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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

JULIA IHLY, a Minor, etc., Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	B259042 (Los Angeles County Super. Ct. No. SC112588)

APPEAL from a judgment of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Reversed.

Law Office of Martin Stanley, Martin Louis Stanley; Esner, Chang & Boyer, Stuart B. Esner and Shea S. Murphy for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Cassidy C. Davenport; Taylor Blessey, N. Denise Taylor and Jennifer A. Scher for Defendant and Respondent.

A jury returned a defense verdict in a medical malpractice case brought by a child who suffered a devastating stroke before she was delivered by Cesarean section (C-section) at defendant's hospital. The plaintiff contends the trial court refused to instruct upon her theory of informed refusal, which was exacerbated by defendant's attempt to place responsibility on plaintiff's mother for delaying the C-section. We agree and reverse.

BACKGROUND

1. Plaintiff's injury

Plaintiff Julia Ihly (Julia) was born on June 21, 2005,[1] at 11:48 a.m. She was delivered by C-section after her mother, Claire Robinson (Claire), spent many hours in the second stage of labor with little or no progress. Soon after Julia was born, it was determined that she had suffered a stroke that left her with hemiplegic cerebral palsy.

Claire had chosen Dr. Carole Archie, a board certified obstetrician and perinatologist, who was an expert in "advanced maternal age" mothers, for her prenatal care and delivery. Unfortunately, Archie was on vacation when Claire's labor began. Archie had asked another board certified obstetrician and perinatologist, Dr. Brian Koos, to cover for her if Claire went into labor during Archie's vacation.[2]

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[1] Undesignated date references pertain to 2005.

[2] Dr. Archie did not testify at trial. Portions of her deposition were read into evidence. UCLA physicians involved in or responsible for Claire's care who were called as witnesses by plaintiff were Drs. Koos, Carla Janzen, and Kianusch Kiai. Plaintiff's expert physicians were Drs. Marshall Kadner (obstetrics/gynecology), William Goldie (pediatric neurology), and Barry Pressman (neuroradiology). UCLA called Drs. Jeannine Rahimian, Kathleen Brennan, Jill Satorie, and Jessica Spencer, all of whom were involved in or responsible for Claire's care, and experts Drs. Marvin Nelson (neuroradiology) and Michael Nageotte (obstetrics/gynecology/maternal fetal medicine). At the time of Claire's labor and Julia's delivery, all testifying physicians involved in or responsible for Claire's care were obstetricians and gynecologists except Drs. Archie and Koos, who were also perinatologists; Dr. Kiai, an anesthesiologist; and Drs. Brennan, Satorie, and Spencer, who were residents. Notably, the trial court allowed all of the physician witnesses, even those involved in or responsible for Claire's care, to provide expert testimony.

Claire and her husband, Ryan Ihly (Ryan), had prepared a "birth plan" that they provided to Dr. Archie. This plan was included in the records University of California at Los Angeles Medical Center (UCLA) had for Claire when she was subsequently admitted for labor and delivery. The birth plan set forth Claire's hope to have a natural delivery and stated, " 'Unless absolutely necessary, I would like to avoid a Cesarean,' " but her goal was to have a healthy baby. Numerous UCLA physicians, including three who were involved in Claire's treatment (Janzen, Koos, and Spencer), testified that when a patient has a birth plan, the medical staff attempt to conform to that plan and that they did so with Claire.

On June 20, Claire was 44 years and 10 months old. She was 41 weeks and 3 days into her first pregnancy. In accordance with Dr. Archie's instructions, she went to UCLA for an ultrasound that revealed she had oligohydramnios, meaning low amniotic fluid. The medical residents advised Claire and Ryan to go home and return later that afternoon. In the interim, Claire was supposed to drink a large quantity of water and she and Ryan were to engage in intercourse to attempt to commence labor.

According to one of plaintiff's expert witnesses, board certified obstetrician Dr. Marshall Kadner, Claire's age, the extended length of her pregnancy, and oligohydramnios elevated the risks to her unborn child. He opined that the standard of care required that Claire be told to stay at the hospital because the umbilical cord would not be sufficiently cushioned and could be pinched or pressed and the amniotic fluid was "subject to disruption, and things can go bad very suddenly."

