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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

VASILIA PETROU et al., Plaintiffs and Appellants, v. DAFNA TRITES et al., Defendants and Respondents.	B226747 (Los Angeles County Super. Ct. No. BC383814)

APPEAL from a judgment and order of the Superior Court of Los Angeles, Richard Adler, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis, for Plaintiffs and Appellants.

Taylor Blessey and Barbara Reardon for Defendant and Respondent Waleed Doany.

Lewis Brisbois Bisgaard & Smith, Mike Martinez and John J. Weber for Defendant and Respondent Catholic Healthcare West.

Law, Brandmeyer + Packer, Robert B. Packer and Paul M. Corson for Defendants and Respondents Dafna Trites and Women's Healthcare Institute, Inc.

Appellants Vasilia Petrou and Andreas Andreou brought suit for medical malpractice and loss of consortium against respondents Dafna Trites, D.O., Women's Healthcare Institute Medical Center, Inc. (WHIMC, the entity through which Dr. Trites provided her services), Waleed Doany, M.D., and Catholic Healthcare West, doing business as Northridge Hospital Medical Center (the Hospital).[1] Dr. Trites was Petrou's obstetrician during her pregnancy, which began in 2006 and culminated in the birth of the couple's daughter in 2007. Dr. Doany became her perinatologist in February 2007.[2]

Appellants claimed injury to themselves based on the alleged negligence/medical malpractice of respondents. The matter was resolved by a jury trial which resulted in a defense verdict. Appellants contend (1) the trial court committed misconduct during the course of the trial; (2) respondents' counsel committed misconduct during the course of the trial; (3) the jury panel was prejudiced by positive comments made by prospective jurors about Dr. Trites; (4) the court gave an invalid instruction with respect to the duty of care; and (5) the court improperly awarded expert witness fees under Code of Civil Procedure section 998. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Vasilia Petrou has Crohn's disease, a chronic disorder of the bowel. In March and April 2007, Petrou, then in her last trimester of pregnancy, began to experience a burning sensation in her upper abdomen. Dr. Trites told Petrou she was experiencing normal, pregnancy-related conditions. Dr. Trites subsequently

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[1] Dr. Trites and Dr. Doany were both sued as individuals and as professional corporations.

[2] A perinatologist is an obstetrician who specializes in care for pregnant women with higher than normal risks for complications.

diagnosed "'round ligament pain,'" a pregnancy-related disorder. Dr. Trites continued to diagnose round ligament pain as Petrou complained of worsening pain and other symptoms. On June 5, 2007, Petrou consulted Dr. Doany, who ordered an ultrasound and diagnosed an impacted bowel. Dr. Doany prescribed an over-the-counter laxative. The next day, feeling worse, Petrou went to the Hospital emergency room, where she was seen by hospital personnel and consulted by phone with Dr. Trites who advised her to go home and take Tylenol. In the days that followed, Petrou continued to experience abdominal pain and Dr. Trites advised Petrou that her condition was a normal result of pregnancy and that she was also feeling the effects of a virus she had contracted. On July 2, Petrou felt unable to get out of bed and Dr. Trites recommended that labor be induced. Petrou gave birth to a healthy baby girl. Petrou was found to be anemic prior to her discharge. Dr. Trites concluded this condition was the result of the labor and delivery and recommended against a transfusion.

Approximately two weeks after her discharge, Petrou felt a large lump on her right side. She did not contact Dr. Trites or Dr. Doany, but a few days later went to St Joseph's Medical Center. On July 18, Petrou underwent abdominal surgery, which revealed an intestinal perforation leading to formation of a fistula and abscess. The intestine was repaired, but the hospitalization and surgery kept Petrou from being with her baby for ten days and left her with an unsightly scar and other alleged injuries.

At trial, appellants and their medical experts took the position that the fistula and abscess were the result of an untreated flareup of Petrou's Crohn's disease, which had begun in May, when Petrou reported her first symptoms to Dr. Trites. Appellants' experts testified that Dr. Trites and Dr. Doany were negligent for failing to diagnose the problem when appellant was seen by them prior to the delivery or for failing to recommend that she see a gastroenterologist. The

Hospital was said to be negligent because its nursing staff failed to recommend that a staff physician see Petrou when she was at the Hospital under the treatment of Dr. Trites and failed to object when Dr. Trites recommended that she be discharged.

