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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GLORIA CHAPARRO et al., Plaintiffs and Appellants, v. JERRY CIMMARUSTI et al., Defendants and Respondents.	B244757 (Los Angeles County Super. Ct. No. KC062198)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Affirmed.

Susan M. Mogilka for Plaintiffs and Appellants.

Taylor Blessey, Barbara M. Reardon and Erica A. Levin for Defendants and Respondents.

Gloria Chaparro (Gloria) and David Chaparro (David) (collectively the Chaparros) appeal the summary judgment entered in favor of respondents Dr. Jerry Cimmarusti, Renee Parilla (Parilla) and Magan Medical Clinic, Inc. (Magan) (collectively the medical defendants) on Gloria's claim for medical malpractice and David's bystander claim for emotional distress. We find no error and affirm.

FACTS[1]

Gloria's history

Gloria was born in 1938. In 1981, she was hospitalized for hemoptysis[2] and diagnosed with allergic bronchopulmonary aspergillosis. A few years later, she became a patient at Magan. In November 1985, March 1986, February 1989, March 1989, February 1991 and January 1997, she was hospitalized for pneumonia.

Dr. Harry H. Chao was Gloria's primary care physician. On December 15, 1998, he documented that Gloria had the following chronic medical problems: long history of chronic asthma, history of aspergillosis, hypertension, osteoarthritis, stress anxiety syndrome, depression, migraine headaches, postmenstrual syndrome, irritable bowel syndrome, dyspepsia and insomnia.

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[1] The Chaparros's appellate briefs fail to provide citations to evidence. They cite to the complaint, separate statements and objections to evidence instead. When a party appeals from summary judgment, assertions of fact must be followed by a citation to the supporting evidence. It is important for appellants to remember that a separate statement is not evidence. We do not suggest, of course, a separate statement should never be cited. Citing a separate statement often helps set forth the substance of a motion. And it can establish that a fact is undisputed. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178; *State of California ex rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc.* (2011) 197 Cal.App.4th 963, 968, fn 1.) Suffice it to say, the Chaparros's approach has hampered our analysis. Much of our statement of facts is based on the admissible evidence offered by the medical defendants, and also from the facts that were undisputed. In the opposition to the separate statement, the Chaparros often listed a fact as disputed but did not cite any conflicting evidence. In those instances, the lack of a genuine dispute is presumed.

[2] According to the medical defendants, hemoptysis is a diagnosis that refers to the spitting of blood from the lungs or bronchial tubes.

In 2002, Dr. Cimmarusti became Gloria's primary care physician. For the next several years, she frequented Magan's clinic and urgent care for complaints related to her chronic pulmonary condition. In 2005, she received numerous chest x-rays and a CT scan of her chest.

Gloria went to see Dr. Cimmarusti for a seven-month check in May 2010. The examination was essentially normal. She was instructed to take calcium and Vitamin D.

The events of July 2010

On July 7, 2010, Gloria was seen at Magan's urgent care by Parilla, a physician's assistant, with a complaint of coughing up blood. Gloria was not experiencing epistaxis, nor did she have weight loss, malaise or shortness of breath. Her temperature was 97.5 degrees, her blood pressure was 112/72, her pulse was 66 and her oxygen level was at 93 percent. An examination revealed decreased breath sounds in all lung fields, scattered wheeze and rhonchi. She was given a nebulizer treatment. Afterwards, Gloria reported that she was much improved. There were increased breath sounds in the lungs, and the wheeze and rhonchi resolved. Her oxygen level increased to 95 percent. Orders were written for an aspergillosis antibody assay, a complete blood count and a tuberculosis test. The assessment was hemoptysis and asthma. She was told to use an inhaler and nebulizer as needed, and to schedule an appointment with Dr. Cimmarusti in seven to 10 days.

The aspergillosis assay—which included IgG, IgM and IgA antibody tests—demonstrated prior infection.

Gloria returned to Magan's urgent care on July 9, 2010. She reported that she was dizzy and weak, and that she had blood in her saliva. Her temperature was 97 degrees, blood pressure 92/62, heart rate 67 and respiratory rate 18. The assessment was hemoptysis, cough, a negative PPD[3] and dizziness. The treating physician, Dr. Arlene Nepomuceno, advised Gloria to see her primary care physician if there was no improvement in two to three days. If the symptoms persisted, Gloria was instructed to

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[3] Presumably PPD stands for purified protein derivative.

proceed to an emergency room. She was given an appointment to see Dr. Cimmarusti on July 12, 2010.