Claire and Ryan returned to the hospital around 3:00 p.m. and she was admitted around 5:00 p.m. They principally spoke with Drs. Jessica Spencer and Kathleen Brennan, both residents, and briefly spoke with Dr. Koos. Claire signed consent forms specifying various possible procedures, including a C-section. Claire testified she did not object to signing the consent form for a C-section and never said she did not want a C-section if necessary for the health of her baby. Claire also signed a form agreeing that

residents, interns, and medical students were allowed to "observe, examine, treat, and participate" at her "request and under the supervision of the attending physician."

Sometime between 6:00 p.m. and 7:00 p.m., first-year resident Dr. Theresa Malcolm gave Claire a drug to induce labor. No physician other than Malcolm saw or examined Claire until 10:15 a.m. the next morning. About 12:50 a.m. and again at 2:42 a.m. on June 21 Malcolm erroneously reported that Claire's baby's head was at the "+2 station," meaning two centimeters past the "0 station," which is the narrowest location in the mother's pelvis. This incorrect measurement indicated Claire and the baby had made significant progress toward delivery. In actuality, the baby remained at the 0 station. Malcolm also wrote in Claire's medical records that Claire wanted the delivery handled by the nurse midwife, Anita Trudell. Claire testified she never agreed to have the midwife deliver her baby. The incorrect staging was reported to the attending physician, Dr. Jeannine Rahimian, and to Dr. Koos, who had left the hospital. Koos transferred Claire's care to Rahimian. Neither Koos nor Rahimian saw or examined Claire. Thereafter, no one contacted Koos about Claire.

By 3:00 a.m. on June 21, Claire's cervix was fully dilated and, according to both plaintiff's and defense witnesses, she had commenced the second stage of labor, which involves pushing and delivery of the baby. In 2005 the second stage of labor was deemed prolonged if it lasted more than two or three hours.[3] According to Dr. Kadner, the average time spent in the second stage of labor for a first baby without an epidural is about 50 minutes.

At 6:47 a.m. Trudell made an entry in Claire's medical records, noting that the baby had remained at station 0 since 3:00 a.m. Trudell testified she had been with Claire from about 5:00 or 5:30 a.m. until she made the 6:47 a.m. entry. Toward the end of that interval Trudell deemed Claire's contractions and pushing to be inadequate. Trudell

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[3] Nurse midwife Trudell and defense expert Dr. Michael Nageotte defined prolonged second stage labor as in excess of two hours *with* adequate contractions and pushing efforts, but without progress.

spoke to Drs. Rahimian and Jill Satorie (a resident) about giving Claire Pitocin to strengthen the contractions. At 7:00 a.m. Claire was given an intravenous line and administration of Pitocin commenced. Trudell admitted at trial that she knew Pitocin created a risk of "hyperstimulation of the uterus so that the contractions are too strong and too close together," which posed a risk of decelerations in the baby's heart rate. Staff began continuous monitoring of the baby's heart rate.

Dr. Kadner testified that during labor a baby's heart rate should remain between 110 and 160 beats per minute to keep an adequate flow of blood and oxygen to the brain. After 7:00 a.m. the records from the baby's heart monitor showed her heart rate became more irregular. It dropped to 90 and came back up slowly. Kadner characterized it as "a progressive sign" that the baby was not tolerating the contractions as well. Around 7:58 a.m. the baby's heart again decelerated, "showing a progressively worse situation."

After Claire began receiving Pitocin, her contractions became stronger and more regular and Trudell characterized Claire's pushing efforts as "excellent." However, the baby had made little progress in descent by 8:00 a.m. Trudell reported that the baby's station remained at 0 to +1. She testified she believed the odds were quite low that Claire would have a natural delivery.

