

1 HON. CHRIS R. CONWAY (RET.)
2 Judicate West
3 601 S. Figueroa, Suite 4000
4 Los Angeles, CA 90017
5 Tel: (213) 223-1113
6 Fax: (213) 223-1114

Arbitrator

7 **IN THE MATTER OF ARBITRATION**

8 **BETWEEN**

9 **), Individually and as Successor-In-) BINDING ARBITRATION AWARD**
10 **Interest,)**
11 **Claimants.)**
12 **vs.)**
13 **)**
14 **)**
15 **Respondents.)**
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17 This is a binding arbitration based upon claims of wrongful death and loss of consortium arising
18 out of allegations of medical negligence or medical malpractice committed by Respondents in their care
19 and treatment of . The Claimants are the Estate of and
20 (hereinafter "Claimants") and Respondents are ;

21 ; and , M.D. (hereinafter "Respondents"). The arbitration
22 hearing in this matter was held on April 29 and 30, 2013, before the undersigned as the agreed upon
23 Arbitrator. Claimants were represented by attorneys, and and the
24 Respondents were represented by attorneys, and .

25 The following individuals were sworn and testified during the hearing:
26 , M.D.; ; ; , M.D.;
27 , M.D.; and , M.D. Claimants and Respondents, through their respective counsel,
28 each submitted a large number of Exhibits, all of which were received into evidence pursuant to

1 stipulation of counsel. At the conclusion of the Arbitration Hearing the matter was deemed submitted
2 by the Arbitrator, who now renders his award as hereinafter set forth.

3 The evidence clearly showed that had been a patient of Respondents for many
4 years prior to May 14, 2007, and remained a patient of Respondents' up until May 13, 2011, when he
5 passed away, however, it is the period between May 14, 2007, and the end of June, 2007, that is the
6 subject of this proceeding. The medical records received in evidence indicate that Mr. presented
7 to , M.D. on May 14, 2007, with complaints of shoulder pain, a rectal problem and persistent
8 episodes of epigastric pain. The records further indicate that Dr. ordered, among other tests, an
9 ultra sound of Mr. abdomen. The ultra sound ordered by Dr. was performed on June 13,
10 2007, and resulted in a finding of "Small echogenic mass is seen in the posterior right hepatic lobe and
11 measures 2.2 x 2.3 x 3.2 cm." Under the paragraph entitled "Impression" it was noted that a "small
12 echogenic mass is seen in the posterior right hepatic lobe. This could represent a hemangioma;
13 however, hepatocellular carcinoma cannot be completely excluded. Recommend further evaluation with
14 liver protocol CT or MRI." Dr. testified that he never saw the ultra sound report and the evidence
15 is undisputed that no follow up testing of any kind was performed on Mr. until September, 2010,
16 when a second ultra sound of Mr. abdomen was performed which showed that the mass
17 detected on the June, 2007, ultra sound had grown significantly in size.

18 Claimants contend that Respondents' failure, and more specifically that of Dr. , to conduct
19 further testing on Mr. following the June 2007, ultra sound constitutes negligence and that such
20 negligence was the direct cause of Mr. death in 2011. Respondents dispute the contention that
21 anything they did or did not do in 2007 caused Mr. death in 2011.

22 , M.D. testified on behalf of the Claimants and opined that Dr.
23 conduct in failing to follow up on the results of the June 2007 ultra sound was below the standard of care
24 and therefore constituted negligence on his (Dr.) part. Dr. further opined that
25 Dr. should have ordered further diagnostic testing for Mr. to determine the full extent of
26 his condition or illness in order to determine the best method of treatment, either surgery, chemotherapy,
27 or both for Mr. , however, Dr. also opined that chemotherapy, even if done in
28 2007, would not have helped Mr. . He also testified that even if surgery had been performed on

1 Mr. in 2007 he would have had less than a 50% chance of surviving more than three years. The
2 evidence in this case clearly shows that in fact, Mr. survived approximately 4 years beyond 2007.
3 On cross examination, Dr. opined that "no treatment in 2007 would have made any
4 difference in the outcome of this case".

