. Taylor was asked *what information the fetal monitoring strips revealed*, as calling for testimony beyond the scope of Ms. Taylor's expert designation and qualifications. The court overruled the objection but gave a limiting instruction, telling the jury not to consider Ms. Taylor's testimony "as a substitute for doctor's testimony as to what a particular neurological or obstetric condition is, but to explain the standard of care that the nurses would take based on the information that they get from the doctor's office." Thereafter, counsel for Janeka objected when Ms. Taylor testified that no decelerations in the fetal heart rate were shown on the NST strip taken in Dr. Brar's office on the afternoon of November 6. The court overruled the objection but repeated the limiting instruction, telling the jury it could not consider Ms. Taylor's testimony to discern the "actual condition" of the fetus, but only to determine whether "*the actions of the nurses*

*based upon that information met or did not meet the standard of care*." Counsel for Janeka then made a continuing objection to RCH's line of questioning, asking Ms. Taylor what the fetal monitoring strips showed, as being beyond the scope of Ms. Taylor's expert designation and expertise.

Janeka argues the limiting instructions were "insufficient" because they were not "given on each question asked" and "there were dozens of questions asked about the reading of the fetal heart monitor strip . . . with defense counsel emphasizing to the jury how [the strips] were always read correctly." We find no reasonable likelihood that the jury misunderstood, misapplied, or did not follow the limiting instructions. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370 ["The meaning of instructions is tested by 'whether there is a "reasonable likelihood" that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.' "]; *People v. Chavez* (2018) 22 Cal.App.5th 663, 705 [Appellate courts presume juries follow the court's instructions absent affirmative evidence in the record that the jury did not follow the instructions.].)

The limiting instructions were given near the beginning of Ms. Taylor's testimony and applied to all of Ms. Taylor's testimony. Further, neither RCH nor any of the other defendants used Ms. Taylor's testimony to show the condition of the fetus on November 6, 2015. RCH only used Ms. Taylor's testimony to show that the RCH nurses, and therefore RCH, met the standard of care in reading and interpreting Janeka's heart monitoring strips on November 6. In sum, Ms. Taylor gave no opinion testimony beyond the scope of her expertise or that was "reserved for a physician specializing in prenatal

medicine." The limiting instructions prevented the jury from using Ms. Taylor's testimony to determine the condition of the fetus during the hours and days preceding the C-section delivery.[2]

B. *The Court Did Not Err in Giving BAJI 6.03 Instead of CACI No. 506*

Janeka claims the court prejudicially erred in giving an "an erroneous amalgam" of jury instructions on different aspects of the standard of care, namely, BAJI No. 6.03 and CACI Nos. 501, 502 and 504. Janeka argues that, because BAJI No. 6.03 was given with CACI Nos. 501, 502, and 504, BAJI No. 6.03 incorrectly stated the law and prevented the jury from finding any of the physician defendants negligent in their respective treatments of Janeka. We find no merit to this claim.

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[2] The limits of Ms. Taylor's expertise and testimony was underscored to the jury when the court sustained two of Janeka's objections to Ms. Taylor's testimony. When counsel for RCH asked Ms. Taylor on direct whether the fact that all of the NST strips taken at RCH were a "category 2" "conclusively indicate[d] that there was no fetal emergency," the court sustained Janeka's objection to the question as beyond the scope of Ms. Taylor's expertise. RCH then rephrased the question to ask Ms. Taylor whether she saw anything on the strips "that would indicate to a reasonable nurse that there was an emergency situation . . . ." Janeka did not object to the rephrased question, and Ms. Taylor answered no, she did not. A second beyond-the-scope objection was sustained when RCH asked Ms. Taylor whether "the absence of any decelerations confirm[ed] that the fetus was never in distress . . ." But when RCH later asked Ms. Taylor whether the absence of decelerations would "indicate to a reasonable labor and delivery nurse" that there was no need for an emergency C-section, the court overruled Janeka's scope objection. These rulings showed to the jury the proper scope and limits of Ms. Taylor's expertise and how to apply the limiting instruction to her testimony.

1. Relevant Background

(a) *Dr. Moola's request to give BAJI 6.03 instead of CACI 506*

Dr. Moola filed a motion in limine to instruct the jury pursuant to BAJI No. 6.03 on "alternative methods of diagnosis or treatment" instead of CACI 506 on "alternative methods of care." Janeka opposed the motion. RCH and Dr. Carstens joined the motion, and Dr. Brar had no objection. The court granted the motion after all of the evidence was presented and while discussing the jury instructions with counsel before closing arguments.

As given, BAJI No. 6.03 instructed: "Where there is more than one recognized method of diagnosis or treatment and no one of them is used exclusively and uniformly by all practitioners of good standing under the same or similar circumstances, a physician or nurse is *not negligent* if, in exercising his or her best judgment, he or she selects one of the approved methods which later turns out to be a wrong selection or one not favored by certain other practitioners." (Italics added.)

The rejected instruction, CACI No. 506, would have instructed: "A [physician or nurse] is *not necessarily negligent* just because [he or she] chooses one medically accepted method of treatment or diagnoses and it turns out that another medically accepted method would have been a better choice." (Italics added.)

In her motion, Dr. Moola argued the "not negligent" language of BAJI No. 6.03 was a correct statement of the law, and the "not necessarily negligent" language of CACI No. 506 misstated the law and would be misleading. Dr. Moola noted the court in *Barton v. Owen* (1977) 71 Cal.App.3d 484 (*Barton*) had approved BAJI No. 6.03 as a correct

statement of the law. *Barton* observed: "BAJI No. 6.03 embodies the notion that different doctors may disagree in good faith upon what would encompass the proper treatment or diagnosis of a medical problem in a given situation. Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient's condition. *Thus, BAJI No. 6.03 states the rule that where there are several methods of approved diagnosis or treatment, which could be made available to a patient, it is for the doctor to use his best judgment to pick the proper one*." (*Barton*, at pp. 501-502, italics added.)

