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## STATEMENT OF THE CASE

### INTRODUCTION<sup>1</sup>

This is an appeal by plaintiff Samuel Lee ("Samuel"), a minor, by and through his guardian ad litem, Esther Lee, from a final judgment; and by plaintiffs Samuel Lee, his mother Esther Lee ("Esther") and his father Young Suk Lee ("Young") from a post-judgment order denying plaintiffs' Motion to Strike and/or Tax Defendant's Memorandum of Costs. The judgment is appealable pursuant to CCP 904.1(a)(1); and the order is appealable pursuant to CCP 904.1(a)(2).

This is a medical malpractice case brought by Samuel Lee, alleging that neonatologist defendant Smeeta Sardesai, M.D. ("Sardesai") and defendant The Hospital of The Good Samaritan ("Hospital") were negligent in their care and treatment of Samuel, resulting in his suffering respiratory and cardiac arrest, followed by severe brain damage when he was two months old.

Samuel and his twin sister, Grace, were born on October 7, 1997, 12 weeks premature. They both suffered from the normal medical problems of premature babies, including respiratory distress syndrome because of the underdevelopment of their lungs at birth. Grace progressed well and was released from Hospital on December 15, 1997, on no medications other than vitamin pills, and was sent home to the care of her parents with no technological equipment.

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<sup>1</sup> Supporting references to the record (Appellants' Appendix in Lieu of Clerk's Transcript and Reporter's Transcript) are not included within the Introduction. They are included in the more detailed section, Chronological Review of Relevant Trial Proceedings and Testimony, commencing at page 6, below.

Unlike his sister, Samuel had rare medical complications which retarded his recovery from the typical premature baby medical conditions, including a condition that caused congestive heart failure, which further complicated his respiratory distress syndrome and required remediation by brain surgery at UCLA. As a result, Samuel was not discharged to the care of his parents at home until December 26, 1997, 11 days after the discharge of his twin sister. Unlike Grace, at the time of his discharge, Samuel continued to suffer from lung disease and respiratory problems, and was sent home to the care of Esther, a 48 year old first-time mother, on sundry medications, supplemental oxygen from an oxygen tank, and with a pulse oximeter (i.e., monitoring equipment that measured his heart-rate and the oxygen saturation in his blood). Pulse oximeters are equipped with an alarm that warns the caregiver when the baby's heart-rate or oxygen saturation is abnormal.

On December 27, 1997, the day after Samuel arrived home, his mother bottle-fed him approximately every four hours. She bottle-fed him at approximately 1 p.m., at which time he vomited his formula during the feeding, but suffered no adverse consequence. She again bottle-fed him at approximately 5 p.m. During this feeding, Samuel again vomited his formula which came out of his nose and mouth. He became limp and non-responsive. His mother attempted to clean the formula from his nose and mouth with a bulb syringe, rendered CPR, and called 911. Samuel remained limp and non-responsive. By the time the paramedic ambulance arrived and was able to transport Samuel to Children's Hospital of Los Angeles, he was in full respiratory and cardiac arrest. Although Samuel's

heartbeat was resuscitated at Children's Hospital, because of lack of oxygen to his brain for several minutes, he suffered severe brain damage.

In order to prevail on a claim of medical malpractice, plaintiff must prove that defendant negligently breached the requisite standard of care, and that there was a proximate causal connection between the negligent breach of duty and the resulting injury to plaintiff. Simmons v. West Covina Medical Clinic (1989) 212 C.A.3d 696, 701-02, 260 C.R. 772. The casual connection must be proven to a reasonable medical probability through expert witness testimony. Jones v. Ortho Pharmaceutical Corp. (1985) 163 C.A.3d 396, 402-403.

The trial was bifurcated into a liability phase and damages phase. The proceedings which give rise to this appeal occurred during the liability phase.

The theory of Samuel's case as to liability is as follows: Pursuant to the applicable standard of care, although medically fragile, Samuel was ready for discharge from Hospital in terms of his personal medical condition. However, defendant Sardesai, Samuel's attending neonatologist, and the nursing staff of defendant Hospital negligently violated the family planning aspect of the standard of care in discharging Samuel to the care of his parents at home, because:

1. Defendants negligently failed to adequately educate and train Samuel's mother in the subtleties of caring for and feeding a lung-diseased, high-risk infant such as Samuel, including how to effectively intervene during foreseeable episodes of respiratory

distress during feeding.

2. Defendants negligently failed to offer such education and training to any other home caregiver.

3. Defendants negligently discharged Samuel into a virtually impossible home care situation, where in order to properly take care of her twin babies, Samuel's mother would have to do so with virtually no sleep, and with no trained help from other home caregivers, as compared to the care-giving environment in Hospital in which Samuel received care from a team of trained, experienced, rested professionals.

4. As a result, Samuel suffered the injuries mentioned above. Had he not been discharged to the care of his inadequately prepared, overburdened mother, but had been maintained under the professional care of the Hospital staff, with reasonable medical probability, Samuel would not have suffered those injuries.

Samuel intended to prove breach of the standard of care and causation by a combination of expert witness testimony from board certified pediatrician Weinstein, M.D., and neonatal nurse practitioner Camara. Samuel adduced extensive standard of care testimony from Camara, and offered causation testimony through both Weinstein and Camara. However, the Court erroneously excluded the testimony of Samuel's experts on causation, thereby rendering it impossible for him to prove an essential element of his case. At the close of his case, the Court granted Hospital's motion for nonsuit. RT<sup>2</sup> 1592:8-20.

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<sup>2</sup> Reporter's Transcript.

SUMMARY OF APPELLANTS' POINTS ON APPEAL

Samuel raises two points on appeal based on rulings of the Court during trial:

1. The Court erroneously excluded the testimony of Samuel's experts (Dr. Weinstein and nurse practitioner Camara) on the issue of causation, thereby rendering it impossible for him to prove his case in chief. In this regard, the Court ruled that Samuel had designated his medical experts to testify only on the issue of standard of care, and not causation. Although the Court granted Samuel's motion to augment the expert witness designation of Dr. Weinstein so as to permit him to testify on the issue of causation, the Court reneged on this ruling, erroneously disallowing Dr. Weinstein to testify on causation before the jury. The Court further erroneously ruled that plaintiffs' failure to designate Camara as an expert witness on causation was not remedied by the fact that she rendered substantial testimony on the causation issue during her expert witness deposition on examination both by counsel for Hospital and Samuel.

2. Immediately prior to Dr. Weinstein's testimony, Hospital's attorney improperly intimidated him by accusing him of having perjured himself in his expert witness deposition, and threatening to report him to the D.A. As a result, Dr. Weinstein appeased defense counsel by waffling on his testimony on the issue of causation, thereby substantially impairing its effectiveness. The Court erroneously ignored Samuel's objection on the ground of defense counsel's misconduct in this regard, and thereafter erroneously denied Samuel's motion for mistrial on this ground.

3. After the Court entered judgment upon its order of nonsuit in favor of Hospital, it denied plaintiffs' motion to strike and/or tax costs. AA 320, 321. Plaintiffs contend that this order was erroneous because Hospital's memorandum of costs was filed untimely as to Esther and Young with reference to the summary judgment entered against them on February 20, 2003 (AA 27). Moreover, the Court erroneously awarded to Hospital expert witness fees pursuant to CCP 998 in the amount of \$16,478.75. AA 148. CCP 998 permits a discretionary award of costs for the services of expert witnesses incurred in "preparation for trial" or "during trial." With the exception of expert witness fees incurred by Hospital in the amount of \$1,112.50, the remainder of its claimed expert fees were not incurred for services of said experts in preparation for trial or during trial. Therefore, the Court did not have authority to award the same to Hospital under CCP 998.

#### CHRONOLOGICAL REVIEW OF RELEVANT TRIAL

##### PROCEEDINGS AND TESTIMONY<sup>3</sup>

##### Proceedings Relevant to Court's Erroneous Award of Costs

Plaintiffs' First Amended Complaint ("FAC") was the operative pleading in this case. AA<sup>4</sup> 1. FAC set forth two causes of action, the first cause of action for medical malpractice on behalf of Samuel, and the second cause of action for fraud on behalf of Samuel, Esther and Young. On January 30, 2003, the Court granted

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<sup>3</sup> In order to understand the context in which the Court made its erroneous rulings during trial, a chronological recitation of the procedural history, interspersed with relevant testimony and offers of proof, is required.

<sup>4</sup> Appellants' Appendix in Lieu of Clerk's Transcript.

Hospital's Motion for Summary Adjudication of the second cause of action, thereby disposing of the only claim in which Esther and Young were parties. AA 197. On February 20, 2003, the Court entered a formal Order Granting Summary Adjudication as to the second cause of action (AA 23), and thereupon entered judgment under CCP 437c in favor of Hospital and against Esther and Young (AA 27). Notice of entry of said Judgment was served by Hospital on February 26, 2003. AA 30.