Respondents and their experts testified that the symptoms Petrou reported were related to her pregnancy, as was diagnosed by her doctors at the time. They testified that the flare-up of Petrou's Crohn's disease which led to the need for surgery occurred after the delivery of her baby, when she felt the mass or lump. According to respondents and their experts, if a perforation had existed in May, as appellants' experts theorized, it would have begun spilling bowel contents into the abdominal area and Petrou would have been much sicker in June and July. The Hospital's expert specifically testified that it would not have been warranted for the nurses to go outside the normal chain of command by disregarding Dr. Trites's orders or recommending that Petrou be seen by another physician.

After hearing evidence for two weeks, the jury deliberated and rendered a unanimous verdict in favor of respondents, finding that none of them was negligent in the care and treatment of Petrou. After the verdict was rendered, the court awarded costs to respondents. Because respondents had served settlement offers under section 998 of the Code of Civil Procedure prior to trial, the costs awarded included expert witness fees -- $26,512 to Dr. Trites and WHIMC, $28,700 to Dr. Doany, and $25,000 to the Hospital. This appeal followed.

DISCUSSION

A. *Alleged Judicial Misconduct or Bias*

Appellants contend the trial court committed misconduct or indicated bias by making condescending and disparaging remarks to or about appellants' counsel at trial. Appellants further contend the court improperly interfered with counsel's

questioning of witnesses by interposing objections and by interrupting with its own questions. The contentions fail on both procedural and substantive grounds.

First, with respect to procedural matters, a party claiming judicial misconduct is required to object and seek a jury admonition as a prerequisite to raising the issue on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 78; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) Timely objection to questionable comments enables the court to dispel any misunderstanding with appropriate admonitions. (*People v. Wright* (1990) 52 Cal.3d 367, 411, disapproved in part on another ground in *People v. Williams* (2010) 49 Cal.4th 405.) Appellants raised no objection at trial and requested no admonition based on any comments of the court referenced on appeal. Accordingly, the issue is forfeited.

Moreover, even if the claim is considered on the merits, our review of the portions of the record cited by appellants reveals no prejudicial misconduct or bias. In support of their claim of condescension and disparagement, appellants cite to six exchanges in the record. One occurred outside the presence of the jury. Four involved the court interrupting appellants' counsel when she attempted to make "editorial comments" about or further argue judicial rulings in front of the jury. "'It is well within [a judge's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.'" (*People v. Snow*, *supra*, 30 Cal.4th at p. 78.)

The final cited exchange occurred when the court suggested that when attempting to impeach Dr. Trites with deposition testimony, it would be "sporting" for appellants' counsel to show the witness the transcript or inform her of the page number where the allegedly contradictory testimony appeared. When counsel questioned the word "sporting," the court responded: "I think the British call it sporting. I'd say it's ethical. Take your pick." Counsel responded that it was "not

really [her] job to be sporting." The court said: "[B]ut it is as an officer of the court," and then went on to explain "[w]hat you were doing was proper[;] [y]ou just didn't give the page."

A trial court has an affirmative duty to "exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a).) In context, it is clear the court was doing no more than ensuring the expeditious questioning of the witness by correcting a procedural flaw in counsel's questioning, not suggesting she was unethical. Moreover, we can conceive of no way in which the court's comment could have affected the results of the lengthy trial.

With respect to the court's alleged interference with counsel's presentation of appellants' case, they cite a handful of instances over the course of a two-week trial when the court interrupted counsel to ask a question of a witness. On nearly every occasion, the court was restating questions asked by attorneys which the witness did not appear to understand, or seeking clarification of terms likely to be unfamiliar to the jury, such as "definitive diagnosis" or "ICD code." Appellants' contention that the court "interpose[ed] its own objections" cites multiple instances where the court merely provided a second rationale for sustaining an attorney objection. The court did independently interpose objections from time to time, but in nearly all of those occasions, the questions involved were cumulative and redundant or the form of the question was entirely improper because it had been prefaced with a lengthy statement or argument.[3]

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[3] For example, the court sustained its own objection when counsel prefaced questions with the following comments: "You testified . . . over my objection"; "I didn't
(Fn. continued on next page.)