When she saw Dr. Cimmarusti, her temperature was 96.6, pulse 70 and blood pressure 103/62 and then 112/70. He noted that she had two episodes of hemoptysis in two weeks and once the night before, and that she had increased cough, fever, chills and a syncopal episode. When he examined her, he found decreased breath sounds, but no wheeze or rhonchi. He ordered a chest x-ray and additional laboratory tests including occult blood, blood urea nitrogen (known as BUN) and creatine. The chest x-ray was interpreted by Dr. Jaime M. Schvartzman, a radiologist. It showed an infiltrate in the inferior division of the lingual, and a second infiltrate posteriorly in the lateral view. There was also a linear faint density in the periphery of the left upper lobe.
Dr. Schvartzman recommended a CT scan, which was ordered by Dr. Cimmarusti. He also ordered a Holter monitor study. Then he prescribed the antibiotic doxycycline for community acquired pneumonia.

Five days later, on July 17, 2010, Gloria was seen in the Emergency Department of the Citrus Valley Medical Center. The next day, she was admitted to the hospital due to "worsening left-sided pleuritic chest and back pain," and for cough with bloody sputum. A chest x-ray showed a large left lower lobe consolidation. Her white count was elevated at 31,000. The impression was left lower lung pneumonia and hemoptysis. She was started on antibiotics and given oxygen. A day later, she had an ultrasound guided thoracentesis. No malignant cells were identified.

On July 23, 2010, Gloria underwent a flexible fiberoptic bronchoscopy, followed by a left thoracotomy, exploration, empyemectomy and decortications. A culture was taken and revealed Streptococcus intermedius.[4] Seven days later, her condition had improved and she was discharged.

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[4] In their opposition separate statement, the Chaparros disputed what happened to Gloria on July 23, 2010. They stated: "After [a] hospital pulmonary specialist ruled out cancer, [Gloria] underwent chest surgery which revealed the cause of her problem to be a large 'empyema'—a collection of pus between the lung and chest wall compressing the

The complaint

The complaint alleged that on July 7, 2010, David took Gloria to Magan because she was coughing up blood and had shortness of breath. Parilla conducted an examination. When the Chaparros returned to their car, Gloria coughed up a large amount of blood, so they went back inside and asked for a further evaluation. The medical defendants turned the Chaparros away, telling them to wait for the CT scan that Magan had scheduled for the following week.

On July 17, 2010, the Chaparros went to an emergency room, where a physician determined that Gloria's oxygen saturation was in the 60 percent range. He said Gloria was in critical condition and might not survive. She was admitted to the hospital and was given a chest x-ray that revealed a large mass. Later, doctors operated on Gloria to remove the mass, which was a large collection of pus in the space between the lung and the inner surface of the chest wall. Pus also had to be removed from where it was accumulating over her diaphragm.

While visiting Gloria in the hospital, David saw Dr. Cimmarusti. David said he was thinking about reporting Dr. Cimmarusti's mistreatment of Gloria. Dr. Cimmarusti replied that if David did not "keep this quiet," Dr. Cimmarusti would not continue to help Gloria.

Gloria was discharged from the hospital and recovered from the infection that had been removed from her chest.

The medical defendants breached their duty of care "to provide qualified or properly trained health practitioners, to have policies and procedures to timely diagnose [Gloria's] illness, to properly assess and treat signs and symptoms of hypoxia, hypotension, and bleeding from the respiratory tract, to properly consider and rule out the presence of emergency medical or surgical conditions despite the patient's request to do

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lung." This dispute appears semantic rather than actual. They did not suggest that a surgery revealing an empyema is something other than a thoracotomy with exploration and an empyemectomy.

so, and to provide timely radiological diagnostic tests and appropriate and timely referrals to specialists to secure timely diagnosis and treatment to avoid unnecessary pain, suffering, and the risk of further injury or even death."

Due to the medical defendants' negligence, Gloria suffered extreme and unnecessary physical and emotional pain, severe hypoxia with mental confusion and the spread of infection.

David was a percipient witness to Gloria's injuries, and suffered extreme emotional distress as a result.

The motion for summary judgment

The medical defendants moved for summary judgment on the grounds that they met the standard of care and did not cause Gloria any damage. They further argued that David's derivative bystander claim lacked merit because Gloria's claim had no merit. In support, Dr. Abraham Ishaaya submitted an expert declaration stating that the medical defendants met the standard of care at all times, and that nothing they did caused injury to Gloria.