Proceedings on April 7 Re Exclusion of )

Expert Witness Causation Testimony

On Monday, April 7, the Court and counsel discussed witnesses, exhibits, time limits, etc. RT 1, et seq. The Court had previously granted Hospital's boiler-plate motion in limine to preclude expert witnesses from testifying to any opinions not expressed during their deposition. AA 14, 20. Hospital had previously filed a trial brief (AA 32) in which it contended that because in the exchange of expert witness disclosures, Samuel's experts had been designated to testify only as to opinions regarding standard of care, and not causation, his experts should be prohibited from rendering opinions regarding causation. During colloquy between the Court and counsel on April 7, the Court noted that it had been advised that Hospital contemplated moving for nonsuit at the close of Samuel's opening statement on the ground that he did not have an expert competent to testify as to causation. RT 3:21-26.

In response to Hospital's trial brief, on April 8, Samuel filed a motion to augment the statement of the general substance of

the testimony of his medical expert, Dr. Weinstein, as set forth in Samuel's expert witness disclosures, such that it would include the testimony of Dr. Weinstein on the issue of causation contained in his extensive Declaration filed in opposition to Hospital's previously-filed motion for summary judgment. Plaintiff argued that since defendants had that Declaration substantially prior to their taking the expert deposition of Weinstein, they could not claim that they were not aware that he held the opinions on causation expressed in the Declaration; and that even though he had not expressed those opinions during his expert deposition, under CCP 2034(k), the Court should exercise its discretion to permit the requested augmentation. AA 70.

On April 9, the Court granted the Motion to Augment, thereby allowing the general substance of Weinstein's expert testimony to be augmented by the content of paragraph 22 of his Declaration, ruling that Dr. Weinstein would not be permitted to offer testimony with respect to anything beyond his expert designation, "except to the limited extent that he will be permitted to testify consistently with paragraph 22" (RT 661:16-19), which paragraph stated:

"It is my opinion that SAMUEL would have benefitted from further medical care and observation. At the minimum, SAMUEL and his parents should have been given options other than just home care. Had this been done, SAMUEL would not have suffered the injuries that he did. For the foregoing reasons, it is my opinion that neither HGS [Hospital] nor Dr. SARDESAI met the standard of care for neonatologists and hospitals with

neonatology practices in the year 1997." AA 70, 79, 85.

During the argument regarding the Motion to Augment with respect to Dr. Weinstein's testimony regarding causation, the issue of whether nurse practitioner Camara would be permitted to testify as to causation was also argued. During this argument, Samuel contended that pursuant to CCP 2034(j), neither defendant had standing to request exclusion of any portion of the testimony of Samuel's expert witnesses, because each defendant had failed to fully comply with the expert disclosure requirements of CCP 2034(f), because they had insufficiently disclosed the general substance of the testimony expected to be given by their medical experts pursuant to the holding of Kennemur v. State of California (1982) 133 C.A.3d 907, 184 C.R. 393. Kennemur at 919 held that the expert witness disclosure statute required a party to disclose either in his witness exchange documentation or during the expert's deposition, "the substance of the facts and the opinions which the expert will testify to at trial." Therefore, defendants' expert witness designations to the effect that their medical experts would testify regarding "standard of care, causation, and damages," did not comply with Kennemur, because those designations merely listed the topics of testimony, as differentiated from "the substance of the facts and the opinions" to which the experts would testify. RT 637:21-640:1.

Furthermore, Samuel argued that despite the fact that he had designated Camara to testify only as to standard of care, during Camara's deposition, she had rendered opinions regarding causation, and thereby had remedied the defect in her expert witness

designation disclosure pursuant to the authority of Kennemur. RT 634:18-635:22. Samuel's counsel made an offer of proof as to Camara's opinion testimony during her deposition on the issue of causation: In Camara's opinion, based on the description of what the mother had previously testified had occurred during the feeding when Samuel went into cardiac arrest, and Camara's knowledge of the medical history of the baby from the hospital records, she testified:

The reason that premature babies, such as Samuel, are on oxygen and are monitored by a pulse oximeter, especially when they are bottle-feeding, is because they have difficulty coordinating sucking, breathing, and swallowing, and sometimes they stop breathing. When one stops breathing for a sufficient time, his heart stops beating. When these kinds of episodes occur, his blood oxygen becomes desaturated because he is not bringing in enough oxygen, and his heart starts slowing down and ultimately stops. When these situations begin to occur during feeding, nurses are trained to make sure that the baby's breathing passages are not blocked by his having spit up formula; they know how to turn up the oxygen and provide more oxygen to the baby, and to stimulate the baby to start breathing if he forgets to breathe or otherwise stops breathing. With a registered nurse, the point at which CPR must be administered to a baby rarely, if ever, actually happens. This is a last-ditch effort when the baby stops breathing and his heart stops beating. If this baby had been under a registered nurses care, the situation never would have

come to CPR, because the nurse would have seen the telltale signs of the baby's breathing problems while feeding, and would have interceded properly to stop a crisis situation from happening. RT 623:8-9; 630:19-632:9; 636:21-637:8.

The Court responded to this offer of proof: "I think that it is sheer speculation . . . . I suspect she lacks the qualifications to offer this testimony." RT 632:10-12. Ultimately, the Court ruled as follows: It found that defendants' conclusory expert witness disclosures ("standard of care, causation, and damages") were adequate; and to the extent they might be inadequate, that did not bar them from challenging the adequacy of Samuel's expert witness disclosure. Further, the inadequacy of Samuel's disclosure with respect to Camara regarding causation was not cured by her deposition testimony on causation. RT 640:5-17.

Thereafter, on April 9, out of the presence of the jury, Samuel and defendant Sardesai advised the Court that they had made a settlement agreement to the effect that Samuel would forthwith dismiss Sardesai with prejudice in exchange for which Sardesai would waive any claims for malicious prosecution, costs or fees against Samuel. Based on this settlement, the Court ordered the claims of Samuel dismissed with prejudice as against Sardesai. RT 670:25-672:11.

Witness Intimidation of Dr. Weinstein by Defense Counsel

April 10 was the second day of trial testimony. Dr. Weinstein was scheduled to commence his expert witness testimony that morning. Immediately prior to the commencement of his testimony,

in the corridor outside the courtroom before Court convened, a conversation ensued between Fraser, Hospital's trial attorney, Dr. Weinstein and Samuel's trial attorneys, Steinhart and Song. This episode is the subject of Samuel's Motion for Mistrial for Misconduct of Attorney Stephen Fraser. AA 112. During this conversation, Fraser asked to see the documents that Dr. Weinstein had reviewed in preparation for his testimony. Song referred him to a box containing trial exhibit books. After quickly reviewing the exhibit books, Fraser addressed Dr. Weinstein in an accusatory, aggressive tone: "You [Dr. Weinstein] couldn't have reviewed these documents. These exhibit books were made up just a few days ago for this trial. How could you have reviewed them?" Song replied to Fraser that these were copies of the same medical records that Dr. Weinstein had reviewed at home. Nonetheless, Fraser raised his voice again to Dr. Weinstein, stating: "You [Dr. Weinstein] stated in your deposition, under oath, in the first 12 to 13 pages of your deposition that you didn't review any of these records. You stated this under penalty of perjury." In an even louder, more agitated voice, Fraser stated to Dr. Weinstein: "This is perjury; I'm gonna fricken report this to the D.A.!" Dr. Weinstein, visibly shaken, responded to Fraser: "I don't appreciate being threatened like this." Steinhart then added: "You can't threaten my witness like that." Fraser then walked away, and Dr. Weinstein and attorneys Steinhart and Song entered the courtroom. Shortly thereafter Court convened, at which time Steinhart stated he wished to bring a matter to the Court's attention. Fraser requested that Dr. Weinstein be excused from the courtroom during that presentation,

which the Court ordered. Steinhart then advised the Court of the witness intimidation episode that had just occurred. Fraser denied that he had engaged in such conduct. The Court did not investigate the incident by examining Dr. Weinstein as to his version of the incident, nor to determine whether Dr. Weinstein was intimidated by it. Rather, the Court emphatically ordered Samuel's counsel not to mention the incident again, and did not admonish Fraser. See Declaration of Song, paragraphs 1-8 (AA 116-117); Declaration of Steinhart, paragraph 2 (AA 119; RT 901:10-902:17).