"'The law of this state confers upon the trial judge the power, discretion and affirmative duty, predicated upon his primary duty and purpose "to do justice," to . . . participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.'" (*People v. Carlucci* (1979) 23 Cal.3d 249, 256.) To this end, "[a] court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case." (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206.) "'[I]f a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for [the judge] to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect . . . .'" (*People v. Carlucci*, *supra*, 23 Cal.3d at p. 255.) In occasionally interrupting appellants' counsel, the court was exercising its prerogative to elicit the truth, prevent misunderstandings, control the manner of questioning, prevent the introduction of extraneous and redundant evidence, and ensure an expeditious trial. There was no misconduct.

B. *Alleged Attorney Misconduct*

Appellants cite to portions of the record where respondents' counsel allegedly made "improper personal comments" about appellants' counsel. Their

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ask you . . . if there was a lack of a record"; "Could I ask you . . . to please answer my question [about Petrou]. . . . I don't want to hear about [other] ladies"; "You know . . . I did not ask you that. This is part of the problem. Perhaps you could answer my question"; "[D]id I ask you to list all of the things that the operative report did not have in it"; and "You're testifying here today . . . without ever having examined Miss Petrou, even though you could have."

brief does not specify the comments made, explain how they were improper or provide the context in which we might determine whether they affected the outcome of the trial. An appellate brief "'should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.'" (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) The appellate court is not required to develop the appellants' arguments for them. (*Dills v. Redwoods Associates, Ltd*. (1994) 28 Cal.App.4th 888, 890, fn. 1.)

Our review of the record reveals that the majority of the cited comments either occurred outside the presence of the jury or involved innocuous complaints that counsel was asking improper questions or raising improper objections. In almost all of the cited instances, counsel for appellants failed to object. On those few occasions where an objection was raised, counsel did not follow up with a request that the jury be admonished to disregard the comments. As with the alleged judicial misconduct, allegations that the attorneys representing the opposing party committed misconduct are forfeited if the appellant fails to make a timely objection, make known the basis of the objection and ask the court to admonish the jury. (*People v. Brown* (2003) 31 Cal.4th 518, 553; *Horn v. Atchison T. & S. F. Ry. Co*. (1964) 61 Cal.2d 602, 610.) Cautionary admonitions and instructions "must be considered a presumptively reasonable alternative" to reversal on appeal or a new trial. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1224.) "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.'" (*Horn, supra*, 61 Cal.2d at p. 610, quoting *Tingley v. Times-Mirror* (1907) 151 Cal.

1, 23.) Appellants' failure to object and seek admonition deprived the trial court of the opportunity to counter the effect, if any, of opposing counsel's comments.

Appellants further contend that respondents' counsel conducted a "smear campaign" against appellants' expert, Robert Friedland, M.D. Again, they fail to summarize the comments or questions that allegedly fit this description, explain why the comments or questions were improper, or provide argument or context to support how the comments or questions affected the outcome of trial.[4] To the extent appellants contend the court committed error in permitting certain questions to be asked or information to be elicited, "'an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' [Citation.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1078.) We are also guided by the rule that a judgment cannot be set aside "by reason of the erroneous admission of evidence" unless we are convinced that "the admitted evidence should have been excluded on the ground stated [at trial] and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.) "In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Huffman v. Interstate Brands Corp*. (2004) 121 Cal.App.4th 679, 692.) The record of comments made and questions asked by respondents' counsel of Dr. Friedland does not support a finding that a miscarriage of justice occurred.