In opposition, the Chaparros's offered the expert declaration of Dr. Paul K. Bronston. Though Dr. Bronston opined that the medical defendants breached the standard of care, he offered no opinion as to causation.

Each party filed objections to the expert declarations.

When the parties convened for oral argument, the trial court indicated that there was no triable issue as to causation because the Chaparros did not have an expert. The Chaparros's counsel argued that because they were alleging that the failure to treat Gloria's empyema caused pain and suffering, an expert on causation was unnecessary. The trial court disagreed.

All objections were overruled and summary judgment was granted in favor of the medical defendants. Judgment was entered.

This timely appeal followed.

DISCUSSION

I. Standard of Review.

We review summary judgment motion de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) When analyzing the issues, "We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836 (*Torres*).) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

Our Supreme Court has not decided whether a trial court's ruling on evidentiary objections in connection with a summary judgment motion should be reviewed under a de novo or abuse of discretion standard. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) In the Court of Appeal, there is a split of authority. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn. 4.) But "the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]" (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

II. The Objections to Dr. Ishaaya's Declaration were moot.

The Chaparros contend that the trial court should have sustained objections to portions of Dr. Ishaaya's declaration because they were speculative, based on hearsay and lacked a factual basis. We examine this contention below.

A. Hearsay.

In making his expert declaration, Dr. Ishaaya relied on medical records from Magan, Citrus Valley Medical Center/Intercommunity Campus, Kamalakar Rambhatla, M.D., Dilip S. Patel, M.D., and the depositions of the Chaparros. He declared that "[b]ased upon my review of the [cited] medical records and depositions, I have determined the following facts relevant to the care [and] treatment of [Gloria][.]" He proceeded to list various facts.

In part, Dr. Ishaaya noted that, ". . . Harry H. Chao, M.D.[] documented on December 15, 1998, that Gloria [] had the following chronic medical problems: long history of chronic asthma, history of aspergillosis, hypertension, osteoarthritis, stress anxiety syndrome, depression, migraine headaches, [postmenstrual syndrome], [irritable bowel syndrome], dyspepsia and insomnia."

The Chaparros objected based on hearsay, and the objection was overruled. Though the Chaparros revisit the issue on appeal, we conclude that it is moot.

In the medical defendants' separate statement No. 3, they stated that Dr. Chao documented that Gloria had various chronic medical problems as of December 15, 1998. As evidentiary support, they cited Gloria's medical records as well as the objected to portion of Dr. Ishaaya's declaration. The Chaparros did not object to Gloria's medical records, nor did they argue that her medical records did not support separate statement No. 3. So even if the objected to portion of Dr. Ishaaya's declaration was based on out of court statements and offered for the truth of the matter asserted, and even if a hearsay

objection should have been sustained, the medical defendants' motion would not have been weakened, i.e., the same facts were still properly before the trial court.[5]

B. Evidence Code section 802.

In his declaration, Dr. Ishaaya made the following statements or partial statements: (1) "For the next several years, [Gloria] was frequently seen in [Magan] for complaint related to her chronic pulmonary condition;" (2) "Numerous chest x-rays were taken, as well as a CT scan of the chest in 2005;" (3) " . . . and the other healthcare providers who provided care and treatment to [Gloria] at [Magan] . . . ;" (4) "She did complain of being dizzy and sick, which was unrelated to her upper respiratory complaints;" (5) " . . . or any other healthcare provider at [Magan] . . . ;" (6) " . . . or any other healthcare provider of [Magan] . . . ;" and (7) ". . . timely access to the performance of the CT of the chest. . . ."

The Chaparros objected to the above referenced statements based on Evidence Code section 802, which provides in part that a "witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." The trial court overruled the objections.

On appeal, the Chaparros argue that the objections should have been sustained because Dr. Ishaaya offered an opinion "about the non-negligence of 'others,' without identifying who they are and describing their conduct. He further credits the [medical defendants] with performing a 'timely' CT-scan but the very records he relies upon for this opinion show that they did not perform one." Next, they contend that the "trial court should have sustained [the Chaparros's written objections and excluded the identified portions of [Dr. Ishaaya's] declaration from [the medical defendants'] evidence before ruling on the motion."

In making this argument, the Chaparros misapprehend the issue.

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[5] Dr. Ishaaya, of course, was permitted to use reliable hearsay when forming his opinions. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523–1524.) The Chaparros do not contend that Gloria's medical records were unreliable hearsay. As a result, we do not construe their hearsay objection below and related argument on appeal as an attack on the foundation for Dr. Ishaaya's opinion.