The Court's Erroneous Exclusion of  
Dr. Weinstein's Causation Testimony

Thereafter, Dr. Weinstein testified, stating: At the time of Samuel's discharge from Hospital, he was still fairly oxygen-dependent, particularly during feeding. His lung disease at that point was not completely resolved. RT 930:17-25. With respect to the tragic incident that happened within 24 hours after Samuel's being released home to the care of his mother, Dr. Weinstein was asked: "By reading Mrs. Lee's deposition, reading the Hospital records that you reviewed from Children's Hospital, what is your understanding of what happened in this event?" Hospital's counsel objected on the ground of Kennemur, and proceedings were thereupon held out of the presence of the jury. During these proceedings, Dr. Weinstein testified, in summary, as follows:

With respect to the tragic incident, when Samuel arrived at Children's Hospital, he was not breathing. Although he was resuscitated, he suffered brain damage as a result of lack oxygen to his brain. There was a lack of oxygen to his brain

tissue because Samuel had massive vomiting of formula while being fed by his mother, and by the time the paramedics transferred him to the Hospital, too much time had elapsed. RT 934:21-936:13.

At a feeding of Samuel about four hours before the tragic incident, he had vomited some of the formula being administered to him. RT 934:4-13. The Court asked if Samuel had remained in the Hospital under the care of a neonatal nurse, did he have an expert opinion "based upon reasonable medical probability" that he would have obtained a better result, to which Dr. Weinstein replied: "I think the answer is yes. If the baby had been in the hospital unit and had this amount of vomiting, they probably would have stopped feeding the baby and have reevaluated why this happened." RT 942:16-943:5.

The following questions and answers then ensued:

Samuel's counsel: "Based on what the mother said happened that afternoon and evening, do you stick by your opinion which you signed under oath [referring to paragraph 22 of his Declaration] that had he, this baby, not been sent home to home care with this mother that he would not have suffered the injury that we're here in the lawsuit about?"

Answer: "My opinion that if there--had there been a nurse present at the time of the reflux it is likely that the responses that the nurse would have made would be more effective than those of the mother."

The Court: "But you cannot say can you, there was a reasonable medical probability that a neonatal nurse would have obtained a better result than the mother, can you?" (Emphasis added).

The witness: "No." RT 952:28-954:20.

It should be noted that the Court asked substantially the same question (also based on reasonable medical probability) in a neutral manner at RT 942-943, to which Dr. Weinstein answered in the affirmative. However, at RT 952-954, the Court took an aggressive, cross-examiner's approach in repeating the question, evoking a negative answer from Dr. Weinstein. See Samuel's Notice of Motion to Disqualify Trial Judge for Cause, AA 93. In his intimidated frame of mind following the aforesaid misconduct by defense counsel, Dr. Weinstein waffled on his causation testimony as a result of the Court's aggressive cross-examination.

Thereafter, proceedings before the jury recommenced. Samuel's counsel then asked whether Dr. Weinstein had an opinion based on a reasonable medical probability whether the baby would have suffered a respiratory arrest had he remained under professional care in the hospital. The Court sustained defense counsel's objection under Kennemur. RT 961:20-962:5. Dr. Weinstein was then asked if he had an opinion of what a professional nurse would have done upon the event of a feeding where the baby vomited up, what would have been the care that would have been given the baby in terms of feeding him or any other care. The Court then sustained defense counsel's objection under Kennemur. RT 963:17-24.

Thereafter, colloquy ensued between Court and counsel as follows: The Court stated that Dr. Weinstein could not state to a reasonable medical probability that a neonatal nurse would have obtained a better result; thus, he does not have an opinion as to causation; and thus the Court would not permit his opinion as to standard of care on this particular topic because of Kennemur. Samuel's counsel responded: Dr. Weinstein stated that once the baby had the episode at the 5 p.m. feeding, he cannot state with reasonable medical probability that a nurse would have been able to obtain a result better than the mother did. But if permitted, he can render an opinion that with reasonable medical probability the 5 p.m. situation would not have occurred because the nurse would not have fed him at 5 p.m. The Court responded she would not permit such testimony before the jury. RT 965:13-966:10.

Substantive Testimony by Young Lee

Samuel's father, Young Lee, testified on April 10 in relevant part as follows:

On December 26, 1997, the day that Samuel came home from the hospital, the Lee family lived in a one bedroom apartment near Paramount studios on Melrose. That night, Samuel and his twin sister Grace stayed at the apartment with their mother and father. Samuel's grandmother, who lived three or four blocks away, did not stay there at night, but came by to help during the day. RT 1286:26-1288:14.

After he got home from work on December 26, the alarm from the pulse oximeter kept sounding repeatedly, very loudly. During the two and a half months that Samuel was at the

hospital, Young had never heard the monitor alarm going off like this. Because of the constant sounding of the alarm, Young got little, if any, sleep that night. While he was getting ready to go to work the next morning, the alarm sounded repeatedly. RT 1288:15-1290:8.

About 5 or 6 o'clock that afternoon, he received a phone call from his wife advising him that Samuel was not breathing and looked like he was dead, and asked him to call 911 right away. He did so, telling them that something was wrong with his baby son. RT 1290:19-1292:6.

Substantive Testimony by Esther Lee

Samuel's mother, Esther, testified on April 10, following the testimony of her husband:

Esther was 48 when she gave birth to Samuel and Grace. RT 1294:5-10. When she picked Grace up at the hospital she was happy. The following day a nurse came by her house for about an hour and checked Grace. For two weeks after she brought Grace home from the hospital, she did not get as much sleep, which caused her to be tired and fatigued. RT 1296:24-1298:15.

Before she took Grace home from the hospital, the nurses helped her to learn how to bottle-feed Grace and Samuel. They did not tell her anything different as how to feed Grace from how to feed Samuel. Prior to this experience, she had never bottle-fed any other babies. RT 1298:16-1299:3.

Grace was sent home from the hospital without any accompanying equipment, such as an oxygen tank or a pulse

oximeter. However, Samuel was sent home with an oxygen tank and monitoring equipment. RT 1299:14-1300:23. Before Samuel left the hospital, nobody told her anything about the oxygen tank equipment. RT 1301:1-4.

When Esther picked up Grace from the hospital, she looked healthy. When she picked Samuel up at the hospital, he did not look healthy. His face looked swollen and his skin looked kind of bluish. When she mentioned this to the nurse, the nurse responded that the baby looked a little swollen because he had been consuming a lot of formula. RT 1301:25-1302:18.

When Esther went to pick up Samuel at the hospital, she was required to wait because the pulse oximeter ("monitor") was making a loud noise, and she was told that particular machine was out of order and had to be fixed. When she arrived home with Samuel, somebody came by with a monitor and left it there. When she went to pick up Samuel, she was a lot more nervous than when she had gone to pick up Grace because Samuel did not look well, the monitor was very noisy, and she was not sure it would be good for the babies. RT 1302:26-1304:10.

After Samuel was home and the man set up the monitor, she had problems with the alarm noise, which was terrible. The alarm kept ringing. Each time it sounded, she would check the baby and ascertain he was okay. When she tried to push the button to stop the alarm, it would not stop. She was able to stop the alarm only by pulling the plug out and putting it back in. But then it would start sounding again after awhile.

RT 1304:19-1305:8.

Because of the alarm sounding, she was not able to sleep on the night of the 26th. RT 1305:15-1306:4.

Her bottle-feeding schedule for Samuel was every four hours, and every four hours for Grace as well. She fed Samuel and Grace at different times, because their four-hour intervals did not occur simultaneously. RT 1306:5-23.

Whenever the alarm would sound, she would check Samuel to see if he was okay, and on each occasion, he appeared fine. After awhile, she formed the opinion that the monitor was not reliable to warn her if something was wrong with Samuel. RT 1306:25-1307:17.

On December 27, she was expecting a nurse to come by because she was told at the hospital that somebody would be there the next day. Throughout the day she was expecting the nurse to arrive. She wanted to talk to her about the monitor, and wanted the nurse to help her with Samuel and Grace. Her mother-in-law came by Esther's apartment on the 27th to help about 10 o'clock. She went back and forth between her own house and Esther's apartment. RT 1307:18-1308:20.

Esther did not get any sleep during the daylight hours of December 27. During that day, she had to feed both babies, change their diapers, give Samuel medication, and do laundry. RT 1308:21-1309:1.

During the daylight hours, the alarm on the monitor kept on sounding as it had during the nighttime hours. When she heard the alarm, she checked Samuel, and each time he was okay

up until the time of the accident. RT 1309:2-25.

At about 1 p.m. that day, she bottle-fed Samuel. During this feeding he regurgitated the formula a little bit, and she could see the formula in his mouth, but he was okay. RT 1309:26-1310:26.

The next time she fed him was approximately 5 p.m. She was holding the baby and feeding him, and then all of a sudden he became quiet. She shook him and called, "Samuel, Samuel," and realized that formula was coming out of his nose and mouth. She heard the monitor alarm sound during this sequence. She used the hose (bulb syringe) she had been given by the hospital to get the formula out of his nose and mouth, and then tried to administer CPR. But his condition did not change at all. She was almost going out of her mind. She called her husband and asked him to call 911. She did not call 911 herself because of her difficulty with English (she is Korean-speaking, and testified through a Korean-English interpreter). RT 1311:3-1312:28.