Dr. Kadner testified that if the Pitocin were going to make something happen, it would have done so by 8:00 a.m. He opined that a C-section should have been initiated by 8:00 a.m. because Claire had been in the second stage of labor for five hours with minimal or no progress, she had additional risk factors of oligohydramnios and this being her first child, and the fetal heart tracings were showing that the baby was not tolerating the labor. At that point a natural delivery was unlikely, and the risks of continuing labor rose. Notwithstanding the birth plan, the standard of care required a physician to advise Claire that the physician would do what was best for Claire and the baby. Dr. Kadner explained that if a baby remains at station 0 after more than two hours in second stage labor, the pressure on the baby's head from repeated contractions and pushing create a risk of harm. The baby's blood pressure rises, the flow of blood and oxygen to the

baby's brain decreases, and this creates a likelihood of injury to the brain or blood vessels in the brain. The longer the second stage of labor continues, the greater the risks to the baby and the lower the likelihood of a natural birth.

Plaintiff's pediatric neurology expert Dr. William Goldie similarly explained that when a baby's head becomes lodged during labor, it is comparable to being caught in a vise that is intermittently tightened. This exerts enormous pressure on the baby's brain, making it extremely difficult to keep the brain perfused with blood and oxygen. At first, the heart attempts to compensate during contractions by increasing compression and heart rate, but under extended pressure and stress the heart may lose its ability to exert adequate force, resulting in reduction of blood flow to the brain, which in turn creates a risk of a blood clot forming. The clot can either block the blood vessel where it formed or be thrown off and lodge into a smaller part of the vessel, which blocks the vessel and stops cerebral blood flow.

Trudell also acknowledged that a prolonged second stage of labor can create risks to the baby of "nonreassuring fetal heart rate," acidosis, asphyxia, and neurological damage. However, three physicians who testified as defense witnesses (Janzen, Koos, and Spencer) denied that a prolonged second stage of labor posed any risk to the baby, as opposed to the mother.

Dr. Kadner testified that fetal heart tracings from 8:58 a.m. to about 9:01 a.m. showed a worsening condition with a deeper deceleration down to 60 beats per minute, lasting for about two minutes and coming after the contraction.

Trudell testified that by 9:00 a.m. she had already decided that a C-section would be necessary and informed the doctors of her conclusion. Around 9:30 she discussed this with Claire and Ryan. Claire did not refuse or object. According to Trudell, however, she asked for a little more time to try pushing in another position. According to Claire, she was exhausted and "looking for someone" to tell her she was "off the hook." Trudell said she would go and get a doctor, and Claire replied she would continue pushing until Trudell returned.

At 9:38 a.m. Trudell made an entry in the medical records reflecting the results of the Pitocin, the lack of progress in the baby's descent, fetal heart rates "120s with decels to 80s to 100s with pushing," Trudell's "discussion" with Claire about a C-section, Claire's purported request for more time, and Trudell's intention to "seek MD evaluation for operative delivery" "if no change in 30 minutes." Dr. Kadner opined that it was beneath the standard of care to wait 30 minutes to summon a doctor because further pressure on the baby's head increased the risks. Furthermore, by 9:38 a.m. a physician should have advised Claire that she was very unlikely to have a natural delivery, the risks to herself and her baby from waiting any longer were "really significant," and it was time to perform a C-section before things got any worse. The medical records did not reflect that any such advisement was given.

Dr. Carla Janzen, the attending physician on June 21, testified that after Trudell spoke to her, she felt that a C-section was inevitable, and the doctors and nurses had "many negotiations with" Claire and were "strategizing about how we're going to get the C-section done." Dr. Spencer testified she had "persistent negotiation[s]" with Claire "from the very beginning throughout her care" because Claire "just, really, was so concerned about having a natural birth experience. And so she was very concerned about us doing things that would take that away from her or increase her risks or increase the chances of C-section." Spencer repeatedly characterized Claire as "not quite being ready," wanting to try something else, asking for more time, and not wanting to have a C-section.

Fetal heart monitoring from 9:58 a.m. to 10:10 a.m. revealed a steep deceleration of the baby's heart rate to 35 to 40 beats per minute for 40 to 50 seconds with a slow return to baseline. A nurse McWilliams made an entry in the medical records reflecting this, as well as having Claire turn on her side to attempt to improve the blood flow to the baby. Dr. Janzen and Trudell both testified this deceleration was "concerning." According to Dr. Nageotte, the deceleration was a common type of occurrence and

overall the baby's heart rate was "reassuring." The administration of Pitocin was stopped at 10:10 a.m., and the baby's heart rate then became "reassuring" according to Trudell.