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[4] A number of the comments of which appellants complain were proper objections to Dr. Friedland's habit of testifying by reading out of his notes or by giving answers that were non-responsive. Appellants also cite to portions of the record where respondents' counsel properly questioned Dr. Friedland's qualifications and the validity of his opinions, either while cross-examining Dr. Friedland or during closing argument.

C. *Alleged Juror Bias*

During jury selection, two prospective jurors revealed that they knew Dr. Trites, having been a patient or the spouse of a patient. The first juror stated "I think she's wonderful" and "really good." The court excused that juror and admonished the panel to disregard statements by prospective jurors about any of the witnesses or parties. The court then asked the panel whether anyone else had been a patient of Dr. Trites's. Another prospective juror volunteered that Dr. Trites had delivered his son, "did a wonderful job," and had "helped [him and his wife] through a miscarriage prior to that." Appellants' counsel moved to discharge the entire venire, contending each member had been prejudiced by the comments. The court denied the motion and instead indicated it would inquire of -- and permit counsel to inquire of -- the prospective jurors to determine whether the statements had affected their ability to be fair. After inquiries were made, the court concluded it did not appear that the entire panel or any individual remaining prospective juror was biased or prejudiced.[5] Appellants contend the court abused its discretion by refusing to order a new panel.

"[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889.) Discharge of a venire is a "drastic remedy," and not required as a matter of course "merely because a few prospective jurors have made inflammatory remarks." (*Ibid*.) In such situations, "further investigation and more

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[5] The court excused for cause a third prospective juror who stated she recognized Dr. Trites as the obstetrician for two of the juror's nieces, and believed her experience would influence her ability to be fair. This third juror made no comment about Dr. Trites's abilities in open court.

probing voir dire examination may be called"; "discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the [party seeking discharge]." (*Ibid*.) "The conclusion of a trial judge on the question of individual juror bias and prejudice is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466.) "Just as a finder of fact is in a better position than the reviewing court to judge the credibility of a witness, the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments." (*Ibid*.)

We conclude that the court did not abuse its discretion. Two prospective jurors expressed positive opinions of Dr. Trites's capabilities under circumstances not likely to parallel appellants'; both were excused. The prospective jurors were at that point strangers to each other. The opinions expressed were unlikely to have had a substantial influence on the views of other venirepersons. The court's decision to inquire, and to permit counsel to inquire, in order to determine the impact, if any, on other prospective jurors was appropriate.[6] We discern no abuse of discretion in the court's conclusion that the remaining members of the panel were not tainted, and that it was unnecessary to order a new venire.

D. *Alleged Instructional Error*

The trial court, over appellants' objection, used BAJI instructions to inform the jurors of the legal considerations governing their determination of the case. The jurors were instructed pursuant to BAJI No. 6.01 that "[a] physician who holds

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[6] The only portions of the voir dire the parties included in the record were the interviews of the three jurors who were familiar with Dr. Trites's practice.

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 that patient the following duties of care: [¶] One, the duty to have that degree of learning and skill ordinarily possessed by reputable specialists, practicing in the same field under similar circumstances[;] [¶] Two, the duty to use the care and skill ordinarily exercised by reputable specialists practicing in the same field under similar circumstances[;] [¶] And three, the duty to use reasonable diligence and the best judgment in the exercise of skill and the application of learning. [¶] A failure to perform any one of these duties is negligence."[7]

The parallel CACI instruction -- No. 501 -- more succinctly provides: "A medical practitioner is negligent if he fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful medical practitioners would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.'" Comparing the two, appellants contend the BAJI instruction's reference to the doctors' "best judgment" resulted in an improper focus on respondents' states of mind rather than their actions and compounded appellant's burden at trial. We find no merit in appellants' contention.