Evidence Code section 803 provides: "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

Thus, if Dr. Ishaaya relied on improper matter, the Chaparros were required to object to his opinion. But they never objected to his opinion that the medical defendants did not breach the standard of care or injure the Chaparros. This means that Dr. Ishaaya's opinion was admissible and properly considered below. As a consequence, whether he relied on improper matter is a moot issue.

III. The Medical Defendants Met Their Initial Burden Under the Summary Judgment Statute to Negate a Triable Issue.

According to the Chaparros, the medical defendants did not meet their burden under the summary judgment statute because they failed to address all material facts framed by the complaint, including these: (1) the Chaparros are senior citizens and dependent upon receiving care from the medical defendants; (2) the medical defendants turned the Chaparros away after Gloria coughed upon blood in the Magan parking lot and returned to Magan seeking care; (3) between July 7, 2010, and July 12, 2010, Gloria showed progressive, obvious symptoms which the medical defendants saw and documented: low oxygen saturation, low blood pressure, dizziness, weakness, increasing cough, shortness of breath, chest pain, fever, chills and fainting; (4) the medical defendants denied requests for a second opinion; (5) the medical defendants did not take chest x-rays, did not check oxygen saturation, and did not refer Gloria to a specialist; and (6) David was warned that if he reported the medical defendants' poor care, further care to her would be withheld. We cannot concur.

The statutory language is clear. A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A material fact in this case is causation. In the absence of

causation, the medical defendants were entitled to judgment. When they offered Dr. Ishaaya's opinion that they did not cause the Chaparros's injury, the medical defendants met their burden. (*Torres*, *supra*, 3 Cal.App.4th at p. 836.)

IV. The Chaparros Failed to Demonstrate a Triable Issue as to Causation.

The Chaparros argue that there is a triable issue as to causation. This argument is unavailing. In a medical malpractice action, the rule is that causation must be established within a reasonable medical probability by competent expert testimony. (*Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603.) Because Dr. Bronston did not offer an opinion on causation, there was no triable issue.

An exception to the rule requiring an expert's opinion on causation is recognized in *Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 368 (*Czubinsky*) and *Valentin v. La Societe Francaise* (1946) 76 Cal.App.2d 1, 5-8 (*Valentin*). The Chaparros try to seize upon this exception. But it does not apply.

When the patient in *Czubinsky* was coming out of anesthesia at the most critical time following surgery, the operating room was inadequately staffed. The patient went into cardiac arrest and suffered a severe loss of oxygen to her brain, which caused permanent and total paralysis. The patient sued the hospital. (*Czubinsky*, *supra*, 139 Cal.App.3d at p. 363.)

A doctor testified that postoperative monitoring is critical, and all personnel in the operating room are required to observe a patient. During the critical life endangered period, the patient's heart rate dropped from 70-80 beats per minute to 12-20 beats per minute. The audio signal on the oscilloscope was always kept on and any significant change in the beep would be readily discernible. Cardiopulmonary resuscitation (CPR), if administered properly, would provide adequate blood circulation and forestall permanent brain damage for as long as a half hour. Effective CPR required a joint effort by a number of people. (*Czubinsky*, *supra*, 139 Cal.App.3d at p. 363.) Other testimony showed that the registered nurse assigned to the patient's operating room was called to another operating room by two doctors. Even though she knew she should not leave the patient, the nurse did because she was being yelled at. A technician noticed that the

patient's legs were cool and her upper extremities were dark, blue and mottled. He asked if the anesthesiologist needed assistance and then went to get help. Left alone, the anesthesiologist had to run back and forth between doing CPR and ventilating the patient. (*Czubinsky*, *supra*, 139 Cal.App.3d at pp. 364–366.)

The jury found in favor of the patient, but the trial court granted a judgment notwithstanding the verdict. The patient appealed. In its respondent's brief, the hospital argued that the absence of expert testimony on causation undermined the patient's case. The *Czubinsky* court disagreed and reversed. (*Czubinsky*, *supra*, 139 Cal.App.3d at p. 363.) It stated: "No expert opinion is required to prove the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent. This neglecting, abandoning and ignoring the patient was a prime reason why effective CPR was unavailable and therefore an immediate, direct, and effective cause of [the patient's] brain damage." (*Id*. at p. 367.) The court went on to state: "On such facts as a conceded abandonment—neglect in the purest sense—of a patient by nursing personnel at a life endangered time, no expert testimony is required either on the issue of neglect or causation. Want of care is so obvious as to render expert testimony unnecessary. [Citations.]" (*Ibid*.)