Five minutes later, Dr. Spencer came in to speak to Claire about having an epidural to control her pain and assist in her pushing efforts. Spencer testified that at that time she did not believe that a C-section was necessary because the baby's heart rate was at all times reassuring. Claire testified that sometime around 10:00 a.m. Spencer told her she was unlikely to have a natural delivery, and if she did, the doctors might have to break the baby's shoulder or collarbone to get her out. Claire was horrified and immediately elected to have a C-section. At 10:30 a.m. Claire was given an epidural.

At 10:40 a.m. the baby experienced a heart deceleration to 40 beats per minute that lasted for 3.5 minutes. Dr. Spencer admitted in her testimony that this deceleration was "a little more concerning," while Dr. Nageotte characterized it as "reassuring." Medical records reflect that Spencer was at Claire's bedside at 10:49 a.m.

At 11:08 a.m. Drs. Janzen and Spencer discussed a C-section with Claire, who agreed but asked for a few minutes to calm herself. No one told her about the changes in the baby's heart rate or the risks to the baby from any further delay. Dr. Spencer testified she told Claire that the baby's heart tracing was reassuring.

From 11:12 to 11:15 a.m. the baby's heart rate fell to 30 to 50 beats per minute and was slow to return to baseline. Dr. Spencer testified that upon viewing that deceleration she went straight to Claire's room and told her that the C-section had to be performed right away. Janzen testified that someone should have told Claire at that time that there was a risk to the baby from further delay. Spencer and Janzen both opined that prior to that deceleration, there was no danger to the baby. A nurse's entry in the medical records reflected that at 11:15 a.m., the nurse told Claire it was necessary to go have a C-section, and Claire agreed. Dr. Nageotte characterized the 11:12 to 11:15 a.m. deceleration as "a little more" concerning.

Claire was taken to the operating room at 11:30 a.m., and Drs. Janzen and Spencer delivered Julia by C-section at 11:48 a.m. Julia was immediately handed off to a team

from the neonatal intensive care unit with a heart rate of 60 beats per minute. Dr. Kadner testified a normal heart rate would have been "[o]ver 100, 120."

Claire, Ryan, Trudell, and Drs. Janzen and Spencer all testified that up until the time she actually had the C-section, no one ever told her that the baby was in distress, that there was any risk whatsoever to the baby by delaying the C-section, or that the baby's heart rate had dropped so many times. Claire testified she never refused to have a C-section and would have agreed to one without regard to her birth plan had she been advised of any danger.

Dr. Barry Pressman, plaintiff's neuroradiology expert, testified that an ultrasound performed on Julia at 2:47 a.m. on June 22 showed subtle changes reflecting something wrong on the right side of her brain, but UCLA's radiologist did not detect these changes. Pressman characterized these as "early changes secondary to a stroke." An MRI performed at 4:00 p.m. on June 23 showed dead tissue from "a very large stroke" on the right side of her brain. Pressman opined that the stroke occurred 12 to 48 hours before the ultrasound, likely closer to the lower end of the time range.

Dr. Goldie testified that it takes about 13 hours for death of brain tissue to show on an ultrasound, and the ultrasound performed about 15 hours after Julia's delivery depicted early phases of brain death. He therefore opined that Julia suffered her stroke during the late stages of labor.

Defense pediatric neuroradiologist Dr. Marvin Nelson agreed with Dr. Pressman that the ultrasound showed abnormalities on the right side of Julia's brain, which he characterized as "dying brain cells" from "an infarct . . . in evolution." Nelson disagreed with Pressman about the timing, however. He opined that if the stroke had occurred during labor it would have been equal on both sides of the brain. In addition, he testified that such damage takes 24 hours or more to appear on an ultrasound. He opined that the stroke occurred 24 to 72 hours before the ultrasound was performed.

Dr. Nageotte opined that all healthcare providers involved in Claire's labor and Julia's delivery met the standard of care, which did not require Julia to be delivered by C-section earlier than she actually was.