The 911 paramedics arrived in about five minutes, and told her they were taking Samuel to Children's Hospital. She drove her car to the Hospital. RT 1313:1-26. RT 1315:15-20.

#### The Last Day of Trial

April 14 was the last day of trial. At the inception of proceedings that day, Samuel simultaneously filed three court documents: (1) Motion to Disqualify Trial Judge for Cause (AA 93); (2) Motion for Mistrial for Misconduct of Attorney Stephen Fraser (AA 112); and (3) Memorandum of Points and Authorities Re:

Causation Testimony by Neonatal Practitioner Camara (AA 128). RT 1501:25-1502:4.

Shortly thereafter, the Court struck the Motion to Disqualify. RT 1502:16-18; AA 107.

Court's Erroneous Denial of Motion for Mistrial

The Motion for Mistrial was factually grounded on Declarations by Samuel's attorneys, Song and Steinhart. The information about the witness intimidation incident set forth is based on that Declaration testimony. In addition, the Declaration testimony contains the following, in summary:<sup>5</sup>

Prior to Dr. Weinstein's trial testimony on April 10, attorney Steinhart had spoken to him several times regarding testimony preparation. On each occasion, Dr. Weinstein consistently opined that, based on reasonable medical probability, the reason that Samuel had suffered his tragic injury was because his mother did not administer the proper standard of care to him, and that had he been under professional medical care in the hospital, he would not have suffered any injury. He stated that causation was obvious in this case.

After the aforesaid witness intimidation incident with attorney Fraser, Dr. Weinstein expressed to Steinhart that he was quite upset with Fraser's threat, and would like to talk to the judge about it. Steinhart responded that as the trial attorney, he would advise the judge himself.

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<sup>5</sup> Declaration of Steinhart, paragraphs 4-14. AA 119.

After listening to Dr. Weinstein's trial testimony, it was obvious to Steinhart that Fraser's intimidation had worked like a charm; that Dr. Weinstein, frightened about being referred over to the D.A. by Fraser on perjury charges, substantially toned down and waffled on his causation testimony to appease Fraser.

After Court recessed on April 10, Steinhart responded to some disturbing voicemail messages that Dr. Weinstein had left for attorney Song by speaking to Dr. Weinstein by telephone. In that conversation, Dr. Weinstein stated that this was one of the worst days in his life. He had spent his life trying to stay out of trouble, but he had gotten himself into a pack of trouble that day. He was worried that Fraser would incite the D.A. to file perjury charges against him, and was further worried that Samuel's counsel and family were going to sue him for failing to testify to the opinions he had previously rendered to Samuel's counsel. He reminded Steinhart that when he requested to speak to the Judge during a break in testimony about the intimidation he had been subjected to by Fraser, the Judge declined to speak to him. He wanted to tell the Judge that he was quite upset by that incident, and therefore, did not feel that this was an appropriate day for him to testify, because of his adverse emotional condition. He felt it was improper for the Judge to decline to speak to him.

Steinhart then advised Dr. Weinstein that he intended to make a motion for a mistrial and wanted to draft a declaration under penalty of perjury for Dr. Weinstein to sign, reflecting

what they had just discussed in their phone conversation. Steinhart advised him that he could not compel him to sign such a declaration, and that Dr. Weinstein would certainly have the opportunity to have his own attorney review the declaration before he signed it. Dr. Weinstein replied that he was too overwhelmed by the whole situation, and did not want to sign such a declaration for fear that he would get himself into deeper trouble than he perceived himself to be in already. He then stated he was too upset to converse any further and the conversation ended.

During argumentation on the Motion for Mistrial, Fraser gave a watered-down version of the witness intimidation episode, stating: "I think I said something to wit: this case is a case that should be considered by the D.A., and walked into the courtroom." RT 1508:14-1510:14.

Steinhart disputed Fraser's version stating: "He unequivocally said in Dr. Weinstein's face that you have committed perjury. I'm going to fricken' report this to the D.A. . . . He definitely said those words in a threatening tone." RT 1514:20-28.

The Court then ruled that Fraser was not going to take the witness stand, and that the Court did not find grounds for granting a mistrial, ruling that she found Dr. Weinstein to be an able, alert, capable, experienced, competent, expert witness, and that nothing about his demeanor suggested that he was incapable of providing testimony. RT 1516:27-1517:9. The Court, however, did confirm that during a break in Dr. Weinstein's testimony, he had requested to speak to the Court, to which the Court responded:

"Absolutely not!"

The Court's Erroneous Exclusion of  
Camara's Causation Testimony

The Court then took up the issues raised by the Memorandum of Points and Authorities Re Causation Testimony by Neonatal Practitioner Camara. (AA 128). During the colloquy, the Court stated that it had previously read the entirety of Camara's deposition. RT 1530:23-26.

In that Memorandum of Points and Authorities, Samuel set forth a summary of the causation testimony given by Camara during her expert witness deposition. AA 131-132.

The first portion of Camara's deposition testimony with respect to causation was upon examination by Hospital's attorney, at pages 119-120 of the deposition transcript:

The question of whether the mother was well-trained to handle adverse events during the feedings that might have been alleviated with a long 12-24 hours of her caring for this infant, learning not only the position to feed him, but what to do when the baby starts choking, what to do when the patient just starts to desaturate, what to do if the baby stops breathing, cleaning out the mouth if he does have formula in it, and exactly how to deal with a choking episode, and was she well-equipped to do this on in infant that was having desaturations. I don't believe she was.

I believe that if the episode that happened on the 27th had happened in the Hospital, that it wouldn't have been nearly as adverse as it was, that it would have been easily

dealt with. That is not pure speculation on my part. I'm fairly confident to say this. I have fed many infants that have trouble during feeding, I feel like that those kind of events can be dealt with appropriately given enough training without the infant coming to the point of needing CPR.  
(Emphasis added).

Following examination by Hospital's attorney, Samuel's attorneys examined Camara at her deposition and elicited the following testimony at deposition transcript, pages 177-184:

Per the admission note of Samuel at Children's Hospital after the incident when Mrs. Lee was feeding him at 5:00 p.m. on Dec. 27, and he ended up going limp. Based on my knowledge of the baby's condition and having read the medical record, the nurse's notes, and all the progress notes and everything else in the progress notes about the baby's condition, the description of the event and based upon my experience of a couple of decades of doing work, with all my training and education and credentials, my opinion, with reasonable medical probability, as to what happened to the baby and why he ended up going limp and ultimately ended up going into cardiac arrest is as follows: Since it was during a feeding, the infant either had problems with the suck, swallow, that was not seen right away, or he had an emesis that blocked the airway. For some reason his airway was blocked and he was not breathing well, and he would have desaturated, turned blue, and either stopped breathing ahead of time, or at that time, at which time the mother would have had to intervene and do

CPR most likely related to some kind of airway obstruction due to the feeding or vomiting during the feeding. The lack of oxygen from and airway obstruction of some kind during the feeding, related to the feeding, would have caused the infant to stop breathing long enough for the heart to be without oxygen and go into cardiac arrest.

At the conclusion of argumentation of the Camara causation testimony issue, notwithstanding Camara's expert witness deposition testimony on the issue of causation, the Court found that neither the letter nor the spirit of CCP 3034 permitted Samuel to offer nurse Camara to testify as to causation. RT 1532:14-17. It is significant to note that the Court's exclusion of Camara's testimony on the issue of causation was based on Samuel's failure to designate her as an expert to testify on causation per CCP 3034, and not on the Court's previous statement that it was preposterous that any plaintiff would seek to prove causation by offering the testimony of a nurse. At the time of that statement, the Court challenged Samuel's counsel to find a single case in which the sole expert witness on causation in a medical malpractice trial was a nurse. RT 1277:3-12. In response to that challenge, Samuel's counsel provided the Court with the case of Longui v. La Societe Francaise De Bien Faisence Mutuelle (1921) 52 C.A. 370, 198 P. 1011, which held that a nurse was qualified to render an opinion as to medical causation. The Court responded that it had read the case and found it to be very helpful. In this connection, Samuel's counsel pointed out that Camara was much more qualified than a mere nurse, in that being a neonatal nurse practitioner, she essentially

operated as a medical doctor in the neonatal intensive care unit, performing admission assessments, doing medical diagnoses, prescribing medications, prescribing lab tests, giving orders to the nursing staff, inserting various lines into babies, and essentially doing everything that a neonatologist medical doctor does, with the exception of circumcisions and certain other surgical procedures. RT 1521:6-22. For a full discourse on Camara's impressive medical credentials, see RT 1534:4-1539:20.