Putting the cart before the horse, appellants contend we must consider the facts most favorably to the party appealing the instructional error. Before that legal maxim applies, however, the party contesting the instruction must first

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[7] BAJI No. 6.01 covers the duty of care owed by medical specialists. In their brief, appellants discuss the similarly-worded BAJI No. 6.00.1, covering the duties of physicians in general, which the court did not give. We address the instruction actually given. As the Hospital points out, neither instruction governs the duty of care owed by hospitals or nurses, which are addressed by BAJI No. 6.20 and No. 6.25, given by the court but not discussed in appellants' brief.

establish error -- that the instruction given incorrectly stated the law. (*Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 462.) "'As long as the instructions cover the issues involved and correctly and fully state the law, the fact that either party would prefer that they be otherwise expressed or expressed in a repetitious manner or different language is immaterial.'" (*Gress v. Rousseau* (1962) 204 Cal.App.2d 149, 154; accord, *People v. Andrade* (2000) 85 Cal.App.4th 579, 585 ["A court is required to instruct the jury on the points of law applicable to the case, and no particular form is required as long as the instructions are complete and correctly state the law."].) There is no misstatement of the law in BAJI No. 6.01. It has long been said that the law places on a physician a duty of "'"possessing that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the physician] practices,"'" of "'"us[ing] reasonable care and diligence in the exercise of [the physician's] skill and the application of [the physician's] learning to accomplish the purpose for which [the physician] was employed"'" and of "'"us[ing] [the physician's] best judgment in exercising [the physician's] skill and applying [the physician's] knowledge."'" (*Adams v. Boyce* (1940) 37 Cal.App.2d 541, 548; accord, *Sansom v. Ross-Loos Medical Group* (1943) 57 Cal.App.2d 549, 552.) The fact that CACI instructions communicate a similar principle through the use of different language does not suggests that the BAJI instruction contains a misstatement of law.

Appellants contend the instruction compounded their burden of proof by requiring them to prove "what [respondents] were thinking, not just what [respondents] did or did not do in relation to Petrous's care." To the contrary, BAJI instruction No. 6.01 provides multiple methods of establishing negligence, each of them independent. Appellants could have established liability by proving that Dr. Trites or Dr. Doany lacked "that degree of learning and skill ordinarily

possessed by reputable specialists practicing in the same field under similar circumstances" *or* by establishing that they failed "to use the care and skill ordinarily exercised by reputable specialists practicing in the same field under similar circumstances" *or* by establishing that either doctor failed to use "reasonable diligence *and* the best judgment." To the extent appellants relied on the last duty of care, the jurors would have had to find that the doctors used reasonable diligence *and* their best judgment to reach a defense verdict. If anything, the instruction alleviated appellants' burden; its use could not have prejudiced them.

E. *Costs*

1. *Background*

Prior to trial, each respondent served an offer to compromise under Code of Civil Procedure section 998 -- the Hospital in March 2009, Dr. Doany in December 2008, and Dr. Trites and WHIMC in November 2009. In their offers, respondents proposed to waive costs and fees in exchange for a dismissal, but did not offer to pay any monetary damages.

After judgment was entered, each respondent submitted a memorandum of costs. The costs sought included expert witness fees awardable under Code of Civil Procedure section 998.[8] The Hospital sought $85,875; Dr. Doany sought $36,060; and Dr. Trites and WHIMC sought $26,512.

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[8] As the prevailing parties, appellants were entitled to costs under Code of Civil Procedure section 1032, but costs awardable under that provision do not include expert witness fees unless the expert was court ordered. (Code Civ. Proc., § 1033.5, subd. (b)(1).) Section 998, subdivision (c)(1) provides that if an offer of compromise made by a defendant is not accepted "and the plaintiff fails to obtain a more favorable judgment or award," the plaintiff "shall pay the defendant's costs from the time of the offer." Under this provision, the court "in its discretion" may require the plaintiff to "pay a reasonable

(Fn. continued on next page.)

Appellants moved to tax costs. With respect to the claim for expert witness fees, they contended the offers of compromise had been premature and made in bad faith. The court issued an order granting in part and denying in part the motion to tax costs as to the non-expert witness fee costs claimed. As to the expert witness fees sought by respondents, the trial court requested further briefing on the issue of good faith.