2. Litigation

Claire, acting as guardian ad litem, filed a complaint on Julia's behalf on May 11, 2011. UCLA and Drs. Archie, Koos, Janzen, Spencer, Rahimian, Satorie, Malcolm, and the anesthesiologist were named as defendants.

A one-month jury trial of the action against UCLA began in May of 2014. By a vote of 10 to 2, the jury found that UCLA was not negligent.

Julia filed a timely appeal.

DISCUSSION

Julia raised several issues on appeal, but we find one dispositive. She contends the trial court erred by refusing to instruct upon her theory that defendants were negligent for failing to advise Claire of the risks of delaying Julia's delivery by C-section after her second stage of labor became prolonged. To this end, she requested the following, customized version of CACI No. 535: "Julia Ihly claims that health care practitioners of the Regents of the University of California's [*sic*] were negligent because they did not fully inform Claire Robinson about the risks of refusing the cesarean section. To establish this claim, Julia Ihly must prove all of the following: [¶] 1. That the Regents of the University of California did not perform the cesarean section on Claire Robinson in a timely manner; [¶] 2. That the Regents of the University of California did not fully inform Claire Robinson about the risks of refusing the cesarean section; [¶] 3. That a reasonable person in Claire Robinson's position would have agreed to the ceasarean if he or she had been fully informed about those risks; and [¶] 4. That Julia Ihly was harmed by the failure to have the cesarean section performed in a timely manner."

Defense counsel objected to the requested instruction on the ground that "[i]nformed consent has not been pled throughout this case." Plaintiff's attorney responded by noting that Dr. Kadner had testified about the risks of not having the C-

section earlier. Defense counsel argued that if plaintiff's version of CACI No. 535 were given, then the court should also instruct with CACI No. 534. The court stated, "All right. 535 is requested by plaintiff, objected to by defendant. And the court is refusing to give that instruction on the grounds stated by defense counsel." Plaintiff's attorney stated he had no objection to also giving CACI No. 534. Defense counsel continued to argue that informed consent had "never been part of this case," then suggested the instruction would have to be revised because "they've mishmashed timely C-section in an informed consent instruction which is not appropriate." The court reiterated its refusal to give the instruction, adding "in the manner in which it is submitted."

Julia argues the court's refusal to give her instruction or a revised version of it deprived the jury of an instructional basis that would have permitted it "to conclude that even if it was not below the standard of care to delay performing the caesarian delivery, it was below the standard of care not to inform plaintiff's parents about the risks associated with that delay so that they could make an informed decision." She argues this was necessary in light of defense efforts to blame Claire for the delay in having the C-section and to claim the defendant physicians were simply conforming to Claire and Ryan's birth plan. She argues, "[T]he jury had no basis to consider whether the parents would have given different directions had they known about the risks . . . associated with a delayed caesarian delivery." We agree.

"Upon request, a party in a civil case is entitled to correct, nonargumentative jury instructions on every theory of the case that is supported by substantial evidence." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526 (*Maureen K.*).) The refusal to give a requested instruction is subject to de novo review on appeal. (*Ibid.*) " '[W]e view the evidence in the light most favorable to the appellant. In such cases, we assume that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated.' " (*Ibid.*)

"A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror, and ordinarily has

no duty to modify a proposed instruction." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684–685.) "This general rule is inapplicable, however, if the inaccuracy is minor and easy to correct and the failure to do so would leave the jury inadequately instructed on an important issue." (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333.) "Certainly if the defect can be cured with a word or two the change should be made by the trial judge in order to state the vital controlling principles, absent any attempt by the author of the proffered instructions to mislead the court or jury by resorting to equivocal or ingenuously phrased requests." (*Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1114.)