5 , M.D. testified on behalf of Respondents and based upon her review of Mr.
6 medical records she opined that he was not a surgical candidate in 2007. She further opined
7 that, to a reasonable degree of medical certainty, no treatment in 2007 would have helped Mr. nor
8 would it have made any difference in the ultimate outcome of this case. As noted above, Dr.
9 , both in his testimony at the Arbitration Hearing and in his deposition testimony, came to the
10 same conclusion.

11 At the conclusion of the presentation of evidence on behalf of the Claimants, Respondents made
12 a Motion For Judgment of Nonsuit based upon the contention that Claimants had failed to sustain their
13 burden of proof on the issue of "causation". After reviewing the Motion and hearing oral comments
14 from counsel for both parties, the Arbitrator denied the Motion.

15 As noted above, there were several other witnesses who testified at the hearing, however, it is the
16 testimony of Dr. and Dr. that hold the key to the outcome of this case.
17 California law is clear that Claimants' have the burden of proof on all issues and must prove their case
18 by a preponderance of the evidence (the more likely than not standard) (CACI 200). It is equally clear
19 that medical negligence is determined only by expert testimony (CACI 501 & 502). It is also clear that
20 in order to prevail in a medical negligence case the Claimants must meet their burden of proof as to the
21 issue of negligence, the issue of causation and the issue of damages. After a careful review of all the
22 evidence in this matter, the Arbitrator finds that while the Claimants may have met their burden of proof
23 as to the issue of negligence, which finding was impliedly conceded to by Respondents, they have not
24 done so as to the issue of causation. Both Dr. and Dr. agreed that nothing
25 Respondents could have or should have done in 2007 concerning Mr. condition or illness would
26 have made any difference in the outcome of this case. Claimants have failed to show, assuming for the
27 moment that Respondents were negligent in their care and treatment of Mr. in 2007, such
28 negligence caused any harm or damage to Mr. . There was no evidence that Mr.

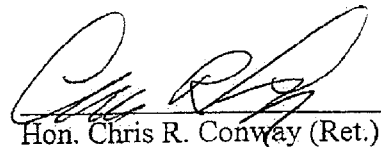
1 condition as shown on the June 2007 ultra sound was in any way caused by the Respondents and the
2 evidence was clear that nothing could have been done in 2007 that would have changed the outcome of
3 this case, as sad as it may be. In light of the Arbitrator's finding on the issue of causation, the issue of
4 damages is moot and need not be addressed.

5 While the Arbitrator has great empathy for Mr. family and completely understands their
6 grief over his passing, the law is equally clear that such empathy or sympathy cannot be the basis for a
7 decision in any case. The outcome of any case must be based upon the law that is applicable to any such
8 case as applied to the facts of that particular case. Here, the law and the facts do not support Claimants
9 claim that the Respondents negligence caused harm or damage to Mr.

10 Based upon the foregoing, the Arbitrator finds in favor of the Respondents and against the
11 Claimants.

12
13 **NOTHING IN THIS ARBITRATION DECISION PROHIBITS OR RESTRICTS THE**
14 **ENROLLEE FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS, RESULTS,**
15 **TERMS AND CONDITIONS OF THIS DECISION TO THE DEPARTMENT OF MANAGED**
16 **HEALTH CARE.**

17
18
19 Dated: May 13, 2013



Hon. Chris R. Conway (Ret.)
Arbitrator

1 which was performed on her on December 6, 2011 by a physician (, M.D.) employed by
2 Respondents'. does not contend that any of the care and treatment rendered to her by
3 Respondents' was negligent or that Respondents' did not believe the surgery performed on her on
4 December 6, 2011, was not medically necessary. As indicated above, the sole issue is whether
5 gave an "informed consent" to the subject surgery and if not, what her damages are.