In supplemental briefing, appellants presented evidence that at the time the offers to compromise were served, appellants had not yet fully evaluated their case or deposed the pertinent witnesses, but had engaged an expert -- Dr. Friedland -- who had expressed the opinion that all respondents were liable for appellants' damages, which exceeded $100,000 in special damages for Petrou alone. Appellants' attorney stated respondents had interfered with appellants' ability to evaluate their claim against them by failing to produce charts and other documents and refusing to present witnesses for deposition. When the Hospital and Dr. Doany served their offers, they had unresolved summary judgment motions on file, which appellants had just opposed. Appellants contended that service of the offers to compromise while summary judgment motions were pending but after oppositions had been filed meant that the offers were "calculated . . . to be [served] at a time when [respondents] knew [appellants] would not accept them."

Issuing a detailed analysis of appellants' claims and respondents' potential liability, the court largely denied the motion to tax the cost of respondents' expert witnesses.[9] Among other things, the court found: (1) "There was no basis to hold

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sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (Code Civ. Proc., § 998, subd. (c)(1).)

[9] The court significantly reduced the Hospital's expert witness fees to $25,000, and calculated the reasonable amount of Dr. Doany's expert witness fees as $28,700.

[the Hospital] liable since [appellants' own expert] Dr. Friedland indicated that the colon ruptured prior to [Petrou] being seen by the [Hospital]"; (2) to the extent the liability of the Hospital was dependent upon establishing that Dr. Trites was its agent, appellants did not argue agency in opposing the Hospital's motion for summary judgment; (3) to the extent the liability of the Hospital was dependent upon establishing that hospital staff should have ignored Dr. Trites's discharge orders, appellants never presented any legal authority for such a proposition and Dr. Friedland's opinion was unsupported and inadequate; (4) appellants "never presented any evidence of an agency relationship [with Dr. Trites]"; (5) "[n]o nurse was called as a witness and the hospital records supported [the Hospital's] position [with respect to the negligence of the nursing staff]"; (6) because "Dr. Friedland was not a board certified pathologist, like Dr. Doany, [Dr. Doany] reasonably believed that Dr. Friedland's opinions would not materially or adversely impact his defense"; (7) "[appellant's counsel's] lack of diligence [in taking party depositions] cannot be used as a shield to insulate [appellants] from an otherwise reasonable offer"; (8) with respect to appellants' claim that Petrou's bowel was perforated as early as May 2007, evidence at trial established the improbability of the condition taking so long to lead to septic shock;[10] (9) Dr. Friedland's declaration filed in opposition to the summary judgment motions provided "minimal" evidence of culpability and would have given respondents "the perception that they were fault free and had 'a very significant likelihood of

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[10] In this regard, the court stated: "[T]his issue of whether a bowel perforation can exist in a pregnant woman for two months without the onset of sep[sis], is not just a simple disagreement between medical experts. Rather, such medical opinions go to causation and call out for confirmation in the medical literature or by diagnostic or scientific tests. The fact that on this vital subject [appellants] offered only medical opinion testimony without such support or corroboration, is an indication of the weakness of such opinions."

prevailing at trial'"; and (10) although appellants "presented a strong case that additional tests and treatment could have been [ordered by Dr. Trites], there was no evidence that failure to administer these added precautions was a cause of injury or damage to [Petrou]." Based on the foregoing, the court concluded that the offers to compromise for a waiver of costs represented "a reasonable and good faith offer" on the part of each respondent.

2. *Analysis*

"There is no dispute that 'a good faith requirement must be read into [Code of Civil Procedure] section 998 in order to effectuate the purpose of the statute.'" (*Bates v. Presbyterian Intercommunity Hospital, Inc*. (2012) 204 Cal.App.4th 210, 220 (*Bates*), quoting *Adams v. Ford Motor Co*. (2011) 199 Cal.App.4th 1475, 1483.) Good faith requires that "'the settlement offer be "realistically reasonable under the circumstances of the particular case"'" and that there be "'"some reasonable prospect of acceptance. [Citation.]"'" (*Ibid*.) "'[A] party having no expectation that his offer will be accepted "will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees."'" (*Ibid*.)