"Instructional error is prejudicial where it seems probable that the error affected the verdict." (*Maureen K.*, *supra*, 215 Cal.App.4th at p. 531.) "The determination of prejudice 'depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury. [¶] . . . [W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Ibid.*)

1. Wording of instruction

UCLA argues the trial court properly rejected the proposed instruction because it was incorrect when compared to CACI No. 535.[4] First, UCLA argues plaintiff's instruction erroneously used "fully inform" instead of "adequately inform" in the first and

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[4] CACI No. 535 provides as follows: "[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] did not adequately inform [*name of plaintiff*] about the risks of refusing the [*insert medical procedure*]. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] did not perform the [*insert medical procedure*] on [*name of plaintiff*]; [¶] 2. That [*name of defendant*] did not disclose to [*name of plaintiff*] the important potential risks of refusing the [*insert medical procedure*]; [¶] 3. That a reasonable person in [*name of plaintiff*]'s position would have agreed to the [*insert medical procedure*] if he or she had been adequately informed about these risks; and [¶] 4. That [*name of plaintiff*] was harmed by the failure to have the [*insert medical procedure*] performed."

fourth paragraphs and "fully informed" instead of "adequately informed" in the fourth paragraph. However, the applicable law requires a physician to provide a patient with "[a]ll information material to the patient's decision." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 (*Truman*).) "The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice." (*Ibid.*) Given the evidence presented at trial, "fully inform" and "fully informed" were not incorrect. Dr. Kadner testified that Claire should have been informed that delaying a C-section posed a risk of harm to the baby, whereas it was undisputed that no one so informed Claire. Thus, use of "fully" in place of "adequately" was not a misstatement of the law in the context of this case and created no risk of confusing the jury.

Second, UCLA argues the proposed instruction was erroneous because it used "did not fully inform Claire Robinson about the risks" instead of "did not disclose to [name of plaintiff] the important potential risks" in the third paragraph. The use of "inform" as opposed to "disclose" is of no consequence, as the two verbs are synonymous in this context. The addition of "fully" is also insignificant in light of the evidence in this case because the asserted duty was to inform Claire of a single fact and no such advisement was given. The only potentially significant omission from the proposed instruction was the concept of materiality, which the form instruction attempts to convey through "important potential risks." At most, however, this was a minor omission that could easily have been corrected if UCLA had raised it in trial court, which it did not do.

Third, UCLA argues the proposed instruction was erroneous because it added "in a timely manner" at the end of the second and fifth paragraphs. This was not error, but a permissible tailoring of the instruction to the circumstances of the case and the contours of plaintiff's informed refusal theory, which was that if Claire had been informed of the risks that delaying a C-section posed to her baby, she would have agreed to have one earlier. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 225–226.) Omission of "in a timely manner" from the proposed instruction would not have constituted adequate instruction on plaintiff's theory of negligence because Claire ultimately had a C-section.

Finally, UCLA argues that "the trial court invited plaintiff to revise her instruction, but she declined." We note that the court had already refused the proposed instruction before UCLA raised an issue about the form instruction having been edited. The court's subsequent reference to "the manner in which it is submitted" when reiterating its refusal hardly appears to be an invitation to revise the instruction. In any event, as previously addressed, only one of the modifications in the proposed instruction was potentially inaccurate, that inaccuracy was minor and easy to correct, and the refusal to instruct on this theory of negligence left the jury inadequately instructed on an important issue.

2. Theory underlying instruction as a basis of plaintiff's case

UCLA continues to argue that "plaintiff never advanced a theory of 'informed refusal.'" UCLA cites the lack of any reference to informed refusal in plaintiff's complaint or discovery responses. However, plaintiff's complaint alleged medical negligence in general terms[5] broad enough to encompass plaintiff's informed refusal theory, which is merely one form of medical malpractice. UCLA also cited and quoted a discovery response by plaintiff that stated, "Defendants failed to properly assess, manage, diagnose, and treat Claire Robinson's pregnancy, labor, and birth of Julia Ihly resulting in severe and profound injuries to plaintiff Julia Ihly." This also was broad enough to encompass the informed refusal theory.