In opposing Dr. Moola's motion to give BAJI No. 6.03, Janeka argued that CACI No. 506 reflected "the current standard of the law" because it was the more recent Judicial Council-approved instruction on whether a physician is negligent for selecting an alternative method of diagnosis or treatment. But Janeka pointed to no case law addressing the "not necessarily negligent" language of 506. Janeka did not claim, as she does in this appeal, that BAJI No. 6.03 would be misleading if given with CACI Nos. 501, 502, 504, and 505 on the standard of care.

In granting Dr. Moola's motion to give BAJI No. 6.03 instead of CACI No. 506, the court agreed that *Barton* "directly addressed" and approved the "not negligent" language of BAJI No. 6.03 as a correct statement of the law. The court also noted that it had found no case law addressing or approving the "not necessarily negligent" language of CACI No. 506. The court did not address whether BAJI No. 6.03 was misleading

when given with CACI Nos. 501, 502, and 504, given that Janeka did not raise that argument.

(b) *Instructions on negligence, causation, and the standards of care*

BAJI No. 6.03 was given immediately after the instructions on negligence and the standard of care. The jury was instructed on negligence pursuant to CACI No. 400: "Plaintiff . . . claims that she was harmed by [the medical negligence of defendants]. To establish this claim for any defendant, plaintiff must prove the following against that defendant: one, that defendant was negligent; two, that plaintiff was harmed; and three, that defendant's negligence was a substantial factor in causing plaintiff's harm." (CACI No. 400 [Negligence—Essential Factual Elements].)

CACI Nos. 501, 502, 504, and 505 instructed on the standards of care for the three categories of medical professionals involved in the case: obstetricians (Drs. Carstens and Moola), a perinatologist or maternal-fetal medicine specialist (Dr. Brar) and nurses (employees of RCH and Drs. Carstens and Brar).

CACI No. 501 set forth the standard of care for obstetricians: "An obstetrician is negligent if he or she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful obstetricians would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' You must determine the level of skill, knowledge, and care that other reasonably careful obstetricians would use in the same or similar circumstances based only on the testimony of the expert witnesses who have testified in the case." (CACI No. 501 [Standard of Care for Health Care Professionals].)

CACI No. 505 set forth a caveat or limitation on this standard of care: "An obstetrician *is not necessarily negligent* just because his or her efforts are unsuccessful or he or she makes an error that was reasonable under the circumstances. An obstetrician is negligent only if he or she was not as skillful, knowledgeable, or careful as other reasonable obstetricians would have been in similar circumstances." (CACI No. 505 [Success Not Required], italics added.)

The jury was similarly instructed on the standard of care for a perinatologist (Dr. Brar), pursuant to CACI Nos. 502, 505, and on the standard of care for nurses, pursuant to CACI Nos. 504 and 505.[3] BAJI No. 6.03 was read to the jury immediately

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[3] "A perinatologist or maternal-fetal medicine specialist is negligent if he fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful perinatologists or maternal-fetal medicine specialists would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' You must determine the level of skill, knowledge, and care that other reasonably careful perinatologists or maternal-fetal medicine specialists would use in similar circumstances based only on the testimony of the expert witnesses who have testified in the case." (CACI No. 502 [Standard of Care for Medical Specialists].) "A perinatologist or maternal-fetal medicine specialist is *not necessarily negligent* just because his efforts are unsuccessful or he makes an error that was reasonable under the circumstances. A perinatologist or maternal-fetal medicine specialist is negligent only if he was not as skillful, knowledgeable, or careful as other reasonable perinatologists or maternal-fetal medicine specialists would have been in similar circumstances." (CACI No. 505, italics added.)

"A nurse is negligent if he or she fails to use the level of skill, knowledge, and care in nursing diagnosis and treatment that other reasonably careful nurses, not doctors, would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' You must determine the level of skill, knowledge, and care that other reasonably careful nurses, not doctors, would use in the same or similar circumstances based only on the testimony of the expert witnesses who have testified in the case." (CACI No. 504.) "A nurse is *not necessarily negligent* just because his or her efforts are unsuccessful or he or she makes an error that was reasonable under the circumstances. A nurse is negligent only if he or she was not as

*[footnote continued on next page]*

following CACI Nos. 501, 502, 504, and 505 on the respective standards of care for obstetricians, perinatologists, and nurses.

2. Legal Principles and Analysis

Janeka claims that BAJI 6.03, "given last and standing alone" "eclipsed" the CACI instructions, which "reflect current California law that the standard of care involves two distinct elements: (1) a physician's manner of treating a patient, or the administration of the treatment, and (2) a physician's judgment in selecting one of two or more approved methods of diagnosing or treating a patient. Janeka argues that giving BAJI No. 6.03 with the CACI instructions on the standard of care prevented the jury from finding any of the physician defendants (Drs. Carstens, Brar, and Moola) negligent in the manner or ways in which each of them treated Janeka. We disagree. As we explain, this argument misreads BAJI No. 6.03 and the CACI instructions on the standard of care.

On appeal, we independently review whether a jury instruction correctly states the law. (*People v. Quinonez* (2020) 46 Cal.App.5th 457, 465.) " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Bates* (2019) 35 Cal.App.5th 1, 9.) "While a single sentence in an instruction 'may or may not be confusing, depending upon the context in which the sentence lies,' an instructional error ' " 'cannot be predicated upon an isolated phrase, sentence or excerpt taken from the instructions . . . .' " ' " (*Quinonez*, at pp. 465-466.)

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skillful, knowledgeable, or careful as other reasonable nurses would have been in similar circumstances." (CACI No. 505, italics added.)

