TAMARA LUKEMAN et. al.,Plaintiffs and Appettants, v. PALOMAR POMERADO HEALTH SYSTEM et al., Defendants and Respondents.

D043499

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2006 Cal. App. Unpub. LEXIS 1434

February 17, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Diego County, No. GIN012975. Lisa Guy-Schall, Judge.

DISPOSITION: Affirmed.

JUDGES: O'ROURKE, J.; McDONALD, Acting P.J., McINTYRE, J. concurred.

OPINION BY: O'ROURKE

OPINION

Plaintiffs Tamara Lukeman and Kenneth Lukeman [1] filed a medical malpractice action against defendants Palomar Pomerado Health System and Gabrielle F. Morris, M.D. (respectively Palomar and Dr. Morris, or collectively defendants) alleging they negligently failed to restrain Lukeman from pulling an externally placed catheter out of her skull. The jury returned a special verdict finding defendants were not negligent in Lukeman's medical care and treatment. Plaintiffs appeal from the resulting judgment in defendants' favor, challenging a myriad of trial court evidentiary rulings excluding certain evidence, limiting cross-examination of defense witnesses, and [*2] allowing impermissible expert testimony from defense witnesses. They further contend the court erred by giving an improper and confusing jury instruction concerning a patient's right to be free from non-medically necessary restraints, and by omitting *BAJI No. 2.03*, regarding willful concealment or suppression of evidence. Finally, plaintiffs contend the trial judge made repeated biased remarks in defendants' favor. Because plaintiffs have not made any showing of error or resulting miscarriage of justice, we affirm the judgment.

1 References to Lukeman are to Tamara Lukeman.

FACTUAL AND PROCEDURAL BACKGROUND

Lukeman has a lengthy preexisting history of hydrocephalus, which beginning in 1991 was treated with a series of ventriculoperitoneal shunts. A ventriculoperitoneal shunt is essentially a tube that redirects excess cerebrospinal fluid from the brain to the abdominal cavity where it can be absorbed by the body.

In 2000, Lukeman, then 35 years old, began experiencing symptoms relating [*3] to her hydrocephalus, including short term memory loss, headache and urinary incontinence. In April 2000, a neurosurgeon, Thomas Marcisz, M.D., replaced her shunt. Dr. Marcisz performed another shunt revision in August 2000 after her symptoms returned.

On September 12, 2000, [2] Lukeman was hospitalized at the Palomar Medical Center Intensive Care Unit after suffering a seizure. The next day, Lukeman's husband asked Dr. Morris to take over Lukeman's care. During the first two days of Lukeman's stay at Palomar, she had physical restraints on her wrists. On the afternoon of September 13, Lukeman's restraints were removed for a period of time but replaced when nurses found evidence she had been pulling at some of her tubes. The next day Lukeman was not restrained; neither Dr. Morris nor one of the nurses caring for her felt she required restraints and there was no evidence Lukeman was pulling out lines or trying to exit her bed to justify restraints. On the morning of September 15, Dr. Morris performed a procedure to temporarily externalize Lukeman's shunt. Lukeman was awake, alert and talking during the procedure, and needed no restraints. Later that afternoon Dr. Morris fixed a leak [*4] in the tubing, and observed Lukeman looked very well; she was awake, eating a normal diet, and had no need for physical restraints.

> 2 Date references are to the year 2000 unless otherwise specified.

At approximately midnight on September 15, Lukeman pulled the shunt out of her head. Dr. Morris reinserted the shunt and Lukeman was given a sedative. Lukeman was placed in restraints at some point before or during the reinsertion procedure. A CT scan of Lukeman's brain showed enlarged ventricles (characteristic of Lukeman's preexisting hydrocephalus) and a large quantity of air in her brain (pneumocephalus). Air in the brain commonly occurs after brain surgery and is not in itself harmful; in Lukeman's case it was not "tension pneumocephalus," a more harmful condition known in which the brain is put under pressure and can be pushed down or herniated. Lukeman's subsequent CT scans showed no evidence of brain damage as a result of the pneumocelphalus occurring on September 16. Dr. Morris saw Lukeman again on September [*5] 18 and 19, checked her catheter site on both days and found no problems or indication that it had become dislodged.

In the next five or six weeks of her hospital stay, Lukeman's neurologic condition waxed and waned and she suffered from a rash and fevers, which prolonged her discharge. She eventually reached a point where her fever wore off and her neurological improvement was visible and sustained, such that she was awake and alert, and following commands. Following further treatment at a rehabilitation facility and then Camp Pendleton Naval Hospital, Lukeman was flown to her parent's home in Arizona. She progressed to the point where in January 2001, she was able to carry on normal conversations, walking with a walker and braces, feed herself and use the bathroom with assistance.