As previously noted, Dr. Kadner testified that by 9:38 a.m. on June 21 a physician should have advised Claire that she was very unlikely to have a natural delivery, the risks to herself and her baby from waiting any longer were "really significant," and it was time

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[5] The complaint alleges: "Defendants at all times were and are health care providers licensed in the State of California, and were at all times practicing as surgeons and physicians and/or health care providers, in the County of Los Angeles California. Defendants' [*sic*] undertook employment to treat, care for, and diagnose Plaintiff prior to, during and after her birth, and to provide Plaintiff with proper treatment with respect to their undertaking and providing of medical care provided to Plaintiff prior to, during, and after her birth. [¶] Defendants were negligent with respect to the necessary knowledge and skill to properly conduct the treatment and were negligent in the treatment and care of Plaintiff. Defendants' negligent treatment and care resulted in severe injury and damage to Plaintiff and were the proximate cause of Plaintiff's injuries."

to perform a C-section before things got any worse. The medical records did not reflect that any such advisement was given. Claire testified that no one ever advised her that there was any risk whatsoever to the baby by delaying the C-section, and that if someone had so advised her she would have agreed to have one right away, without regard to her birth plan.

In contrast, defense witnesses repeatedly invoked their deference to Claire's birth plan and attempted to depict Claire as being highly resistant to their efforts to convince her to have a C-section. Dr. Janzen even testified that around 9:38 a.m. on June 21 she thought a C-section was inevitable, and the doctors and nurses were "strategizing about how we're going to get the C-section done." Yet it was undisputed that no one informed Claire of any risk to her baby (or herself) from continuing to push instead of having the baby delivered by C-section.

Thus, the evidence at trial not only supported, but demonstrated the necessity of the proposed instruction to inform the jury of plaintiff's alternative theory of negligence as a basis for recovery. UCLA's claim that informed refusal was never raised before plaintiff submitted her proposed instruction, which apparently convinced the trial court, was demonstrably false.

Finally, UCLA argues that the instruction was not supported because its doctors "did not recommend a c-section at the time Ms. Robinson asked to push longer." This argument also misses the mark. The evidence established that by 9:38 a.m. Trudell and the physicians involved in Claire's care all believed she would require a C-section and, according to Dr. Janzen, were even "strategizing about how we're going to get the C-section done." Thus, the medical personnel were apparently of the opinion that a C-section should be recommended and should be performed. This distinguishes the present case from *Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, cited by UCLA, which addressed a plaintiff's request for instruction on the defendant's failure to recommend a CT scan, where the defendant had recommended an MRI scan. Here, the medical personnel agreed that performing a C-section was appropriate, advantageous, and

inevitable, and a C-section was ultimately performed. Neither *Vandi* nor any other authority cited by UCLA negates the viability of plaintiff's theory, i.e., that the failure of the medical personnel to inform Claire of the risks entailed in delaying performance of the appropriate, advantageous, and inevitable procedure constituted negligence.

3. Prejudice

Plaintiff's case essentially was based upon delay in performing the C-section and had two alternative theories: UCLA violated the standard of care either through the delay itself or by failing to inform Claire about the risk to Julia from delaying the C-section so that she could make an informed decision. The refused instruction was essential to provide the jury with a legal framework for liability on the latter theory, which was neither addressed by nor an obvious application of either the general medical negligence or standard of care instructions given. (CACI Nos. 400/500, 501, 502a, 502c.) "The requested instruction, however, focuses on the peculiar circumstances of the case and calls the jury's attention to a ground for a finding of negligence that might not otherwise be considered." (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 542.)

The need for the refused instruction was especially severe in light of UCLA's defense theory that any delay in performing a C-section resulted from attempting to honor Claire's birth plan and her purportedly tenacious resistance to having a C-section. As previously noted, a number of the physicians charged with Claire's care, including Drs. Janzen, Satorie, and Spencer, testified that they attempted to conform to Claire's birth plan. Janzen and Spencer also testified that they knew Claire would require a C-section, but had to engage in repeated "negotiations" with her and strategize about how to convince her to have the C-section because she was so opposed to it. Dr. Spencer also testified that she would have performed a C-section earlier if Claire had agreed to it.