#### Camara's Trial Testimony<sup>6</sup>

Camara gave a summary of Samuel's medical problems from his birth in October 1997 through his discharge from Hospital on December 26, 1997. He was a 28 week gestation premature twin who had originally had respiratory distress syndrome, immature lungs, and was on a ventilator for quite awhile, developed bronchopulmonary dysplasia and was oxygen dependent at the time of discharge. He developed congestive heart failure which complicated the lung disease. He was found to have an arterial-venous malformation in the brain and needed to be transferred to UCLA for the performance of a coil embolism (brain surgery) to remedy the malformation problem, after which he was retransferred back to Hospital. He also had some normal premature feeding difficulties, which included originally gastroesophageal reflux requiring medication which was discontinued prior to discharge. He also had some retinopathy because his eyes were immature so he was followed

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<sup>6</sup> Prior to the Court's hearing Camara's testimony, it stated that any opinion by Camara as to causation was mere speculation, and that in any event, it suspected she was not qualified to render such an opinion. Therefore, an in depth summary of Camara's testimony is reasonably required. RT 632:10-12.

by and ophthalmologist. He also had some anemia, which is common in premature babies. Those were his major problems. RT 1546:24-1548:13.

With respect to the mechanism of how his congestive heart failure impaired his already diseased lung condition: He originally went on a ventilator because his lungs were immature. When they tried to get him off the ventilator, he failed because he seemed to have a lot of fluid in his lungs. In congestive heart failure, the heart is not pumping adequately enough to deal with all of the fluid, so you get a backup in fluid. With the extra fluid in the lungs, it is more difficult for the infant to breath, so he is unable to get off the ventilator. The ventilator, because it is artificial, can cause lung scarring and lung damage, even though it is a life-saving device for the baby. It also causes bronchopulmonary dysplasia, which is a scarring of the lungs, and chronic lung disease. With this disease, babies retain extra fluid in their lungs and do not have the lung reserves that most babies have. If they get a cold, they have much more trouble breathing. RT 1548:15-1549:18.

Having studied the medical records through the time of Samuel's discharge, Camara formulated the opinion that with reference to Samuel's medical condition (as differentiated from family planning issues), his discharge was within the appropriate standard of care. She opined that Samuel was medically stable enough to be discharged. Further, it was within the standard of care to discharge him with an oxygen tank, humidifier, and pulse oximeter. RT 1549:26-1556, 1552 11-16.

With respect to family planning issues, as to whether there was adequate training and education, and understanding of the training and education by his home health care providers, whether the standard of care with respect to sending Samuel into that environment without professional care was complied with or not, she rendered the opinion that the parents were not adequately prepared to receive Samuel, the mother was not comfortable with the training she had received, and was not comfortable in the care of Samuel, nor with the technological equipment. RT 1552:18-1553:7.

Part of the medical staff's responsibility is family care, making sure that they prepare the family to accept the child, that the family knows how to deal with the particular child and his medical needs. In Samuel's case, the mother needed to be very comfortable with the oxygen, understand why Samuel needed it, that it was flowing right, and whether it ever needed to be increased. Samuel was having desaturations with his feedings, that is, the oxygen concentration in his blood would go down; meaning, while he was feeding, sometimes he was not breathing effectively and was not getting sufficient oxygen. In the Hospital, the nurses would deal with this by stopping the feeding, and giving him a chance to rest. Up until December 23, they occasionally would increase the oxygen to help him recover. Samuel's mother needed to know how to do all these things also.

Positioning when feeding an infant, especially with bronchopulmonary dysplasia, is important because they need to be aligned and comfortable in feeding since they must be able to suck, swallow, and breath all at the same time. A premature baby has

more trouble learning to suck, swallow, and breath. He is already working hard to breath and has increased difficulty with all of that. The mother needs to know how to deal with that, how to know if Samuel is distressed during feeding, and if so, exactly how to intervene with him.

She also needs to know about the pulse oximeter. How to put it on appropriately, if it is reading appropriately, what to do when it alarms, and how to know what is a true alarm or a false alarm. She also has to be trained about what happens when an emergency occurs. Parents need to receive CPR training, and how to resuscitate the baby in case of an emergency. The medical staff is responsible to make sure that all those that are involved in the care of the baby at home receive this training--mother, father, and whoever else would be involved in care. RT 1554:24-1556:15.

Whoever is going to be taking care of the baby in the home has to receive this training. It is very hard for a technologically dependent child to have only one caregiver. A mother needs someone else in the home who can provide care. It is hard, especially for anyone with twins, to be the only one caring for the babies. When you have a baby that requires such extra care, it can be exhausting. Samuel required medication, oxygen, and a monitor that was going off all the time. It is almost impossible for someone to render care 24 hours a day with the monitor going off. The mother needs to sleep some of the time, to rest some of the time, especially because she had another baby to take care of. RT 1556:20-1557:9.

Since Samuel was having some desaturations during feedings, anyone feeding him would have to know how to appropriately position him, to watch him feeding, to watch for when he was having any trouble, to give him breaks during that time, to stop to burp him, to watch for his color, to be able to monitor the pulse oximeter if it is going off, whether to stop if he spits up at all, and how to deal with that. There is a bulb syringe with which you have to suction out his mouth and make sure he continues to breathe well.

With respect to positioning, one has to make sure the baby is straight and not too far forward or hyperextended, because that will block the airway. It is difficult for them to be swallowing and breathing all at the same time unless their airway is completely open.

In terms of watching the baby to see if he is having difficulty or is in trouble, you are watching to see that he is calmly sucking, swallowing, and relaxed, whether he is starting to struggle in any way, or whether he is starting to breath fast. You have to watch his color. A baby who is feeding should remain pink. If they are not getting enough oxygen, they start to get a little bluish discoloration or start to get pale, they start to struggle like anybody that is not getting enough oxygen, and the mother needs to be able to recognize those things in her baby and give a baby a break in the feeding, and be able to intervene if he spits up in order to clear the airway. RT 1558:15-1559:3.

A caregiver of such a baby has to know how to intervene if there are problems. When he is feeding, if he is having difficulty, the first response is to stop feeding him, hold him a

little upright, make sure he is breathing well. If that does not work, clean out his mouth with a bulb syringe and see if there is any formula or anything blocking the airway. This will stimulate him to breathe through clearing his airway. One has to make sure he can breathe and is relaxed before continuing the feeding. If that does not work, one needs to know the steps of CPR in order to get him breathing and begin to support his life in an emergency. RT 1564:1-1565:1.

Regarding remedies that can be administered if the baby is not breathing in regard to technology that he is hooked up to: With the oxygen, up until December 23, the nurses notes reflect that they were stopping the feeding and increasing the oxygen a little bit, and allowing him to recover before proceeding with feeding. In this case, Samuel was on 1/8 of a liter per minute, and then the nurses would increase that to a quarter or half a liter if Samuel needed a little bit extra oxygen. One needs to know how to increase and how much would be appropriate to increase. How long would be dependent on his response. If he responds well, once he is pink again and relaxed, then you go back to where he was. A baby can be harmed by very high levels of oxygen for too long a time, which damages his eyes. So oxygen is to be increased just until it is not necessary any longer and then decreased again. RT 1565:3-1566:24.

The mother must also be familiar with the functioning of the pulse oximeter. The mother needs to know if it is picking up well. If it is not in place, which is frequent if the baby moves, the pulse oximeter will give false alarms. The pulse oximeter site

must be moved, because if you leave it one place too long it will cause a skin breakdown. Pulse oximeters have screens with readouts of the heart-rate and the oxygen saturation, and there is a wave form. When a pulse oximeter alarms in the hospital, the staff first looks at the baby and then checks to see if it is reading appropriately, has a good wave form. The mother needs to know and be aware of all of these things. RT 1556:24-1568:23.

Pulse oximeters can give off false alarms. A true alarm is when the baby's oxygen saturations are low or when the heartbeat is low. False alarms occur when the pulse oximeter is not positioned appropriately. If the baby is moving around quite a bit, the pulse oximeter might not correctly pick up the saturation or the heartbeat, and give off a false alarm. RT 1568:24-1570:1. Training as to what to do when there are false alarms consists of adjusting the probe and finding a new placement for it; checking the connection which sometimes come out of the machine, and just knowing how to trouble-shoot the machine. RT 1570:7-15.

Based upon the nurses' notes and the Declaration of Mrs. Lee, Camara's opinion was that Esther was not adequately trained and educated on the pulse oximeter. She complained several times in the Hospital that the alarm was always sounding, was concerned that she would not be able to sleep, and did not think it worked appropriately. In talking to the social worker at Children's Hospital, she felt that the machine was malfunctioning. RT 1571:9-19.