On February 6, 2001, Lukeman fell on a carpeted floor while reaching out for her mother. A week later, Lukeman experienced a severe headache and was taken by ambulance to the hospital, where a CT scan revealed tension pneumocephalus in a different area of her brain (her subarachnoid space) with brain compression. Since her hospital admission in February 2001, Lukeman has been bedridden, suffers from [*6] seizures and by August 2003 (at the time of trial) was living at a trauma care center in Arizona.

Lukeman and her husband sued Palomar and Dr. Marcisz, asserting four causes of action for medical malpractice and a cause of action for intentional infliction of emotional distress. In part, plaintiffs alleged Palomar negligently rendered medical care and treatment so as to permit Lukeman to pull the shunt out of her brain, causing her to sustain further damages and fall into a coma. Plaintiffs also sued Dr. Morris asserting she was negligent in her care of Lukeman beginning on September 15, 2000. [3]

> 3 The operative pleading is plaintiffs' first amended complaint filed in September 2002.

The matter proceeded to trial against Palomar and Dr. Morris on the sole theory that Palomar, through its nurses and employees, and Dr. Morris were negligent in treating Lukeman by failing to restrain her and permitting her to pull her shunt from her brain on September 16. [4]

> 4 The court bifurcated Lukeman's claims against Dr. Marcisz and Palomar seeking damages for burn injuries alleged to have been sustained during an August 2000 surgery. Plaintiffs dismissed those claims after the jury returned its verdict in favor of Palomar and Dr. Morris.[

[*7] At trial, plaintiffs presented a nursing expert who testified that Palomar's nurses fell below the standard of care by failing to restrain Lukeman on September 15. They also presented a neurosurgeon expert, Edward Smith, who testified (1) Dr. Morris fell below the standard of care in not ordering Lukeman's arms be restrained after she externalized her shunt on September 15; (2) Dr. Morris's charting was below standard in that she failed to document a reinsertion of Lukeman's shunt occurring on September 18; and (3) Lukeman was made much more prone to falling in February 2001 due to the pneumocephalus she experienced at Palomar in September 2000. Dr. Smith, however, did not criticize Dr. Morris's surgical technique on September 15 in externalizing the shunt, nor did he contend (consistent with his prior deposition testimony and the trial court's in limine ruling on the subject) that any dislodgement or reinsertion of Lukeman's shunt purportedly occurring on September 18 was the result of any negligent act or caused Lukeman any harm. Plaintiffs also presented an expert pediatric neurologist, Robert Podosin, M.D., who testified in part that Lukeman developed a tension pneumocephalus [*8] following Lukeman's September 16 shunt dislodgement.

Palomar presented a licensed clinical nurse specialist expert, Patricia Atkins, M.S.N., who testified based on her review of the nurse's depositions, Lukeman's medical records, computerized notes and progress notes, and the entire clinical picture, Lukeman did not need to be restrained on September 15. Defendants also presented an expert neurological surgeon and neurosurgery professor, Dr. Lawrence Shuer, who testified that Lukeman's pneumocephalus following the September 15 dislodgement of her shunt did not cause either her tension pneumocephalus or her seizure disorder. He concluded to a reasonable medical probability that Lukeman's deteriorated neurological condition was caused by her fragile condition that existed before she was admitted to Palomar, including her seizure disorder, and not by the pneumocephalus she experienced at Palomar.

After deliberating for less than a day, the jury returned a special verdict in favor of Dr. Morris and Palomar. It found by a 9 to 3 vote that Palomar was not negligent in Lukeman's medical care and treatment and by a unanimous vote that Dr. Morris was not negligent in Lukeman's medical care [*9] and treatment. As a consequence of its liability verdicts the jury did not reach the question of whether the defendants' care was the cause of any injury to Lukeman. The court entered judgment in defendant's favor. After unsuccessfully moving for new trial on various grounds, plaintiffs filed this appeal.

DISCUSSION

I. *Claims of Evidentiary Error*

Plaintiffs challenge a host of trial court rulings on the admission and exclusion of certain evidence. Most commonly, plaintiffs' claims of error relate to (1) evidence of an asserted "second injury" occurring on September 18, when Lukeman's shunt purportedly became dislodged again and was reinserted by Dr. Morris and (2) purported evidence that Dr. Morris instructed a nurse to advance Lukeman's catheter to a "black mark," which according to plaintiffs is circumstantial evidence that Dr. Morris reinserted the shunt on the 18th and is relevant to impeach her testimony that she did not reinsert the shunt. [5] Plaintiffs also challenge a ruling assertedly preventing counsel's cross-examination of defense expert Dr. Shuer on his opinion that Lukeman's condition would have deteriorated even absent the September 16 shunt dislodgement. [*10]

> 5 The latter claim apparently stems from a nurse's note on September 20 reading in part: "ventric c minimal output from 1300 to 1600, dr morris notified at 1650 of low csf output, orders to advance catheter under dressing to black mark, done as ordered c immediate improvement in csf drainage, informed of ptintermittently [*sic*] less responsive, turns head to voice, tracts intermittently, follows some commands, at 1800, attempted to feed pt, able to suck fluid from straw but does not swallow, kept fluid in mouth c bulging cheeks, instructed to spit it outand [*sic*] did."