A physician's "duty of care applies not only to the physician's 'actual performance or administration of treatment,' but also to [the physician's] 'choice' of which courses of treatment [or method of diagnosis] . . . ." (*Flores*, *supra*, 60 Cal.App.5th at pp. 290-291.) BAJI No. 6.03 does not concern a physician's actual performance or administration of treatment. Rather, BAJI No. 6.03 concerns the physician's choice of an approved method of diagnosis or treatment from one or more approved methods.

As the court concluded, BAJI No. 6.03 correctly states the law. (*Barton*, *supra*, 71 Cal.App.3d at pp. 500-502.) The plaintiff in *Barton* claimed BAJI No. 6.03 incorrectly stated the law because it required the jury to find that the defendant physician was *not negligent* "if he used a single approved diagnostic or treatment procedure even though the jury believed that he *was negligent* in not using others." (*Id*. at p. 501, italics added.) As indicated, *Barton* rejected this claim, explaining that "BAJI No. 6.03 embodies the notion that different doctors may disagree in good faith upon what would encompass the proper treatment or diagnosis of a medical problem in a given situation. . . . BAJI No. 6.03 states the rule that where there are several methods of approved diagnosis or treatment, . . . it is for the doctor to use his best judgment to pick the proper one." (*Id*. at pp. 501-502.)

That is, BAJI No. 6.03 correctly states that a physician is not negligent for choosing a " 'recognized' " or " 'approved' " method of diagnosis or treatment that other practitioners of good standing would choose under similar circumstances. (*Barton*, *supra*, 71 Cal.App.3d at pp. 501-502.) That other practitioners of good standing would choose the same method under similar circumstances necessarily means that the choice

falls within the standard of care. (See *id*. at pp. 501-502; *Flores*, *supra*, 60 Cal.App.5th at p. 292 ["[T]he duty of care for recommending courses of treatment is pegged to what reasonable physicians using such skill, prudence and diligence as other members in the relevant medical community would do . . . ."]; *Folk v. Kilk* (1975) 53 Cal.App.3d 176, 185 ["The law requires only that doctors exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by doctors under similar circumstances in diagnosis and treatment, with no different or higher degree of responsibility than that obtaining in their professional community."].)

Janeka's claim that the jury must have misunderstood BAJI No. 6.03 as preventing it from finding any of the physician defendants negligent in treating Janeka relies in part on a misreading of the CACI instructions on the standard of care. The CACI instructions on the standard of care are broadly phrased; they encompassed the duty of care both in administering or implementing a course of treatment and in selecting a method of diagnosis or treatment. (CACI Nos. 501, 502, 504, and 505.)

As given, CACI Nos. 501 and 502 stated that obstetricians and perinatologists or maternal-fetal medicine specialists are negligent if they fail to use "the level of skill, knowledge, and care *in diagnosis and treatment* that other reasonably careful" obstetricians or perinatologists would use in similar circumstances. (Italics added.) These instructions further advised that "[t]his level of skill, knowledge, and care is sometimes referred to as 'the standard of care,' " and that the jury had to "determine the level of skill, knowledge, and care that other reasonably careful" obstetricians and perinatologists would use in the same or similar circumstances, based on the expert

testimony in the case. CACI No. 505 stated that obstetricians and perinatologists are "not necessarily negligent just because" their "efforts are unsuccessful or [they] mak[e] an error that was reasonable under the circumstances." Such physicians are "negligent only if [they were] not as skillful, knowledgeable, or careful as other reasonable [practitioners] would have been in similar circumstances." The jury was also instructed to "[p]ay careful attention to all of the instructions."

Thus, the instructions on the standard of care for the physician defendants (CACI Nos. 501, 502, and 505) allowed the jury to find the physician defendants negligent if the jury believed the physician defendants were negligent in their treatments of Janeka. BAJI No. 6.03 did not prevent the jury from finding any of the physician defendants negligent in their treatments of Janeka. BAJI No. 6.03 only prevented the jury from finding the physician defendants negligent for selecting an approved method of diagnosing or treating Janeka. Based on all of the instructions, we discern no reasonable likelihood that the jury applied BAJI No. 6.03 in the impermissible manner Janeka claims. (*People v. Gomez* (2018) 6 Cal.5th 243, 313.)

The rejected instruction, CACI No. 506, states that a medical practitioner "*is not necessarily negligent just because*" he or she "chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice." As Dr. Moola argued, CACI No. 506 is misleading because it suggests a medical practitioner may be negligent for choosing an accepted method of diagnosis or treatment that other medical practitioners of good standing would choose under similar circumstances. A physician is negligent for choosing a method of diagnosis

or treatment *only if* no reasonable physician would have chosen that method under similar circumstances. (*Flores*, *supra*, 60 Cal.App.5th at pp. 290-291.) In that event, the physician's choice of method falls below the standard of care. (See *id*. at p. 292.) CACI No. 506 would not have made this point clear to the jury.

Janeka suggests the court was required to give CACI No. 506 because it is the most recent Judicial Council-approved instruction addressing a physician's negligence for selecting an approved method of diagnosis or treatment. In civil cases, the CACI are the latest edition of the Judicial Council-approved "official instructions for use in the state of California." (Cal. Rules of Court, rule 2.1050(a).)[4] If the CACI contain an applicable instruction, the Judicial Council "recommend[s]" that the court use the CACI instruction "unless [the court] finds that a different instruction would more accurately state the law and be understood by the jurors." (Rule 2.1050(e).) Thus, courts may use a BAJI instruction instead of a CACI instruction when, as here, the court finds that the BAJI instruction more accurately states the law. (Rule 2.1050(e); *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 29-30, fn. 15.) In fact, it can be prejudicial error to give a CACI instruction rather than a BAJI instruction when the BAJI instruction more accurately states the law. (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1396-1400 [prejudicial error to give CACI 510 rather than BAJI 6.06 where BAJI 6.06 more accurately stated the "captain of the ship" doctrine].) As *Baumgardner* makes clear, the

[4] Further references to rules are to the California Rules of Court.

court's duty is to correctly instruct on the law, rather than to give any specified pattern or form instruction.