These themes of Claire's intransigence and UCLA's attempts to adhere to her birth plan were addressed in UCLA's opening statement and arguments. Indeed, UCLA began its opening statement by addressing Claire's birth plan and its contents: "[S]he wanted to avoid a C-section. If it was indicated, she wanted to be fully informed and participate in

the decision-making process. [¶] . . . [T]hat is exactly what happened throughout this labor with this patient. There was negotiations [*sic*] going on from the minute she had that test the morning of the 20th until the minute she was rolled back to the C-section. Because . . . she did not want a C-section. That is what they did for her at UCLA. [¶] . . . [¶] Okay. So what the evidence will show, ladies and gentlemen, is that in this case, this patient came to UCLA. And what they did is they honored her desires and they worked with her to have a natural childbirth, if at all possible. And they had a very experienced team of providers working with her to that end. And that when vaginal delivery was not possible, they did a Cesarean section."

During UCLA's closing argument, counsel apparently displayed the birth plan by projector, argued UCLA was not attempting to blame Claire, then read portions of the plan, including, " 'Unless absolutely necessary, I would like to avoid a Cesarean' "; then argued, "And, by the way, this birth plan, we didn't create it; the plaintiffs [*sic*] did." A little later counsel reiterated: "This birth plan was created by the parents. However, they created it. They brought it to UCLA. There's a UCLA stamp on it, and it was in the chart. It was at the front of the chart, and everyone knew about it." Counsel read from a nurse's note: " 'Has a birthing plan and is in the chart and will be followed as much as possible, depending on fetal and maternal well-being.' The nurse discussed this with Dr. Satorie and Dr. Malcolm, the two residents on the shift. The patient and the doctors agreed with the plan that was written at the time." Soon thereafter counsel again emphasized the significance of the birth plan: "They had this birth plan. There is no question—there should not be any question in anyone's mind, they wanted a natural delivery. It is well documented in the record." Counsel argued: "The motivation of Dr. Janzen and Dr. Spencer and Ms. Trudell, as they testified from this witness stand, was to give this patient the delivery that they wanted, as she wanted." Counsel then quoted from Dr. Nageotte's testimony: " 'I believe they went above and beyond the standard of care in trying to achieve for her what her wishes were, yes.' " Counsel then quoted Dr.

Janzen's testimony at length about why she " 'tried to honor the patient's wishes with respect to the birth plan.' "

UCLA similarly argued that Claire's resistance was responsible for any delay in performing the C-section. First, before reading Trudell's 9:38 a.m. note, counsel stated, "Now, there are a few other places in the record that tell us about Ms. Robinson's thought process during this labor." After reading the note, counsel repeated one sentence from it: " 'The patient requests more time.' " Counsel later remarked that Drs. Spencer and Brennan remembered Claire because she required so much persuasion, then argued: "So before this patient was even admitted, she didn't want a C-section. She wanted a natural birth. Is there anything wrong with that? No. But there's something wrong with her coming in and suing UCLA and claiming that they caused a stroke; and claiming, 'You were just willing to lay down and have a C-section the minute anyone told you,' when that is so far from the truth, so far from reality, so far from what is documented in the record, so far from what is in the memory of the doctors in which she made an impression on." Counsel then quoted at length the testimony of Spencer and Brennan to the effect that they remembered Claire because they had to negotiate with her and because she said at their first encounter that she did not want a C-section. A little later counsel argued: "At 10:15 Dr. Spencer was at the bedside. As she told you, she was talking to the patient for about that next hour, trying to get her to have a C-section. . . . And by 11:10 she finally agreed—or 11:08, but she still wanted a few minutes to calm herself." Just before concluding her argument, counsel referred to "doctors and midwifes spend[ing] this much time and energy and attention to give the best care they can, to give a patient what she's asking for," and, " 'Oh, finally, she had the C-section.' "

Accordingly, given the state of the evidence, the insufficiency of other instructions to address the informed refusal theory, and counsel's arguments, we conclude the trial court's refusal to give the requested instruction prevented plaintiff from placing her full case before the jury and was therefore prejudicial. As stated in *Truman*, *supra*, 27 Cal.3d at page 295, "If the jury had been given this instruction and had found in favor of the

appellants, such a finding would have had support in the record before us. Reversal is therefore required."

DISPOSITION

The judgment is reversed. Appellant is awarded her costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.