Plaintiffs' arguments have been framed in a confusing series of contentions, with little or no authority but many general criticisms of the trial court. For example, in arguing the court erroneously precluded plaintiffs' expert Dr. Podosin from testifying about the second injury after defense counsel asked the court to do so, counsel states, "As was her custom and practice throughout the trial, whenever defense counsel requested something, [*11] the Judge immediately granted it with zeal. . . . [P] The judge then undertook to lecture Dr. Podosin as if he were a child and to force him to use her

opinion and words as to [Lukeman's] clinical courser [*sic*] rather than his own. . . . When Dr. Podosin had the temerity to offer his own opinion as to what happened the Judge rejected it because of her misunderstanding that his opinion as to what happened to [Lukeman] was inadmissible because he didn't say that the second injury was caused by negligence." The rationale and authority for plaintiffs' evidentiary arguments is not well explained.

In *Kim v. Sumitomo Bank (1993) 17 Cal.App.4th 974, 979*, these criticisms of such a brief were made by the appellate court: "The bulk of the legal authority relied on by the [appellants] is the opinion of their counsel, an opinion often unsupported by citation to any recognized legal authority. At times, the relevance of the cited authority is not discussed or points are argued in conclusionary form. 'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.' " (*Ibid*.) [*12]

Further, plaintiffs' challenges to the trial court's rulings with respect to the second injury and "black mark" notation are moot if we uphold the jury's verdict as to the absence of negligence by Palomar and Dr. Morris. In seeking to admit the second injury and "black mark" evidence, plaintiffs' theory was *not* that either Palomar or Dr. Morris was negligent in Lukeman's catheter placement on September 18 or any "second injury" resulting from that placement, they sought to show that Lukeman's injuries stemming from defendants' negligence on September 16 were aggravated by subsequent medical treatment, i.e., the asserted second dislodging of and reinsertion of her shunt on September 18. [6] (See *Ash v. Mortensen (1944) 24 Cal.2d 654, 657* ["It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate [or legal] cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor"]; *Maxwell v. Powers (1994) 22 Cal.App.4th 1596, 1607* [*13] ["When subsequent medical treatment of an injury results in aggravation of the injury, the original tortfeasor is liable because he or she 'is always considered to be a proximate [or legal] cause of the plaintiff's further injuries' "].) The theory goes only to causation and damages.

> 6 Plaintiffs' counsel emphasized to the jury in closing arguments that plaintiffs were not claiming negligence with regard to Lukeman's shunt placement on September 18. Plaintiffs confirm that the second injury theory is relevant to causation and/or damages in their opening brief: "This second injury was believed by Plaintiffs [*sic*] designated expert neurologist, Dr. Podosin, to explain why [Lukeman's] condition did not recover following the pull out but deteriorated leaving her in near [*sic*] for a lengthy period of time [citation] and eventually causing her to become permanently and totally disabled."

Plaintiffs spend much effort arguing that under this theory the subsequent medical treatment on September [*14] 18 did not have to be negligent to be an aggravating cause, and that the trial court erred in so ruling and also by preventing their witnesses to testify on these matters. But we need not address these issues if we do not disturb the jury's finding that neither Palomar nor Dr. Morris were negligent in their medical care and treatment of Lukeman on September 15. Under that circumstance, there is no negligently caused injury on which to base a claim of aggravated subsequent medical treatment. Consequently, we begin with plaintiff's evidentiary claims that do not relate to the alleged "second injury" or "black mark" evidence, and with the foregoing views in mind, respond to plaintiffs' evidentiary arguments as best we can on the record supplied.

A. *Sitter Testimony*

Plaintiffs contend the court prejudicially erred by precluding their expert neurosurgeon, Dr. Smith, from testifying as to his opinion that it was below the standard of care for Dr. Morris not to order an attendant or "sitter" for Lukeman if she was not going to order physical restraints. Specifically, they contend the court should have permitted Smith to testify about the opinion because he had testified to such [*15] opinion in his deposition, which their counsel presented to the trial court at some point during a break in Dr. Smith's testimony.