Lastly, Janeka argues Dr. Moola "seized on" BAJI No. 6.03 in closing argument to urge the jury to find that Dr. Moola was not negligent in treating Janeka if the jury found that Dr. Moola chose an approved alternative method of diagnosing and treating Janeka. Janeka relies on a portion of the argument, where counsel for Dr. Moola stated, "Where there is more than one recognized method of diagnosis or treatment and [no] one of them is used exclusively and uniformly by all practitioners in good standing, *a physician or nurse is not negligent if there's more than one reasonable way of managing the case.* A doctor or nurse is not negligent if in exercising his or her best judgment he or she selects one of the approved methods, which even later turns out to be the wrong one or one not favored by certain other practitioners." (Italics added.)

Janeka claims the jury must have understood counsel's reference to "more than one reasonable way of managing the case" as synonymous with "more than one reasonable way of *treating*" Janeka, and used the argument to find none of the physician defendants negligent in their treatments of Janeka, despite the evidence that the physician defendants were negligent in treating Janeka. This claim disregards Dr. Moola's argument as a whole and the instructions a whole. Dr. Moola's closing argument was not misleading and her counsel did not urge the jury to misapply BAJI No. 6.03. Before counsel for Dr. Moola referred to BAJI No. 6.03 and stated there was "more than one reasonable way of managing the case," counsel told the jury that a physician is "negligent only" if the physician "fails to use the level of knowledge and care in diagnosis and

treatment that other reasonably careful obstetricians would use in similar circumstances. You have to determine whether or not what Dr. Moola in my case did is what other reasonable doctors would do in the same or similar circumstances. If you decide that yes, then the doctor has met the standard of care. If you decide, no, then, of course, she has not." This was a correct statement of the law. (See CACI Nos. 501, 502, 505.) Further, this part of counsel's argument, when considered with counsel's later reference to BAJI No. 6.03 and statement that there was "more than one way of managing the case," did not suggest that the jury could find any of the physician defendants "not negligent" in the ways they treated Janeka solely because they chose an approved method of diagnosing or treatment. We find no error in the court's giving of BAJI No. 6.03 and its rejection of CACI No. 506, as the instructions as a whole correctly stated the law as we have explained.

3. Janeka's Other Claims of Instructional Error

(a) *BAJI No. 6.01*

Janeka claims the court had a duty to give BAJI No. 6.01 with BAJI No. 6.03 because BAJI No. 6.01, " 'describes the three discre[et] ways the jury could . . . conclude that a medical defendant committed malpractice, but which are not included in CACI No. 501's general definition of standard of care."[5] At most, BAJI No. 6.01 would have

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[5] BAJI No. 6.01 [Duty of Specialist] (Fall 2008 Revision) provides: "A physician, who holds [himself] [or] [herself] out as a specialist in a particular field of medical, surgical or other healing science, and who performs professional services for a patient as a specialist in that field, owes the patient the following duties of care: [¶] 1. The duty to have that degree of learning and skill ordinarily possessed by reputable

*[footnote continued on next page]*

clarified and expanded upon the duty of care of physicians and specialists described in CACI Nos. 501 and 502. A party's failure to request a clarifying instruction forfeits any claim that the instruction was insufficiently clear. (*People v. Simon* (2016) 1 Cal.5th 98, 143; *Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 260 ["If further clarification was needed, plaintiff had the duty of requesting it."].) Janeka has forfeited her right to complain that BAJI No. 6.03 was insufficiently clear without BAJI No. 6.01 because Janeka did not ask the court to give BAJI No. 6.01.

(b) *CACI No. 2.05*

Janeka claims the court erroneously refused to give CACI No. 205 [Failure to Explain or Deny Evidence] pursuant to her request. CACI No. 205 states: "If a party failed to explain or deny evidence against [the party], when [the party] could reasonably be expected to have done so based on what [the party] knew, you may consider [the party's] failure to explain or deny in evaluating that evidence. [¶] It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party." The court refused Janeka's request to give CACI No. 205 on the ground there was no evidence that any of the defendants failed to explain or deny anything.

The court's ruling was proper. A court does not err in refusing to give a requested instruction that is unsupported by any substantial evidence. (*People v. Parker* (2022)

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specialists, practicing in the same field under similar circumstances; [¶] 2. The duty to use the care and skill ordinarily exercised by reputable specialists practicing in the same field under similar circumstances; and 3. [¶] The duty to use reasonable diligence and [his] [her] best judgment in the exercise of skill and the application of learning. A failure to perform any of these duties is negligence."

13 Cal.5th 1, 68.) CACI No. 205 requires evidence that a party failed to explain or deny evidence against the party when the party could reasonably be expected to have done so. (See *People v. Grandberry* (2019) 35 Cal.App.5th 599, 606 [discussing CALCRIM No. 361, the analog to CACI No. 205].) There was no evidence that any of the defendants failed to explain or deny evidence against them when they reasonably could have been expected to have done so.

C. *Alleged Juror Misconduct During Voir Dire*

In her motion for a new trial, Janeka claimed that six of the jurors who voted for the four defense verdicts engaged in prejudicial misconduct during voir dire, by failing to disclose their involvement in prior "lawsuits or legal claims," namely, bankruptcies, credit collection actions, and an uncontested marital dissolution proceeding. Janeka claims the court abused its discretion in denying her new trial motion on this ground. We find no merit to this claim.