Camara's opinion was that Esther was not adequately trained in the use of the oxygen flow equipment based upon Hospital

documentation, including that she lacked understanding with respect to increasing the oxygen with feedings. Camara saw no notation in the Hospital records that she was instructed on this. RT 1572:1-10.

Camara further opined that Esther was not adequately trained as to the different aspects of feeding the infant, including positioning, watching, intervening, etc. She did not understand desaturations and was very concerned. Several times in the nurse's notes, they noted her concern and that it would be helpful for her to room in for eight to 12 hours with the baby, performing all of the care and using all of the home equipment so that she would become very comfortable with using it, while still having the nursing staff around to help and to intervene if there were any problems. RT 1572:11-16.

Camara further opined that Esther was not adequately trained in CPR, because the Hospital documentation did not substantiate that she was; and Mrs. Lee's Declaration states that she was very quickly trained in CPR. RT 1572:27-1573:8.

A caregiver of Samuel should have been trained that he was to be fed differently from his twin sister, much more carefully, with breaks, and with watching him carefully. It would not be proper for the mother to feed Samuel the same way she fed his sister. RT 1574:1-14.

The Hospital records reflect that the bedside nurse recommended that Esther room in from eight to 12 hours as part of her training; and on December 24, reflects a doctor's order that as a prerequisite to Samuel's being discharged to the care of his

mother, she would have to room in and do well in caring for him. RT 1574:15-1577:6. The Hospital record reflects that on December 24, Esther arrived at 1530 and fed the baby at 1700; and in doing so, she was fidgeting around and had to be calmed down because she was still very anxious at the time, requiring the nurse to have her sit down, breathe, and ask her to relax her shoulders. That was two days before Samuel's discharge. That visit would not qualify as Esther's rooming in and doing well: it was not for an extended period of time; it was not with the discharge equipment; and she did not do well. There is nothing in the Hospital record after that episode that Esther was ever informed that it was very important to spend eight to 12 hours with the baby. RT 1577:7-1578:28.

Exhibit 15-850 (Nurse's Note of December 25, 1997) reflects that Esther was still concerned about the pulse oximeter, about all of the alarming, about not understanding that false alarms are normal, and that the home machine was not correlating to the Hospital machine in its readings, so she did not feel it was appropriate. RT 1578:28-1579:18.

On December 25, there is a Nurse's Note (Exhibit 849) that states both mom and grandmother need to know how to use the pulse oximeter. The Hospital record contains no notation that the grandmother was ever trained on the pulse oximeter. The proper standard of care is to so train anyone who is going to be taking care of the baby. RT 1579:19-1580:11.

Exhibit 15-898 (List of Parenting Skills) documents that Esther was instructed on the use of the bulb syringe, but there is

no documentation that she gave a return demonstration to show that she had comprehended the instruction. It is important that a return demonstration be given, and that it be documented. RT 1580:19-1581:18.

Plaintiffs' counsel asked Camara whether during her deposition while she was being examined by the defense attorneys she expressed an opinion as to whether the harm that was complained of to Samuel would have happened to him if he had remained under professional care in the Hospital setting, as opposed to being sent home to the unprofessional care of his mother. The Court thereupon sustained defense counsel's objection to the question, and would not permit plaintiffs' counsel to make an offer of proof. RT 1585:19-1586:16.

Plaintiffs' counsel then asked Camara whether she had an opinion based on a reasonable medical probability whether the subject harm to Samuel would have occurred had he remained under professional care at the Hospital. The Court sustained defense counsel's objection to that question. Plaintiffs' counsel then asked Camara whether based upon the information obtained by Camara from reading Mrs. Lee's Declaration testimony and from reading the Children's Hospital progress note, and assuming that those facts were an accurate reflection of the sequence of events that occurred on the afternoon and evening of December 27, whether she had an opinion based on reasonable medical probability as to medically the mechanism that resulted in Samuel's going into cardiac arrest. The Court sustained defense counsel's objection to that question. The

Court did not allow plaintiffs' counsel to make an offer of proof as to either of those final two questions.

ARGUMENT

I. THE TRIAL COURT'S EXCLUSION OF CAUSATION TESTIMONY BY SAMUEL'S EXPERT WITNESSES WAS IN ERROR, BECAUSE:

A. Hospital Lacked Standing to Request Exclusion of Any Portion of The Testimony of Samuel's Expert Witnesses, Because Hospital Had Failed to Fully Comply With The Expert Witness Disclosure Requirements of CCP 2034.

To have standing to object to an opposing party's expert testimony, the objecting party must have "made a complete and timely compliance" with the CCP 2034 expert witness disclosure requirements. CCP 2034(j). Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (Rutter Group 2002), Section 8:1710. Those requirements include the exchanging of an expert witness declaration signed by the attorney of the party designating the expert, which must include, amongst other things, a "brief narrative statement of the general substance of the testimony that the expert is expected to give." CCP 2034(f)(2)(B). In the leading case of Kennemur v. State of California (1982) 133 Cal.App.3d 907, 184 C.R. 393, the Court explained the meaning of this requirement at 919:

"In our view, this means the party must disclose either in his witness exchange list or his expert's deposition, if the expert is asked, the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable

notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for a cross-examination and rebuttal of the expert's testimony. Only by such a disclosure will the possibility of a reasonable settlement of the case before trial be encouraged." (Emphasis supplied).

The expert witness declaration of Hospital (AA 138) failed to make a complete compliance with the expert disclosure requirements of CCP 2034, in that it failed to set forth a "brief narrative statement of the general substance of the testimony that the expert is expected to give," as that statutory requirement is explained in Kennemur. For example, in Hospital's expert witness declaration, regarding its medical experts, with respect to Gordon-Lomax, R.N., the general substance of the testimony was stated as "nursing and discharge planning;" with respect to Schwartz, M.D., it was stated as "standard of care, causation and damages;" and with respect to Schultz, M.D., it was stated as "standard of care, causation and damages, and as to his independent medical examination of the minor Plaintiff."

The above-quoted statements do not contain a "brief narrative statement of the general substance of the testimony" expected from Hospital's experts as defined in Kennemur. Hospital failed to comply with CCP 2034, in that it did not give reasonable notice to Samuel of the specific areas of investigation by the experts, the opinions they had reached and the reasons supporting the opinions, to the end that Samuel could prepare for cross-examination and

rebuttal of the experts' testimony. Therefore, pursuant to 2034(j), Hospital did not have standing to object to nor seek exclusion of any portion of the testimony of either of Samuel's expert witnesses.

It is well-established that a party's lack of standing to assert any legal claim or right is treated as a "jurisdictional" defect, and is not waived by the other party's failure to raise it by demurrer, answer, motion or objection: "[C]ontentions based on a lack of standing involve jurisdictional challenges that may be raised at any time in the proceeding." Common Cause of California v. Board of Supervisors (1989) 49 C.3d 432, 438, 26 C.R. 574, 577 (lack of standing can be raised for first time on appeal); Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n (1999) 21 C.4th 352, 361, 87 C.R.2d 654-659.

B. Assuming For the Sake of Argument That Hospital Had Standing to Object to The Causation Testimony of Expert Witness Camara, Any Defect in Samuel's Expert Disclosure Regarding Camara's Testimony on That Issue Was Remedied by Her Testimony on Causation During Her Expert Witness Deposition.

Kennemur was an automobile accident case in which plaintiff contended that defendant was liable because it failed to prevent, remedy, or adequately warn of a known dangerous condition on public property, i.e., ice on a state highway. The Trial Court rendered judgment for defendant and plaintiff appealed. On appeal, the Court held, amongst other things, that the Trial Court correctly applied the statute requiring pre-trial disclosure of the general substance of an expert witness' testimony, and the statute

governing the testimony of an expert witness on rebuttal, where the general substance of his proposed testimony was not disclosed before trial. The decisive issue on appeal was plaintiff's failure to disclose the expected testimony of his expert, Mitchell, concerning the tire tracks either at Mitchell's deposition or as required by CCP 2037.3 (superceded by CCP 2034). Defendant's designated expert was O'Shea. When plaintiff decided that he would use Mitchell at trial to rebut O'Shea's opinion concerning the tire tracks, he was required to have previously disclosed to defendant the substance of Mitchell's opinion and offer him for deposition pursuant to the expert designation statute. In holding that plaintiff was not entitled to adduce testimony of Mitchell's opinion on that subject in rebuttal, the Court held at 919 (including footnotes):

"If appellant [plaintiff] had disclosed Mitchell's opinion concerning the tire tracks in his deposition, the statutory noncompliance would have been harmless since respondent would have been afforded the opportunity to prepare for cross-examination and rebuttal of Mitchell's opinion. For example, respondent also failed to comply with section 2037.3 with respect to Mr. O'Shea's testimony because the general substance of O'Shea's testimony was not included in the witness exchange list. Nevertheless, during O'Shea's deposition, he opined that the tire tracks belonged to the V.W. and stated his reasons in support of that opinion; thus, appellant was afforded the opportunity of preparing for O'Shea's cross-examination thereby rendering harmless

respondent's non-compliance with section 2037.3. . . .