Plaintiffs' contention is not accompanied by any record citation to a critical piece of information underlying this contention, namely, that portion of Dr. Smith's deposition in which Smith purportedly testified that Dr. Morris's failure to call for a sitter fell below the standard of care. The trial court stated on the record that,

in fact, while Dr. Smith made mention of using a room attendant in his deposition, he did *not* testify that the failure to do so in this case was a breach of the standard of care, which was the basis for the court's ruling precluding that specific opinion at trial. It is plaintiffs' affirmative burden to show prejudicial error, and thus absent record evidence otherwise we will not disturb the trial court's conclusion on that point. (*Cal. Rules of Ct., rule 14(a)(1)(C)*; *Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295, 240 Cal. Rptr. 872*; *Hernandez v. California Hospital Medical Center (2000) 78 Cal.App.4th 498, 502*.) The court permitted Dr. Smith to testify that he [*16] had a "general criticism" of the doctors about that matter. In fact, Dr. Smith testified that a physician concerned about a patient harming herself but wanting to avoid restraints could have used a sitter, which was commonly done. Based on this record, plaintiffs have not shown the court abused its discretion in its ruling.

B. *Nurses' Testimony*

Plaintiffs contend the court abused its discretion by denying their in limine motion to prevent Palomar from calling nondesignated nurse employees as experts, and allowing Palomar's nurse witnesses (Patricia Hirst, R.N., and Sarah Propis, R.N., Lukeman's attending nurses) to give expert opinion testimony on professional standards of nurses. The contention is based in part on the premise, set forth without record citation, that Palomar "insisted on listing several of its nurses as expert witnesses."

The contention fails for several reasons. First, its premise is incorrect. Both defendants specifically listed Hirst and Propis as percipient, not expert witnesses, in the Joint Trial Readiness Conference Report. Second, as evidenced by the excerpts set out in plaintiffs' brief, neither Hirst nor Propis testified about the standard [*17] of care for nurses in the community with respect to use of restraints or whether they met the standard of care in their treatment of Lukeman. Their testimony was directed at whether either nurse felt Lukeman needed to be restrained at various times during her hospital stay, and the reasons why they felt as they did. Testimony about the nurses' impressions and the reasons for their actions at the time they took them is not after-the-fact expert opinion, it is proper percipient testimony. (See *St. Mary Medical Center v. Superior Court (1996) 50 Cal.App.4th 1531, 1539*; *County of Los Angeles v. Superior Court (1990) 224 Cal. App. 3d 1446, 1445-1446, 274 Cal. Rptr. 712* ["questions to the defendant physicians about their impressions and reasons for their action or lack of action at the time the medical procedure was performed are, of course, entirely appropriate"].) Both nurses also testified, without objection, that Lukeman did not meet the criteria for restraints as set forth in Palomar's written immobilization protocol addressing use of restraints. Assuming plaintiffs challenge the nurses' testimony concerning that "criteria," the record demonstrates [*18] the nurses did not refer to the standard of care in the community, it was Palomar's written policy about use of restraints. The court did not err in permitting the nurses to testify as they did.

Plaintiffs cite *Kalaba v. Gray (2002) 95 Cal.App.4th 1416* for the proposition that the trial court's in limine ruling "violated both the applicable statutes and case law on the subject." The argument is too vague for meaningful consideration. But *Kalaba* in any event does not convince us to change our conclusion. *Kalaba* merely holds that where a party seeks to call a treating physician for the purpose of eliciting expert testimony, it is insufficient to include a reference in the designation to "all past or present examining and/or treating physicans," without identifying the persons by name. (*Kalaba, 95 Cal.App.4th at pp. 1418, 1422-1423*.) Because defendants did not seek expert testimony from Hirst or Propis, *Kalaba* has no relevance to the issue presented.

C. *Cross-Examination of Dr. Morris*

Plaintiffs contend the court abruptly cut off their counsel's cross-examination of Dr. Morris. They maintain their counsel was unfairly surprised [*19] and they suffered prejudice to their due process rights to question Dr. Morris when, after the morning break on the second day of counsel's cross-examination, the court gave counsel only 30 minutes to complete his questioning. Plaintiffs sole argument as to prejudice is that "the demeaning manner in which the trial judge chastised Plaintiffs' counsel when she cut off his cross examination surely had an impact on the Jury as some sort of Judicial intervention for the protection of Dr. Morris."