In *Valentin*, a patient underwent a successful hernia operation at a private hospital. His condition was normal for eight days, but then he developed a fever, pain and other symptoms. For the next couple of days, he had a high fever, and suffered a tight feeling in his throat and pain when he tried to open his mouth. At noon on the fourth day of symptoms, a doctor finally examined the patient and reported to the supervisor of nurses that it looked like the patient had tetanus. He instructed her to call the attending physician. Throughout the day, the patient suffered progressive deterioration. The patient's mother arrived at 7:30 p.m. and was alarmed to see the change in her son. She reported her observations to the nurse, expressed anxiety and demanded a physician. For three hours, the mother pleaded in vain. Finally, after she left at 10:30 p.m., a doctor examined the patient, announced that he was suffering from tetanus and ordered him

transferred to a county hospital. Once there, he was given antitetanic treatments but died. (*Valentin*, *supra*, 76 Cal.App.2d at pp. 3, 6–8.)

The complaint alleged that the defendants negligently failed to discover the tetanus or prevent its development following a definite diagnosis. The court explained that "[i]f the alleged neglect relates to matters or conduct which are reasonably within the ken of the average layman the jury may determine the culpability of the person charged therewith without the aid of experts. If it relates solely to the exercise of judgment in the application of skill and learning then proof of the negligence must be made by experts." (*Valentin*, *supra*, 76 Cal.App.2d at p. 5.)

A doctor testified that the tetanus cure was effective in a great majority of cases if promptly applied. (*Valentin*, *supra*, 76 Cal.App.2d at pp. 6, 8.) Based on the proof, the jury was warranted in finding that the physicians and nurses knew of the cure and were negligent in not making it promptly available. The court concluded that "the proof of defendant's negligence and that it was the proximate cause of the death of [the patient was] substantial. It is established by evidence of the inaction of the nurses in the presence of signals of danger which would have moved a reasonably intelligent attendant promptly to import a competent physician for the purpose of taking necessary precautions to prevent the development of the disease." (*Id*. at p. 7.)

Without citation to evidence, the Chaparros state: "Like [*Czubinsky* and *Valentin*], [the Chaparros's] evidence catalogues . . . a . . . period where [the medical defendants] fail[ed] to act in the face of ever-escalating signals of danger. Indeed, [Gloria's] progressive decline and extreme distress while under [the medical defendants'] care is so obvious, it's a 'fact' used by [Dr. Bronston] in reaching his conclusion that many breaches in the standard[] of care occurred over a period of time in the face of [the medical defendants'] ordinary duty to treat. [¶] 'Want of care' as the cause of escalating harm suffered by [Gloria] is ascertainable by the ordinary use of the senses of a nonexpert. [¶] [The medical defendants'] repeated failures to intervene allowed her illness to worsen from coughing up blood, to suffering low oxygen level, then low blood pressure[], then weakness, dizziness, increasing shortness of breath, chest pain, fever[],

chills, fainting, and then finally, to suffering mental confusion and gasping for air and having to be taken to an emergency room where she is found to be in critical condition with a 60 [percent] oxygen level and at risk of death."

In our view, neither *Czubinsky* nor *Valentin* assist the Chaparros. In those cases, there was substantial evidence that the patients probably would have avoided brain damage and death respectively if they had received immediate and adequate care in the face of known or suspected conditions. The jury was told exactly what care should have been provided—adequate CPR and antitetanic treatments. It was easy for the jurors to conclude that the withholding of proper care caused injury. The facts of the Chaparros's case are starkly different. The cause of Gloria's condition was not known. There was no evidence regarding the progression of her epyema, and no evidence regarding epyemas in general. Dr. Bronston offered no opinion regarding when the epyema should have been detected and how it should have been treated upon detection. Should Gloria have been rushed to the hospital for surgery right away? Or do physicians first give antibiotics before doing an invasive surgery? Should she have received antibiotics sooner, or different antibiotics? How much pain could have been avoided if the medical defendants had taken a different approach to Gloria's treatment? We easily conclude that it is beyond the ken of a laymen to determine the progression of Gloria's epyema, when it would have been detected, whether surgery would have or should have been scheduled sooner, and how much of Gloria's pain and suffering could have been avoided or minimized. Thus, in this case, a jury cannot decide causation.

DISPOSITION

The judgment is affirmed.

The medical defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
FERNS

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.