1. Relevant Background

During jury voir dire, the court asked all of the prospective jurors, in the context of probing them for bias, whether any of them had been "involved in any lawsuits or claims, or . . . had experience with testifying at a deposition or in court." In response, six prospective jurors, who were later sworn as jurors and voted for the defense verdicts—jurors Aguilar, Clayton, DeTrinidad, Hawkins, Huerta, and Swenson—did not disclose their involvement in prior legal proceedings. Five of the six jurors, Aguilar, DeTrinidad, Hawkins, Huerta, and Swenson, did not disclose prior bankruptcy filings from 2001 to 2012; Aguilar and Clayton did not disclose that default judgments were entered against

them in small claims credit collections actions in 2008, 2009 and 2011; and DeTrinidad did not disclose that he was the respondent in a 2005, uncontested marital dissolution proceeding.

In her new trial motion, Janeka claimed that the nondisclosures constituted prejudicial juror misconduct warranting a new trial. (Code Civ. Proc., § 657, subd. (2).) The court took judicial notice of court records, adduced by Janeka, to the extent the record showed that the six jurors were parties to the legal proceedings identified in the court records and the nature and extent of the proceedings. The court records showed Swenson filed for bankruptcy in 2001, Aguilar in 2007, Hawkins and Huerta in 2008, and DeTrinidad in 2012. Aguilar suffered a $698 default judgment in a credit collections case in 2008, and Clayton suffered default judgments in two credit collections cases, one in 2009 and another in 2011. DeTrinidad was the respondent in a 2005 martial dissolution proceeding, but he did not appear in court in the matter, and a default judgment was entered. In opposition to the motion, RCH submitted declarations from jurors DeTrinidad and Swenson. No declarations from the four other jurors, Aguilar, Clayton, Hawkins, or Huerta, were submitted.

Juror DeTrinidad explained he filed for bankruptcy in 2012 but did not "complet[e]" the bankruptcy. He "gave honest and truthful answers" during voir dire to "the best of" his ability." He understood the court's question about "claims and lawsuits" to be asking about lawsuits in which the parties "go before a judge and jury," and he did

not consider his bankruptcy or divorce to be responsive to the court's question.[6] He noted that, at one point during voir dire, he mentioned his ex-wife, in effect disclosing that he had been divorced, but there were no follow up questions about the divorce and he was not asked whether it made him biased in this case. He also disclosed that his current wife worked at a hospital and had a patient whose mother was seeking an attorney to file a medical malpractice action. He claimed his "brief and distant involvement" with his bankruptcy filing and divorce "did not in any way create any strong feelings, biases or prejudice regarding the legal system, attorneys, lawsuits in general, or the parties in this case." These matters were "unrelated to issues and evidence" in this case and had "no impact" on the way he viewed the evidence, his deliberations, or his verdicts.

Juror Swenson declared that her failure to disclose her 2001 bankruptcy filing was unintentional. She did not understand the court's question about "claims" or "lawsuits" to include bankruptcy filings. Had she been asked whether she had filed for bankruptcy, she would have "openly disclosed" it. Her bankruptcy did not cause her to have any "strong feelings" about the judicial system, any bias or prejudice for or against either side in the case, and it did not influence her verdicts.

In opposition, Dr. Carstens adduced reporter's transcripts of portions of the voir dire, showing that jurors DeTrinidad, Swenson, and Clayton disclosed and discussed their

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[6] Janeka also claimed that DeTrinidad was a defendant in an unlawful detainer action in 2000 and in a small claims collection action in 1995. DeTrinidad denied he was the defendant in either of these cases; he explained that the cases could have involved his father or his son because the three of them have the same name. The court took judicial notice that both cases were resolved by default judgments and that DeTrinidad did not appear in court in either case.

own and their family members' past involvements in various legal matters and experiences related to bias. Clayton disclosed having a worker's compensation claim and lawsuit, but she said the experience did not leave her feeling "bad about lawyers or people in the legal profession." Swenson disclosed that, as a social worker, she once testified in a criminal investigation about abuse to a minor, but she had no biases for or against lawyers. DeTrinidad disclosed that his daughter was born one month premature via C-section, and that he had a brother who was autistic, died at age 35, and required a lot of in-home care, but he denied these experiences would make him biased.[7]

In denying the new trial motion, the court found it was significant that, apart from the bankruptcy filings, all of the undisclosed legal proceedings involved default judgments. The court also found that juror DeTrinidad "did not willfully conceal his divorce" during voir dire because he disclosed that he had an ex-wife. The court found that all of the undisclosed legal proceedings were "irrelevant to bias in this case," that all of "the failures to disclose were unintentional omissions, not willful concealment[s]," and there was "no evidence of juror bias."

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[7] Juror Aguilar said things in voir dire that indicated he would be biased against RCH. Aguilar expressly stated he would be biased against RCH because his mother-in-law died at RCH. He also said his daughter almost died when she was young, and he was skeptical about the care she received from doctors. He answered "kind of" when asked whether he thought that "either side ha[d] a leg up in [his] mind before [he had] even heard anything." He also said he thought RCH could "afford better lawyers," and answered "kind of " when asked whether his belief "might affect [his] ability to be fair to both sides."

2. Legal Principles

A new trial may be granted based on prejudicial juror misconduct. (Code Civ. Proc., § 657, subd. (2); *Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 53 (*Stokes*).) The moving party bears the burden of establishing juror misconduct. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345 (*Barboni*).) "One form of juror misconduct is a juror's concealment of relevant facts or giving of false answers during a voir dire examination." (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57-58 (*Ovando*).)

Juror misconduct raises a presumption of prejudice, which can be rebutted by a showing that there is no substantial likelihood of actual juror bias. (*In re Manriquez* (2018) 5 Cal.5th 785, 798 (*Manriquez*).) " 'That is, the "presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased" ' " against the party moving for a new trial. (*Ibid*; *Ovando*, *supra*, 159 Cal.App.4th at p. 58.)