Plaintiffs' cursory and unsupported assertion as to how the trial court's time limitation caused them prejudice is insufficient to establish reversible error under settled appellate standards. In evaluating the effect of error we are governed by *article VI, section 13 of the California Constitution*, which precludes reversal unless " 'the error complained of has resulted in a miscarriage of justice.' " (See *Cassim v. Allstate Ins. Co. (2004) 33*

Cal.4th 780, 800-802.) A "miscarriage of justice" occurs when it appears there is a reasonable probability that the appealing party would have realized a more favorable result in the absence of the error; probability in this context meaning [*20] merely a " '*reasonable chance*, more than an *abstract possibility*.' " (*Id. at p. 800*.) Under *Cassim*, we are required to examine " 'each individual case to determine whether prejudice actually occurred in light of the entire record.' " (*Id. at pp. 801-802*.) Plaintiffs have the burden of showing that the error resulted in a miscarriage of justice. (*County of Los Angeles v. Nobel Ins. Co. (2000) 84 Cal.App.4th 939, 945*; *Paterno v. State of California (1999) 74 Cal.App.4th 68, 105* [appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice].)

There is no such showing here. To the extent we understand the basis for plaintiffs' claim of error in cutting off Dr. Morris' cross-examination, it is that the trial court did not permit counsel to question Dr. Morris on the issue of Lukeman's purported second injury or the "black mark" evidence. But unless plaintiffs' provide some reason to disturb the jury's verdict finding Dr. Morris and Palomar not negligent in their care and treatment of Lukeman with respect to the use of restraints, evidence of the purported second [*21] injury or black mark evidence goes only to causation or damages, and error as to that evidence will not support a reversal of the judgment.

Nor does this contention succeed on the merits. A trial court has broad discretion to control cross-examination "so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth. . . ." (*Evid. Code, § 765, subd. (a)*; *People v. Adan (2000) 77 Cal.App.4th 390, 394* [The trial court has discretion to control cross-examination, and "only a manifest abuse of the court's discretion will warrant a reversal"]; *Continental Dairy Equip. Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 384, 94 Cal. Rptr. 887*.) Plaintiffs originally provided the trial court a 2.5 hour time estimate for their portion of Dr. Morris' testimony but ultimately were allowed over three hours of cross-examination, not including their playing of Dr. Morris's deposition testimony, which took just over an hour. The trial court advised plaintiffs' counsel he had 30 minutes to finish his questioning after it sustained defense counsel's objection that the cross-examination began exceeding the [*22] scope of direct. Plaintiffs' counsel did not object at that time, nor did he provide an offer of proof demonstrating that he had more than 30 minutes of relevant cross-examination remaining for Dr. Morris. It was only after the court told counsel he had five minutes to finish his examination did counsel ask Dr. Morris if Lukeman's shunt had become dislodged again on the morning of September 18, and also whether she had reinserted the shunt. Dr. Morris testified the shunt did not come out and she did not reinsert it that morning, and she did not make a record of doing so because she did not perform any reinsertion. The trial court concluded counsel's cross-examination after sustaining objections to several further questions of Dr. Morris on grounds they violated the trial court's in limine rulings.

The record reflects the court accommodated counsel by giving him more time for his cross-examination than originally estimated and also allowed counsel to ask Dr. Morris proper questions relating to the purported second injury of September 18. Faced with no objection by plaintiffs' counsel when it gave its 30-minute warning and seeing no further productive questioning, the trial court acted [*23] well within its discretion to conclude Dr. Morris' cross-examination when it did.

D. *Cross-Examination of Dr. Shuer on Shunt's "Siphon" Mechanism*

Plaintiffs contend the trial court erred by preventing their counsel to cross-examine defense expert Dr. Shuer with a hypothetical question based on whether Lukeman's shunt used a siphon mechanism, thus depriving them of a their "right to cross-examine an important witness on a critical issue." [7] The foundation for the contention, namely, that Dr. Smith testified at trial that the shunt worked "kinda like" a siphon, is not supported by the citation provided to the appellate record, and for that reason alone, we may disregard the contention. (*Nwoso v. Uba (2004) 122 Cal.App.4th 1229, 1246* ["The appellate court is not required to search the record on its own seeking error. [Citation.] Thus, 'if a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived"].)

> 7 That portion of the record shows that in response to plaintiff's counsel questioning, Dr. Shuer testified that Lukeman's shunt system "will not allow siphoning." The following colloquy occurred: "[Plaintiffs' counsel]: Well, if there were siphoning - and let's say you're in error on this point - it would be logical for that fluid to continue to flow then, would it not, once - [P]

> [Defense counsel]: Objection; assumes facts not in evidence. [P] The court: I'm going to have to sustain that. He says it doesn't happen so - [P] [The witness]: It doesn't happen. [P] The court: A hypothetical does have to include facts that would be within the range of the evidence. Unless you've got another witness who is going to come in and say that, there's no evidence of that in the record right now. [P] [Plaintiffs' counsel]: Well, this is the first that's been brought up."