"When appropriate demand is made for exchange of an expert witness list, the party is required to disclose not only the name, address, and qualifications of the witness but the general substance of the testimony the witness is expected to give at trial (Sect. 2037.3). In our view, this means the party must disclose either in his witness exchange list or at his expert's deposition, if the expert is asked, the substance of the facts and the opinions that the expert will testify to at trial."

Camara rendered extensive opinions and reasons therefor on the issue of causation during her expert witness deposition. She first rendered opinions and reasons therefor regarding causation upon examination by Hospital's counsel. Thereafter, she rendered further opinions and reasons therefor on the issue of causation upon examination by Samuel's counsel. By reason of Camara's aforesaid testimony on the issue of causation at her expert witness deposition, per Kennemur, Samuel's deficient CCP 2034 expert disclosure regarding Camara's causation testimony was remedied. Thus, the Court's exclusion of Camara's testimony on the issue of causation was in error.

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C. Having Granted Samuel's Motion to Augment His CCP 2034 Expert Witness Disclosure With Respect to Dr. Weinstein, And Ordering That He Be Permitted to Testify to the Causation Opinion He Had Rendered in His Motion For Summary Judgment Declaration, the Court Erred in Thereafter Reneging on This Order by Disallowing Dr. Weinstein to Testify to His Causation Opinion Before the Jury.

During an Evidence Code 402 hearing out of the presence of the jury, Dr. Weinstein rendered a causation opinion to the effect that, with reasonable medical probability, if Samuel had been under the care of professionals at Hospital, he would not have sustained the catastrophic injury he suffered under his mother's care. Thereafter, Dr. Weinstein waffled on this opinion under leading question cross-examination by the Court itself, essentially recanting his previous causation opinion. Samuel respectfully submits that Dr. Weinstein's waffling was a result of his testifying while suffering the effects of the wrongful witness intimidation practiced on him by Hospital's counsel. See Argument II, below. Notwithstanding, before waffling on his causation opinion under cross-examination by the Court, Dr. Weinstein did render a causation opinion favorable to Samuel. Since the Court had previously ruled that Dr. Weinstein was to be allowed to testify to his causation opinion before the jury, the Court erred in disallowing him to do so. His waffling properly went only to the weight of his testimony, not to its admissibility. Before the jury, opposing counsel could have cross-examined him about the contradictory opinions he had made during the 402 hearing, and commented on the same during summation argument. However, it was

error for the Court to exclude Dr. Weinstein's testimony before the jury because of its inconsistency.

II. THE COURT ERRED IN DENYING SAMUEL'S MOTION FOR MISTRIAL, GROUNDED ON THE WITNESS INTIMIDATION MISCONDUCT OF DEFENSE COUNSEL.

The most common ground for a mistrial motion is alleged misconduct by opposing counsel. Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS & EVIDENCE (Rutter Group 2003), § 12:21. It is well-settled that when a party or his counsel becomes aware of facts constituting misconduct in the proceedings, he must promptly bring such matters to the attention of the Court if he desires to object to it, or he will be deemed to have waived the point. Weathers v. Kaiser Foundation Hospitals (1971) 5 C.3d 98, 103, 95 C.R. 516, 519. Challenging misconduct during trial is normally a multi-step procedure: (1) objection to the misconduct; (2) a motion for mistrial (if that is what is desired); or (3) a request that the Court admonish the jury and/or reprimand counsel as an alternative to granting mistrial. These alternative motions are particularly important where counsel does not want a mistrial. Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS & EVIDENCE (Rutter Group 2003), § 12:133.

A motion for mistrial is usually made orally because it must be made immediately after the misconduct occurs to avoid waiver. However, a written motion is necessary for misconduct occurring outside the presence of the Court, because supporting declarations are required. Where the alleged misconduct did not occur in the judge's presence, declarations are required to establish an evidentiary record for the mistrial motion. Id. at §§ 12:151,

12:156.

Samuel complied with the above procedure. Immediately after opposing counsel's witness intimidation misconduct, Samuel's counsel brought the same to the attention of the Court. The Court responded by improperly failing to make any inquiry about the allegations, especially where a specific allegation of misconduct was made by Samuel's counsel and flatly denied by defendant's counsel. The Court further erred in stridently ordering Samuel's counsel not to speak of the subject again. Notwithstanding this improper instruction by the Court, Samuel's counsel thereafter presented a written motion for mistrial based upon attorney misconduct as soon as they were practically able to prepare the motion.

Substantively, the mistrial motion was well-taken. Arguably, the witness intimidation conduct of Hospital's counsel constitutes criminal conduct in violation of Penal Code 136.1(a) and/or Penal Code 133. Section 136.1(a) provides in relevant part:

"[A]ny person who does any of the following is guilty of a public offense and shall be punished in County jail for not more than one year or in state prison . . . knowingly or maliciously attempts to prevent or to dissuade any witness or victim from attending or giving testimony at any trial . . . ."

Penal Code 133 provides:

"Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statements, representations, token, or writing, to any witness or person

about to be called as a witness upon a trial, proceeding, inquiry or investigation whatsoever authorized by law with intent to effect the testimony of such witness is guilty of a misdemeanor."

For the purpose of Penal Code 136.1, "malice" means any attempt to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.

An example of witness intimidation misconduct of counsel was illustrated in People v. Hill (1998) 17 C.4th 800, 72 C.R.2d 656, in which the Supreme Court reversed a murder conviction on the ground of misconduct of the prosecuting attorney, which included, amongst other things, intimidating one of defendant's witnesses. The witness intimidation consisted of the prosecutor's threatening witness Berry with a perjury prosecution. Berry, who ultimately testified for defendant and claimed that the victim's killer did not look like defendant, had previously given a statement to the police. Berry was a 23 year old mentally retarded person. The prosecutor told Berry's mother that if Berry lied on the stand or had given the police false information, the prosecutor would not hesitate to file a felony charge on him. In holding that the prosecutor's threat to charge a defense witness with perjury should he testify for the defense constituted attorney misconduct, the Court held at 835:

"Because Berry eventually testified for defendant, no prejudice flowed from this individual act of misconduct.

[Citation]. Nevertheless, we cannot emphasize strongly enough

that, although Morton [the prosecutor] could seek to impeach Berry at trial if he testified inconsistently with his pretrial statement, it was improper to have threatened him in advance of trial with a perjury prosecution. Had Berry succumbed to Morton's threat and refused to testify, Morton's blatantly unethical behavior would have threatened to undermine the entire adversary process, as Berry . . . was a key defense witness. Indeed, although Berry found the courage to testify for the defendant, risking a threatened perjury prosecution, it is possible that the added stress engendered by Morton's threat of prosecution effected his emotional state and his demeanor on the stand, evidencing a hesitancy that Morton exploited in closing arguments. This, then, comprises just one more example of Morton's misconduct during defendant's trial."

In People v. Hill, supra, the intimidated witness chose to testify, and his testimony was favorable and exculpatory of the defendant. Hence, the Court held that although the threat of a perjury prosecution constituted attorney misconduct, it was not prejudicial misconduct. In so holding, however, the Court noted that even though Berry testified, it was possible that the intimidating threat might be deemed prejudicial if it effected the emotional state and demeanor of the witness on the stand, thereby adversely affecting the believability of his testimony.

In the instant case, although Dr. Weinstein did render expert testimony on behalf of Samuel at trial, because of opposing counsel's intimidating threat and Dr. Weinstein's ensuing fear of

being subjected to a criminal prosecution for perjury, the quality of his testimony was adversely effected, which is evidenced by his waffling on the causation issue.

Furthermore, although unwitting, the Court's conduct further added to Dr. Weinstein's intimidated emotional state when the Judge refused his overture to talk to her by responding to his inquiry: "Absolutely not!" As testified to in the Declaration of Steinhart in Support of Motion for Mistrial, Dr. Weinstein wanted to advise the Court that he did not feel that he should testify that day because of his adverse emotional condition resulting from the intimidation.

Following the Court's rebuff of Dr. Weinstein, the Court magnified Dr. Weinstein's state of intimidation when it aggressively cross-examined him with leading questions, which caused him to recant his previous causation testimony which was favorable to Samuel.

When Samuel's counsel immediately brought the witness intimidation conduct of Hospital's counsel to the attention of the Court, the Court should have made inquiry into the accusation, permitting Dr. Weinstein to address the Court and/or testify about it, especially where the accusation of intimidation was made to the Court by Samuel's counsel, and sharply denied by defense counsel. Had the Court properly addressed the issue at that time, Dr. Weinstein's state of intimidation might have been remedied; and if not, he might have been permitted to testify another day after his peace was restored.