"'When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of [Code of Civil Procedure] section 998 for the defendant to make a modest settlement offer. If the offer is refused, it is also consistent with the legislative intent for the defendant to engage the services of experts to assist him in establishing that he is not liable to the plaintiff. It is also consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred.'" (*Bates*, *supra*, 204 Cal.App.4th at p.

220, quoting *Culbertson v. R. D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704, 710-711.)

"Where the defendant obtains a judgment more favorable than its offer, '"the judgment constitutes prima facie evidence showing the offer was reasonable . . . ."'" (*Bates*, *supra*, 204 Cal.App.4th at p. 221, quoting *Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 117.) "It is the plaintiff's burden to show otherwise." (*Bates*, *supra*, at p. 221, citing *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) "'The reasonableness of a defendant's [Code of Civil Procedure] section 998 settlement offer is evaluated in light of "what the offeree knows or does not know at the time the offer is made."'" (*Bates*, *supra*, at p. 221, quoting *Adams v. Ford Motor Co*., *supra*, 199 Cal.App.4th at p. 485.)

"Whether a section 998 offer was reasonable and made in good faith is left to 'the sound discretion of the trial court.'" (*Adams v. Ford Motor Co*., *supra*, 199 Cal.App.4th at p. 1484.) We review the trial court's award of costs under Code of Civil Procedure section 998 for abuse of discretion. (*Bates*, *supra*, 204 Cal.App.4th at p. 221.)

Appellants contend that the offers were made in bad faith and that the court abused its discretion by awarding expert witness fees. They point out that the costs incurred by the Hospital and Dr. Doany as of the date of their offers were minimal, and that those respondents were, therefore, risking very little. They reiterate that at the time the offers were served, appellants' expert was of the opinion that all respondents violated the pertinent standard of care in treating Petrou, causing injury to Petrou, who incurred special damages exceeding $100,000. They contend the court erred in referring to trial testimony to support its view that the offers were reasonable because offers must be evaluated based on the knowledge available to the parties at the time they were made.

With respect to the amount at risk in the Hospital's and Dr. Doany's offers, "'[e]ven a modest or "token" offer may be reasonable if an action is completely lacking in merit.'" (*Bates*, 204 Cal.App.4th, *supra*, at p. 220, quoting *Nelson v. Anderson, supra,* 72 Cal.App.4th at p. 134.) As the trial court explained, no agent of the Hospital's treated Petrou except its nurses, and appellants presented no evidence with respect to the nurses' possible culpability. Dr. Doany examined Petrou only once, on June 5, and the possibility that the rupture existed on that date was extremely remote for the reasons discussed by the court in its order. With respect to the court's reliance on trial evidence, the order reflected its understanding that "[a] Defendant's offer to waive its costs must be tested by the circumstances as [they] existed at the time the offer was made . . . ." The court discussed the state of the evidence at the time of appellants' opposition to the summary judgment motions -- which was just prior to the time the offers of the Hospital and Dr. Doany were served and well before Dr. Trites and WHIMC's offer was served. Implicit in the court's ruling was the understanding that the evidence available to appellants to support their claims at the time of the offers was no better than that available at trial and likely even less substantial. Thus, the court's reference to trial evidence reflected its effort to give appellants the benefit of the doubt with respect to the strength of their claims.

Appellants contend the amount awarded was unreasonable. We are not persuaded. The trial court evaluated every item of cost for reasonableness. It rejected the Hospital's claim of having incurred $85,965 in expert fees based on 186 hours of expert time, concluding that a reasonable amount of expert fees for the Hospital was 50 hours at $500 per hour, or $25,000. It likewise concluded that the expert witness fees of $36,060 sought by Dr. Doany were excessive and awarded a total of $28,700 for the three experts he had hired. The court did not reduce the roughly $26,000 in expert fees sought by Dr. Trites and WHIMC, as

these were based on the equivalent of a day or two for each of three experts, including trial time. These amounts are not unreasonable based on the nature of the case and the length of trial. We find no abuse of the trial court's discretion in the award of expert witness fees under Code of Civil Procedure section 998.

DISPOSITION

The judgment and the cost order are affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.