[*24] Even were we to consider the contention, plaintiffs provide no explanation as to how the mechanism of the shunt was a critical issue, or how the absence of Shuer's answer on the hypothetical posed to him resulted in a miscarriage of justice. Nor have plaintiffs provided any authority by which to evaluate the trial court's ruling. Nevertheless, we conclude the trial court did not err in preventing the cross-examination after sustaining defense counsel's objection that it assumed facts not in evidence. Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Gardeley (1996) 14 Cal.4th 605, 618*.) The assumptions that make up the hypothetical question, however, "must be rooted in facts shown by the evidence." (*Ibid*; *Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1135* [expert opinion based on "assumptions which are not supported by the record" has "no evidentiary value"].)

" 'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' " (*Gardeley, supra, 14 Cal.4th at p. 618*.) [*25] In addition, a trial court " 'has considerable discretion to control the form in which the expert is questioned' " and " 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' " (*Id. at p. 619*.)

Here, the trial court did not abuse its discretion in sustaining defense counsel's objection to the hypothetical question posed by plaintiff's counsel. Just before counsel asked the question, Dr. Shuer testified that the shunt system would not allow siphoning. Plaintiffs have not provided a citation to trial testimony or other evidence demonstrating that the shunt used a siphon mechanism, and thus they have not shown the hypothetical questioning of the defense expert was "rooted in facts shown by the evidence." (*People v. Gardeley, supra, 14 Cal.4th at p. 618*.) Indeed, plaintiffs' counsel observed at the time that it was the first time the issue had been brought up, and in response to the court's comment he did not offer another witness who would testify on that point. As a result, any answer to the question [*26] was irrelevant. (*Ibid*; *Pacific Gas & Electric Co. v. Zuckerman, supra, 189 Cal. App. 3d at p. 1135*.) The trial court did not abuse its discretion in precluding the question.

E. *Remaining Evidentiary Contentions*

Plaintiffs have not shown error impacting the jury's finding that the defendants were not negligent in their care and treatment of Lukeman, including error in connection with the jury instructions or the trial court's conduct, contentions that we address and reject below. Plaintiffs other contentions all pertain to the alleged second injury or "black mark" and go to causation or damages, i.e., aggravation of Lukeman's original injury. Under these circumstances, we need not reach plaintiffs' other evidentiary contentions.

II. *Claims of Instructional Error*

A. *Instruction on Law Pertaining to Use of Restraints*

Plaintiffs contend the court committed prejudicial instructional error when it gave the following special instruction regarding the law pertaining to use of restraints on a patient: "Under California and Federal Law a patient has the right to be free from restraints of any form that are not medically necessary or are used [*27] as a means of coercion, discipline, convenience, or retaliation by staff. A restraint can only be used if needed to improve the patient's well being and less restrictive interventions have been determined to be ineffective in protecting the patient from harm." Plaintiffs assert the jury could reasonably interpret this instruction as telling them it would be illegal for defendants to have applied restraints to Tamara; they maintain the instruction "confused the issue" in that it forced them to overcome the inferences stemming from the nonspecific reference to state and Federal law.

" 'Error in instructing the jury shall be grounds for reversal only when the reviewing court, "after an examination of the entire cause, including the evidence," concludes that the error "has resulted in a miscarriage of

justice." The test of reversible error has been stated in terms of the likelihood that the improper instruction misled the jury. [Citation.]' [Citations.] Thus, if a review of the entire record demonstrates that the improper instruction was so likely to have misled the jury as to become a factor in the verdict, it is prejudicial and a ground for reversal. [Citation.] 'To put it another [*28] way, "where it seems probable that the jury's verdict may have been based on the erroneous instruction prejudice appears and this court 'should not speculate upon the basis of the verdict.' " ' " (*Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 335* (*Mock*).) " 'The determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all of the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn.' " (*Mock, at p. 335*, italics omitted.)

Plaintiffs do not set out these settled review standards and they do not apply them in any way to assist our resolution of the court's asserted instructional error. Nor have plaintiffs provided any statutory or case authority whatsoever pertinent to the use of patient restraints that would enable us to evaluate the correctness of the above instruction and the extent to which the jury might have been "misled" about the law. Having no information by which to assess whether the instruction was erroneous or misleading, we reject [*29] their claim of instructional error. An appellate court is not "required to consider alleged error where the appellant merely complains of it without pertinent argument." (*Rossiter v. Benoit (1979) 88 Cal. App. 3d 706, 710, 152 Cal. Rptr. 65*.)