Under all of the above circumstances, the Court erred in

denying the Motion for Mistrial.

III. THE COURT ERRED IN AWARDING COSTS AS AGAINST SAMUEL'S PARENTS; AND FURTHER ERRED IN AWARDING EXPERT WITNESS FEES CHARGED FOR CONSULTING SERVICES, RATHER THAN IN PREPARATION FOR TRIAL OR DURING TRIAL.

On February 20, 2003, the Court filed a Judgment under CCP 437c, ordering that plaintiffs Esther and Young take nothing on their action as against Hospital, and that Hospital was entitled to costs in the amount of \$\_\_\_\_\_ as against Esther and Young. AA 27. Notice of Entry of said Judgment was served by Hospital on February 26, 2003. AA 30.

A Memorandum of Costs must be served and filed within 15 days after any party's service of notice of entry of judgment. CRC 870(a)(1). This time limit is mandatory, and failure to timely file and serve a Memorandum of Costs results in a waiver of costs. Sanabria v. Embrey (2001) 92 C.A.4th 422, 111 C.R.2d 837; Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co. (1990) 223 C.A.3d 924, 227 C.R. 899.

CCP 437c(k) provides that: "Except when a separate judgment may properly be awarded in the action, no final judgment may be entered on a motion for summary judgment prior to the determination of the action . . . ." (Emphasis added). The emphasized language in the summary judgment statute implicates the principles of the so-called "one judgment rule," which was discussed in Degrandchamp v. Texaco, Inc. (1979) 100 C.A.3d 424, 431-432, 160 C.R. 899 (disapproved on other grounds), in which the Court stated:

"The general rule precludes piecemeal disposition of

several counts in a complaint. That rule is stated by our Supreme Court in Bank of America v. Superior Court [citation]:

"There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains . . . ."

"There are exceptions to this rule, and there is at least one acceptable device of avoiding it under certain circumstances.

"The first exception applies where the judgment disposes of all issues to be determined as to one party. Thus, where the cause of action left undisposed of is against a different defendant than the one dismissed, a several judgment is proffered. [Citations]. Likewise, where all issues as to one party plaintiff are disposed of, an appealable judgment results. . . .

"It is settled that the rule requiring dismissal does not apply when the case involves multiple parties and the judgment is entered which leaves no issue to be determined as to one party.'"

Specifically with respect to judgments entered under CCP 437c, the rule was stated in Etienne v. DKM Enterprises, Inc. (1982) 136 C.A.3d 487, 489, 186 C.R. 321, wherein the Court held:

"Although the trial court has authority to grant partial summary judgment . . . the general rule is that such an order is reviewable only upon an appeal from the final judgment ultimately rendered in the case. [Citations]. The general

rule does not apply, however, when one of multiple parties seeks review of a disposition which as to him leaves no issue to be determined. [Citations]. In this case, the order granting partial summary judgment disposed of all the causes of action involving Bobby.

" '[I]t better serves the interests of justice to afford prompt appellate review to a party whose rights or liabilities have been definitively adjudicated, than to require [her] to await the final outcome of trial proceedings which are of no further concern to [her].' [Citation]."

Based on the above authority, the Summary Judgment entered against Esther and Young on February 20, 2003, was a final, appealable judgment. Therefore, the 15 days in which Hospital was required to file its Memorandum of Costs commenced to run on February 26, 2003, when it served Notice of Entry of said Judgment. The Memorandum of Costs was untimely, as it was filed and served on or about August 1, 2003. Therefore, Hospital's right to recover costs against Esther and Young on the Summary Judgment was waived.

The Judgment appealed from herein was entered on May 16, 2003 in favor of Hospital and against Samuel, and provides that Samuel take nothing on his action against Hospital, and that Hospital is entitled to costs in the amount of \$\_\_\_\_\_ against Samuel. Under that Judgment, costs can be awarded only against Samuel as the losing plaintiff, and not against Esther in her capacity as Samuel's guardian ad litem. Kemp v. Lynch (1934) 220 C. 505, 31 P.2d 375; Lynch v. Kemp (1935) 4 C.2d 440, 49 P.2d 817. A person serving in the capacity of a guardian ad litem for a party who

loses a civil action is not personally liable for costs awarded against the losing party. Ibid. This is so even if the person serving as guardian ad litem would personally have received pecuniary benefit if his or her ward had prevailed in the action. Ibid.

As to Samuel, the Court erred in awarding to Hospital, expert witness costs incurred by it for services rendered by its experts that were not reasonably necessary in the preparation for trial or during trial. CCP 998(c)(1) provides in relevant part:

"If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award . . . the Court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to recover costs of the services of expert witnesses, . . . actually incurred and reasonably necessary in either, or both the preparation for trial . . . or during trial . . . of the case by the defendant." (Emphasis added).

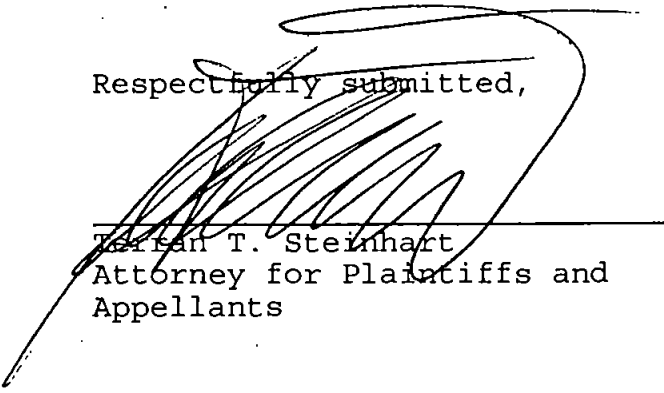
Prior to being officially designated as an expert witness under CCP 2034, an expert is merely an expert consultant, rather than an expert witness. Hospital did not designate its expert witnesses until December 30, 2002. Thus, all expert costs incurred by Hospital prior to that date were not incurred for the services of expert witnesses in preparation for trial or during trial, but were incurred for the services of expert consultants. In support of Hospital's opposition to Samuel's Motion to Strike and/or Tax Defendant's Memorandum of Costs, Hospital attached copies of the statements for services of its various experts. AA 223. Of the

statements attached, the only ones that reflected expert services rendered after December 30, 2002, were the following: Gene Bruno, 3/7/03, \$337.50; Paul Schultz, M.D., 4/20/03, \$100; and Jacquie Lomax, 4/3/03, \$765, for a total of \$1,112.50. The Court awarded Hospital the entirety of its expert witness fees claimed in the amount of \$16,478.75. The Court was in error in so ruling, in that Hospital was entitled to expert witness costs in the amount of only \$1,112.50.

CONCLUSION

For all of the reasons set forth above, the Judgment appealed from should be reversed. Furthermore, no costs should be awarded against Esther and Young Lee on the Summary Judgment entered against them. Moreover, if the Court does not reverse the Judgment appealed from, no costs allowed thereunder should be awarded against Esther Lee in her capacity as guardian ad litem, and the amount of expert witness fees should be reduced from \$16,478.75 to \$1,112.50.

Respectfully submitted,

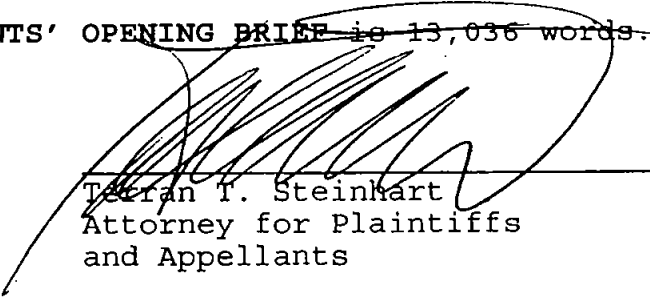


Terrian T. Steinhart  
Attorney for Plaintiffs and  
Appellants

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c)

Counsel for plaintiffs and appellants hereby certifies that  
the number of words in APPELLANTS' OPENING BRIEF ~~is 13,036 words.~~

Dated: March 25, 2004



Terian T. Steinhart  
Attorney for Plaintiffs  
and Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANTS' OPENING BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and five copies to the California Supreme Court per said Service List; and that envelope was placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed on March 26, 2004.



Terrian T. Steinhart

SERVICE LIST

CALIFORNIA SUPREME COURT  
300 S SPRING ST  
LOS ANGELES CA 90017

KRISTEN J HEIM ESQ  
FONDA & FRASER  
222 S HARBOR BLVD STE 600  
ANAHEIM CA 92805-3701  
[Attorneys for Defendant GOOD SAMARITAN]

HON ELIZABETH A GRIMES  
C/O LOS ANGELES SUPERIOR COURT CLERK  
111 N HILL ST  
LOS ANGELES CA 90012

689\AOB.3

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