Actual bias means " 'a state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' " (*Manriquez*, *supra*, 5 Cal.5th at p. 799.) A trial court has discretion to determine whether a juror's failure to disclose material information was intentional or unintentional, and whether the juror was biased. (*People v. Wilson* (2021) 11 Cal.5th 259, 310 (*Wilson*); *Ovando*, *supra*, 159 Cal.App.4th at p. 59.) Unless the record clearly shows a juror's actual bias, the trial judge is " best

situated " to evaluate the juror's state of mind and intentions. (*Wilson*, at p. 310.) A juror's " 'good faith when answering voir dire questions is the most significant indicator that there was no bias.' " (*Manriquez*, at p. 798; *In re Hamilton* (1999) 20 Cal.4th 273, 300 (*Hamilton*).)

In assessing juror bias, intentional and unintentional concealments of material information are not accorded the same effect: "While a juror's intentional concealment of material information may demonstrate implied bias sufficient to justify disqualification, unintentional failure to disclose material information will only justify disqualification if the juror was sufficiently biased to constitute good cause for removal." (*Stokes*, *supra*, 34 Cal.App.5th at p. 53; *People v. San Nicolas* (2004) 34 Cal.4th 614, 644 (*San Nicolas*).) That is, "an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias." (*Hamilton*, *supra*, 20 Cal.4th at p. 300.) Regardless of whether the concealment was intentional or unintentional, however, "the ultimate question" is whether there is a substantial likelihood of juror bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.)

"Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror's subjective reasoning process." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125 (*Bell*).) More specifically, "[t]he jury's impartiality may be challenged by evidence of '*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,' but

‘[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined.’ (Evid. Code, § 1150, subd. (a), italics added; see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 . . . .) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, ‘open to [corroboration by] sight, hearing, and the other senses’ (*Hutchinson*, [at p. 350]), which suggests a *likelihood* that one or more members of the jury were influenced by improper bias” (*Hamilton*, *supra*, 20 Cal.4th at p. 294).

“[A] court generally undertakes a three-step inquiry in ruling on a new trial motion based on juror misconduct. First, the court determines whether affidavits supporting the motion are admissible. Second, the court determines whether the facts establish misconduct. Third, the court determines whether any misconduct resulted in prejudice”—that is, the court determines whether there is a substantial likelihood of actual juror bias. (*Stokes*, *supra*, 34 Cal.App.5th at p. 52.)

On appeal, we review a court’s rulings on the admissibility of affidavits and other evidence on a new trial motion for abuses of discretion. (*Barboni*, *supra*, 210 Cal.App.4th at p. 345.) We defer to the court’s credibility determinations and accept the court’s factual findings if substantial evidence supports them. (*Stokes*, *supra*, 34 Cal.App.5th at p. 53; *Ovando*, *supra*, 159 Cal.App.4th at p. 59.) We independently determine whether any juror misconduct was prejudicial, that is, whether there is substantial likelihood of actual juror bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798; *Barboni*, at p. 345.)

3. Analysis

The court did not expressly find that any of the six jurors committed misconduct in failing to disclose their prior bankruptcy filings or other "prior lawsuits" during voir dire. As noted, "[a] juror who conceals relevant facts or gives false answers during the voir dire examination . . . commits misconduct." (*Hitchings*, *supra*, 6 Cal.4th at p. 111; *Stokes*, *supra*, 34 Cal.App.5th at p. 52.) But even if all of the six jurors' nondisclosures amounted to misconduct, substantial evidence supports the court's findings that the nondisclosures were "unintentional omissions, not willful concealment[s]" and did not conceal actual juror bias against Janeka. Thus, we find no substantial likelihood of actual juror bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.)

The entire record, including the context in which the court's question about "lawsuits" and "claims" was asked, supports the court's finding that the six jurors' nondisclosures were unintentional. First, the question was asked in the context of the court's broader inquiry about bias. The court's earlier questions focused on experiences and "strong feelings" that may have caused a prospective juror to be "biased for or against either side in this case." In this context, the six jurors could have reasonably believed that the court's subsequent question about "lawsuits" or "claims" was not asking about bankruptcy filings, or uncontested matters. All of the prior lawsuits involved default judgments and no court appearances, and none involved medical-legal issues. Thus, to the six jurors, all of the undisclosed prior lawsuits could have reasonably seemed irrelevant to the court's question about prior "lawsuits" and "claims."

Second, jurors DeTrinidad and Swenson each declared they did not understand the court's question about "lawsuits and claims" as asking them to disclose their prior bankruptcy filings or DeTrinidad's uncontested divorce proceeding. These jurors' statements confirmed what the record of the voir dire proceedings showed: it was reasonable to interpret the court's question about "lawsuits" and "claims" as not asking about bankruptcy filings or uncontested matters involving no court appearances.

Janeka argues that, because jurors Aguilar, Clayton, Hawkins, and Huerta did not submit declarations explaining why they failed to disclose their bankruptcies and other prior lawsuits, there is no evidence that these four jurors' nondisclosures were unintentional or concealed no actual bias. We disagree. The record of the voir dire and the DeTrinidad and Swenson declarations support a reasonable inference that all of the nondisclosures were unintentional. Further, the court found there was no evidence of actual bias, and no evidence of actual bias appears in the record.

Janeka points out that, near the beginning of jury voir dire, the court emphasized the importance of being honest during the voir dire process. The court also said the integrity of our justice system depended on the prospective jurors being honest about their qualifications as jurors. The court asked the prospective jurors not to tell "little white lie[s]" and showed them power point slides with the phrases "Any lawsuits or claims" and "Don't Make Us Guess." Janeka suggests this evidence shows there is a substantial likelihood that the six jurors were actually biased against her. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.) The evidence does not support this inference. Notwithstanding the courts' admonitions about honesty and the power point slides, for

the reasons we have explained, the six jurors could have reasonably believed that the court's question about "lawsuits" and "claims" was not asking them about their prior bankruptcy filings and the uncontested matters they did not disclose.