Even if we were to entertain plaintiffs' contention of error, we would be unable to ascertain any confusion or prejudice resulting from the giving of defendant's proposed special instruction. There is no evidence of jury confusion because the jury did not request a reread of *BAJI No. 2.03* or any testimony. (*Mock, 4 Cal.App.4th at p. 335*.) The jury rendered a unanimous verdict on liability for Dr. Morris, and plaintiffs have not shown the jury's 9-3 verdict in Palomar's favor is, standing alone, evidence that the jury was misled. The authority on which plaintiffs rely in their reply brief, including *Norman v. Life Care Centers of America, Inc. (2003) 107 Cal.App.4th 1233*, is stated without meaningful analysis or application to the particular facts here and does not suffice to demonstrate prejudicial error. (E.g., *Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1115* [*30] [brief failed to present any issue pertaining to the summary judgment motion at issue when it cited only general legal principles without relating them to any specific facts or admissible evidence].) Unlike in *Norman*, plaintiffs have not demonstrated anything other than a close verdict; there is no showing as to whether the jury's notes or conduct demonstrate it was misled, whether counsel's arguments somehow contributed to any misleading effect, or whether other instructions may have impacted the jury in any way. (*Norman, supra, 107 Cal.App.4th at pp. 1251-1252*.) In short, plaintiffs have provided no basis for reversal by the giving of defendant's special instruction regarding the use of restraints.

B. *Refusal to Instruct Jury with BAJI No. 2.03*

Plaintiffs contend the court erred by refusing to give *BAJI No. 2.03*, which instructs jurors if they find a party willfully suppressed or concealed evidence, they may consider that fact in determining what inferences to draw from the evidence. Without explanation, they maintain the instruction "should have been given as applying to Dr. Morris' failure to document [*31] her reinsertion of the shunt on the 18th."

Again, we are provided with no legal standards whatsoever by which to evaluate this claim, including authority setting forth what circumstances warrant giving such an instruction. Plaintiffs provide no record citation to the court's ruling on this issue; the sole record support for this claim is to the refused instruction. Further, plaintiffs' argument fails for the lack of any explanation how the evidence supports a conclusion that Dr. Morris's failure to document her reinsertion of Lukeman's shunt on the 18th was an intentional effort to conceal evidence in anticipation of a trial. (See *County of Contra Costa v. Nulty (1965) 237 Cal. App. 2d 593, 594, 47 Cal. Rptr. 109* [*BAJI No. 2.03* is designed for the "relatively rare case where there has actually been a fraudulent suppression of evidence . . . it is prejudicial error to give this instruction if there is no showing of fraudulent suppression"].) "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by [her] which is supported by substantial evidence." (*Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 572* [*32] (*Soule*).) Because plaintiffs have not shown that substantial evidence

supported the giving of the instruction, we find no reversible error in the court's refusal to give it.

III. *Claims of Judicial Bias*

Plaintiffs contend the court was biased in defendants' favor; they set out seven instances where the court assertedly made remarks before the jury that were "designed" to leave an impact favorable to the defense. Plaintiffs subjectively characterize the referenced remarks or alleged conduct, describing, for example, one unspecified remark as "outrageously critical" of plaintiffs' counsel; characterizing the court as "smiling with glee" in response to plaintiffs' counsel's objection to a question asked of plaintiffs' expert witness; and stating the court "bragged" about 'getting a laugh' out of the Jury" about a comment she made in ruling upon the aforementioned objection.

Plaintiffs' claim of judicial bias is fatally deficient for several reasons. First, plaintiffs have not set out any standards whatsoever by which we are to assess the court's conduct, nor have they provided reasoned legal argument or authority demonstrating the court's conduct was of the sort likely [*33] to result in prejudice. As appellants, they bear the burden "not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal." (*Wiley v. Easter (1962) 203 Cal. App. 2d 845, 848, 21 Cal. Rptr. 905*; *Betz v. Pankow (1993) 16 Cal.App.4th 919, 926* [party claiming arbitrator bias, similar to claims of judicial bias, has burden to establish facts supporting his or her position]; *Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632*.) Plaintiffs have made no attempt to demonstrate any of the court's conduct had an impact on the jury. For these reasons alone, their claim fails. (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal.4th 352, 366, fn. 2*.)

Second, many of plaintiffs' challenges to the trial court's conduct are simply not supported by the record, either because no record exists of the event, or the record simply does not support plaintiffs' characterization of the conduct. For example, plaintiffs assert the trial court bragged to the jury that her daughter had been admitted to Stanford University, even though the court knew [*34] defense expert Dr. Shuer was chief of staff of Stanford University Medical Center. However, in their briefing they admit those proceedings went unreported. [8] Setting aside plaintiffs' failure to show any prejudice stemming from such an offhand comment, we decline to consider claims unsupported by the record. (*City of Lincoln v. Barringer (2002) 102 Cal.App.4th 1211, 1239*.) Plaintiffs also assert the trial court and its clerk met with and had unreported discussion with jurors; the record, however, reveals the court clerk merely brought in prospective jurors to fill out jury questionnaires and noted some of their concerns about sitting for the trial. We see no indication of impropriety or impact on the actual jury in the case. Nor do we find another cited comment by the trial judge to be "outrageously critical" to plaintiff's counsel; in the instance cited by plaintiffs, the court outside the jury's presence told plaintiffs' counsel to pull a deposition reference "after lunch, because I've spent more down time with you when you can't locate things." The comment in our objective assessment was neither critical nor could it prejudice plaintiffs since the jury had already [*35] been excused.

> 8 After close of briefing in this case, plaintiffs belatedly sought to augment the appellate record with a transcript purportedly containing the trial court comment during voir dire pertaining to Stanford University. We denied the motion. Even were we to consider the trial court's purported comment, as stated, plaintiffs' have not shown resulting prejudice and their contention of bias fails for that reason alone.

Plaintiffs' claim relating to the court's asserted joke and "bragging" about getting a laugh out of the jurors is not supported by the record. The cited portion of the record shows that in response to plaintiffs' counsel's objection that a particular question was an unfounded attack on the witness, the trial court commented that she was "trying to make sure [counsel] didn't attack each other" and then struck the question, ruling it was argumentative. Later, outside the presence of the jury, the court admonished counsel to be civil to each other, allowed plaintiffs' counsel to apologize [*36] at his request to do so, and advised counsel she had gotten a laugh from the jurors because they sensed counsel's animosity: "Why do you think I got the big laugh out of the jurors when they went on break because they sense this animosity and you need to stop. You need to do your job, focus for your clients and let's just do our business here." We fail to see any bias or prejudice stemming from the court's comment before her evidentiary ruling or from the remainder of the proceeding, which was held outside the jury's presence.

Finally, as to those claims not referenced above, we reject plaintiffs' challenges on the merits in that we do not deem the court's actions or comments to be indicative of bias or prejudice. "When reviewing a charge of bias, '. . . the litigants' necessarily partisan views should not provide the applicable frame of reference. [Citations.]' [Citation.] Potential bias and prejudice must clearly be established [citation] . . . . 'Bias or prejudice consists of a "mental attitude or disposition of the judge towards [or against] a party to the litigation. . . ." ' [Citations.] Neither strained relations between a judge and an attorney for a party nor 'expressions [*37] of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice.' " (*Roitz v. Coldwell Banker Residential Brokerage Co. (1998) 62 Cal.App.4th 716, 724*.) Thus, a party cannot premise a claim of bias on a judge's statements made in his official capacity (*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1031, 240 Cal. Rptr. 78*), or a judge's substantive opinion on the evidence (*Kreling v. Superior Court (1944) 25 Cal.2d 305, 312)* or the judge's ruling (even erroneously) against him (*McEwen v. Occidental Life Ins. Co. (1916) 172 Cal. 6, 11)*.

The trial court did not, by either its conduct or remarks, deprive plaintiffs of a fair trial, and there is no basis for reversal on the record before us.

IV. *Request for Sanctions*

Plaintiffs request we sanction Palomar for making misleading statements with respect to its application for a 30-day extension of time to file its respondent's brief. Specifically, plaintiffs assert Palomar's counsel misrepresented when it had obtained the appellate record in its application [*38] for the purpose of obtaining the extension; that they had received the record at the latest on December 15, 2004 but suggested they only received it as of February 17, 2005. Palomar responds that its counsel did not mislead this court in requesting the extension and they point out plaintiffs have not complied with *California Rules of Court, rule 27(e)* by providing some justification for a sanction award.

We find no basis for sanctions. In particular, nothing in Palomar's application for an extension of time to file its respondent's brief suggests that Palomar requested an extension because it did not obtain the appellate record until February 2005, or that it had insufficient time to review the appellate record. Rather, counsel's request on its face was based on counsel's unexpected need to prepare post-trial motions following a large punitive damage judgment in another case. In short, Palomar's application does not contain the misleading statements suggested by plaintiffs. Otherwise, plaintiffs have provided no reason why the circumstances warrant sanctions under *California Rules of Court, rule 27(e)*, which authorizes us to impose [*39] sanctions for committing unreasonable violations of the Rules of Court. (*Cal. Rules of Court, rule 27(e)(1)(C)*.) Having reviewed the papers at issue, we find no such violation.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P.J.

McINTYRE, J.