In sum, given that substantial evidence supports the court's findings that the nondisclosures were unintentional, and record contains no evidence of actual juror bias, we discern no *substantial likelihood* of actual juror bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.) The presumption of prejudice was rebutted, and the court properly denied Janeka's new trial motion based on her claim of juror misconduct during voir dire. (*Ibid*.)

A similar claim of juror misconduct was rejected in *Hasson v. Ford Motor Corp.* (1982) 32 Cal.3d 388, 408 (*Hasson*). The plaintiff claimed he suffered brain injuries due to brake failure on a Ford vehicle and obtained a judgment against Ford Motor Co. (*Id*. at pp. 396-398.) During voir dire, counsel for Ford asked a group of prospective jurors, " 'I believe [counsel for plaintiffs] asked you if you had been involved in litigation arising out of automobile accidents. Are there any of you who have been involved in lawsuits for any other reason?' " (*Id*. at p. 408.) One juror did not disclose that he had been a defendant "in several lawsuits brought by large corporate creditors." (*Ibid*.) Another juror did not disclose that "his son had died as a result of brain damage sustained in an automobile accident" when he was in a group of prospective jurors who were asked whether they had " 'dealt with brain injuries.' " (*Ibid*.)

Ford moved for a new trial, claiming the jurors committed misconduct. (*Hasson*, *supra*, 32 Cal.3d at pp. 407-408.) The trial court denied the motion, and the *Hasson* court

rejected Ford's juror misconduct claim. The court reasoned: "Not surprisingly, Ford cites no authorities that these facts establish misconduct. It is difficult to see how either of these incidents involving failure to affirmatively respond to such generalized inquiries asked of a group of jurors can be thought to amount to concealment of bias. [Citation.] Moreover, Ford presented no evidence of actual bias other than the jurors' silence on voir dire; and the trial court, in denying a new trial on this round, impliedly determined that there was insufficient proof of concealed bias. . . . We see no reason to disturb that finding." (*Id*. at p. 408.) Here, too, there is no reason to disturb the court's findings that the six jurors acted unintentionally in failing to disclose their bankruptcy filings and other prior lawsuits, and that there was no evidence of actual juror bias.

Cases finding prejudicial juror misconduct based on facts concealed during voir dire typically involve intentional nondisclosures, the failure to answer questions "clearly and fairly" asking about the matter concealed, and evidence clearly indicating bias. (*Hitchings*, *supra*, 6 Cal.4th at pp. 104, 112-116; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 107-110; *Ovando*, *supra*, 159 Cal.App.4th at pp. 54-56, 59-60.) None of these factors were present here. The juror misconduct here, if any, was unintentional and concealed no actual juror bias. " 'Where the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside.' " (*Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1445.)

D. *Alleged Irregularity and Juror Misconduct During Polling on RCH Verdict*

Janeka claims the court prejudicially erred in denying her new trial motion based on what she claims was an irregularity, and juror misconduct, in the polling of the jury on its 9 to 3 verdict finding RCH not negligent. As we explain, this claim is forfeited for two reasons, and it fails on its merits.

1. Relevant Background

The special verdict form posed the question: "Was any defendant negligent in the treatment rendered to Janika or Ayani Elizondo?" The verdict then listed the names of each defendant, and next to each name the jury was asked to answer the question by marking the verdict "yes" or "no" for each defendant. The jury answered the question "no" for each defendant, including RCH. The jury's "no" negligence vote in favor of RCH was 9 to 3.

In polling the jury on the verdict on favor of RCH, the court referred to the question, as stated on the verdict form: "Was any defendant negligent in the treatment rendered to Janika or Ayani Elizondo, as to [RCH], answer no." Addressing each juror in turn, the court asked, "Is this your verdict?" This meant that if the jurors agreed with the verdict rendered, they were agreeing that their answer was "no" to the question of whether RCH was negligent and "yes" to the question of whether that was their verdict. Eight of the 12 jurors, Carmona, Clayton, DeTrinidad, Hawkins, Huerta, Nunez, Swenson, and Vergara, answered the question "yes" and four jurors, Gallagher, Aguilar, Boyer, and Gonzalez, answered the question "no."

Immediately after the polling, juror Carmona said, "Your honor, if I may, can I ask or can we talk to the jury—can the jury talk real quick?" The court said "yes" and the jury conferred. The foreperson, juror Boyer, then said, "I think it's because he's misunderstanding what your question is in regards to answering yes or no." Juror Carmona then said, "Your honor, can you read it in the form that it's put on the paper?" The court said "yes" and repolled the jury, this time asking each juror whether their answer to the question "Was [RCH] negligent . . . ." was "yes" or "no." In response to the second poll, nine of the jurors, including juror Aguilar, responded "no" and three jurors, Boyer, Gallagher, and Gonzalez, responded "yes."

In a declaration in opposition to the new trial motion, juror Boyer declared that each of the nine jurors who answered the second polling question "no," including juror Aguilar, voted in the jury room to find RCH not negligent. Juror Carmona also declared that juror Aguilar voted "no" in the jury room in response to the question whether RCH was negligent. Juror Carmona further declared that, when she spoke with juror Aguilar in open court after the initial polling, he "indicated he misunderstood the way the [initial polling] question was asked," and he "had not changed his vote, which was still in favor of the hospital." Juror Carmona averred that she did not tell juror Aguilar "how to vote" either during deliberations or when she spoke with him in open court after the initial polling.

2. Legal Principles and Analysis

A motion for a new trial may be made based on "[i]rregularity in the proceedings of the court, jury or adverse party. . . by which either party was prevented from having a

fair trial." (Code Civ. Proc., § 657, subd. (1).) A motion for a new trial based upon an irregularity in the proceedings "must be made upon affidavits." (Code Civ. Proc., § 658; *Gay v. Torrance* (1904) 145 Cal.144, 149.) Janeka claims there was an irregularity in the polling of the jury on the RCH verdict because juror Aguilar "changed his vote" during the second polling from finding RCH negligent to finding RCH not negligent. Janeka also suggests that jurors Aguilar and Carmona committed juror misconduct by conferring between themselves during the polling. (Code Civ. Proc., § 657, subd. (2).)

Janeka has forfeited this claim for two reasons. First, Janeka did not preserve the claim for appeal because she did not object to the alleged irregularity either when the jury was polled or before the jury was discharged. " 'Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected.' [Citation.] Further polling of the jury and sending the jury out for further deliberations are means by which some defects can be corrected." (*Bell, supra*, 181 Cal.App.4th at p. 1130; *Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264-265 (*Keener*).) Any irregularity in the polling of the jury on the RCH verdict based on juror Aguilar's vote was apparent in open court, at the time of the polling, and could have been corrected by polling the jury a third time or by sending the jury out for further deliberations. (*Bell*, at p. 1130.) Thus, Janeka forfeited her polling irregularity claim by failing to assert it before the jury was discharged. (*Ibid*.)

Second, Janeka has forfeited the claim in this appeal by failing to support it with argument and legal authority in her opening brief. An appellant's burden on appeal,

" ' includes the obligation to present *argument and legal authority* on *each point* raised.' " (*Lee*, *supra*, 41 Cal.App.5th at p. 721.) In her opening brief, Janeka asserts only that, "One juror [(Aguilar)] changed his vote during the polling of the juror and after another juror [(Carmona)] whispered in his ear. . . . [J]uror deliberations outside of the jury box and by whisper to another juror is jury misconduct that cannot be waived." Janeka cites no legal authority to support this claim.

The claim also fails on its merits. In denying the new trial motion based on the alleged polling irregularity, the court found that juror Aguilar did not change his vote during the polling, and that there was no irregularity or misconduct by jurors Aguilar and Carmona in connection with the polling or with juror Aguilar's vote. Substantial evidence supports these findings. In declarations filed in opposition to the new trial motion, jurors Boyer and Carmona averred that juror Aguilar voted in the jury room to find RCH not negligent; he did not change his vote during the polling; and he merely misunderstood the court's initial polling question.

The declarations of jurors Boyer and Carmona concerning how juror Aguilar voted on the RCH verdict were admissible because they described objectively ascertainable, overt acts: how Aguilar voted on the RCH verdict, both in the jury room and when the jury was polled in open court. (*Bell*, *supra*, 181 Cal.App.4th at pp. 1124-1125; Evid. Code, § 1150, subd. (a).) In contrast, the court properly sustained defense objections to juror Gonzalez's declaration, submitted in support of the new trial motion, in which juror Gonzalez averred that, during deliberations, juror Aguilar "intended to

vote against the hospital." This statement was inadmissible because it purported to describe juror Aguilar's internal thought processes. (*Bell*, at p. 1124.)[8]

E. *Janeka Has Forfeited her Other Claims of Juror and Judicial Misconduct*

In her new trial motion, Janeka claimed that, during deliberations, some jurors "pressured" other jurors to vote for the defense verdicts, and that some jurors told others that they were not allowed to change their votes during deliberations. The court found there was no admissible evidence of juror misconduct during deliberations. Janeka also claimed in her new trial motion that the court and the bailiff "pressured" the jury to reach verdicts based on expediency, rather than the evidence, by telling the jury to make a schedule for its deliberations and to "prioritize" the deliberations. The court did not expressly rule on this claim but implicitly rejected it in denying the new trial motion.

In her opening brief, Janeka makes passing references to these claims but does not claim her new trial motion was erroneously denied on any of these grounds. Janeka also does not challenge any of the court's evidentiary rulings excluding most of the statements in the declarations of Boyer and Gonzalez, which were submitted in support of her new trial motion, as inadmissible. (Evid. Code, § 1150, subd. (a); *Bell*, *supra*, 181 Cal.App.4th at p. 1124.) Thus, Janeka has forfeited these claims on appeal. (*Lee*, *supra*, 41 Cal.App.5th at p. 721.)

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[8] Jurors are permitted to change their votes at the time of polling if the verdict has not been recorded. (*Keener*, *supra*, 46 Cal.4th at p. 256 & fn. 1; *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1230.) Here, however, all of the admissible evidence showed that juror Aguilar did not change his vote in favor of RCH during the polling on the RCH verdict.

F. *Substantial Evidence Supports the Verdicts*

Janeka claims, as she did in her new trial motion, that the verdicts "ran counter to the weight of the evidence." This claim is not cognizable on appeal. (*Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889, 908 [ "Defendants are simply arguing the weight of the evidence, and it is elementary that this court will not reverse a judgment on that ground."]; *Jones v. City of Los Angeles* (1951) 104 Cal.App.2d 212, 217 ["It was the duty of the trial court to grant a new trial . . . if the verdict was determined to be against the weight of the evidence. This was a factual question which is not reviewable on appeal."].) Even if the claim can be construed as a challenge to the *sufficiency* of the evidence supporting the verdicts, Janeka has forfeited any substantial evidence argument by failing to summarize the facts in the light most favorable to the judgment. (See *Oak Valley Hospital Dist. v. State Dept. of Health Care Services* (2020) 53 Cal.App.5th 212, 237.) In any event, substantial evidence supports the jury's special verdict finding none of the defendants negligent in the treatments they rendered to Janeka and Ayani. As the court found, "[a]ll defendants presented substantial evidence through expert testimony that they met the standard of care."

## IV. DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Rule 8.278(a)(2).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.