6 At the start of the arbitration hearing, made a Motion In Limine to Exclude Expert
7 Testimony Proffered by Respondents'. The Motion sought to exclude the testimony of Respondents'
8 designated expert, , M.D. in six areas. Initially the Arbitrator took the matter under
9 submission pending hearing the evidence in the case and making a determination as to the claims being
10 made by . As indicated earlier in this award after the presentation of evidence it was
11 clear that the only claim she was making was one of a lack of "informed consent" for the surgery of
12 December 6, 2011, referenced above. In light of the foregoing any testimony by Dr. on any issue
13 other than "informed consent" was irrelevant and therefore the Arbitrator granted the Motion except to
14 the extent that Dr. would be allowed to testify regarding his opinion that Respondent's had
15 provide sufficient information to for her to make an "informed consent" concerning the
16 December 6, 2011, surgery.

17 testified that she woke up early in the morning of October 12, 2011, with pain in her
18 stomach and abdominal area and drove herself to the emergency room at
19 which was very close to where she lived. According to the medical records (Exhibit 22) she was
20 diagnosed with "gastritis", given some medication, discharged and told to see her own doctor at
21 Respondents. Later that day, she testified, she saw , M.D. at Respondent's facility in
22 , California. According to the medical records (Exhibit 23) Dr. examined her and ordered
23 some blood tests as well as scheduling her for a CT Scan (which was set for October 23, 2011). On
24 October 13, 2011, Dr. reviewed the lab results (Exhibit 23) and noted her "Lipase" level was 1257
25 (normal is 16 - 63 per all the testimony and medical records received in evidence). testified
26 that while at work on October 13th she got a call from Respondents telling her that her Lipase and liver
27 tests were "high" and that she should go to Respondents' emergency room immediately. She further
28 stated that she did so and upon arrival saw , M.D.

1 Dr. testified that he saw on October 13th and that she no longer had any "pain" in
2 her abdomen or stomach area. His medical chart states "she has no pain, nausea, vomiting, or any
3 complaints. No dysuria." Dr. further testified that when he saw her, her Lipase was down to 77
4 (near normal) and her liver tests, while still slightly elevated were lower, and that he believed at that
5 time had passed the gall stone or stones that caused her to have elevated Lipase and liver tests.
6 He further stated that he believed her problems were "resolving". According to Dr. testimony he
7 did order an ultra sound for which showed "gall stones in her gallbladder" but he did not see
8 any need for an emergency referral to surgery. testified throughout the hearing that she was
9 never told about any of the "good" or "normal" results from any of her tests but was only told about the
10 results from the first tests when her Lipase and liver tests were "high".

11 testified that she next saw , M.D., who was her regular doctor at
12 Respondents', on October 28, 2011. Prior to her visit with Dr. , had a CT Scan on
13 October 23rd which, according to the medical records, was normal, however, that information was not
14 told to until after her surgery of December 6th. During the October 28th visit with Dr. ,
15 was advised that Dr. was referring her to surgery. According to testimony,
16 Dr. told her that she had "many stones" in her gallbladder which had to be removed. It is
17 interesting to note that the pathology report prepared after the surgery indicated there were no stones
18 found in the gallbladder nor any in "the tray" into which the gall bladder had been placed following the
19 surgery. further testified that she tried to talk to Dr. about "alternatives" to surgery, but
20 Dr. told her "there were none" and that surgery was the only option. Dr. , during her
21 testimony, acknowledged that during the October 28th visit she never told about her improving
22 lab results or the normal CT scan.

23 had another "blood draw" on November 1, 2011, however, for some reason not
24 explained during the hearing, the results were not "published" until November 14th. The medical
25 records clearly indicate that tests by that time were all "within normal limits", for example
26 her Lipase was 30 and her liver test were normal. Again, according to testimony these results
27 were never communicated to her before the surgery of December 6th.

28

1 , M.D. testified that he saw on November 14, 2011, to discuss her surgery
2 with her. He examined and found neither pain nor any abnormal tenderness in her abdomen or
3 stomach area. He further stated that he was aware "acute, mild pancreatitis usually heals itself within a
4 few days". This was the diagnosis given to several weeks earlier following her attack of
5 October 12, 2011. Dr. testified that he believes he was aware that test results were
6 getting better but that fact is not noted in his chart. The weight of the evidence appears to clearly
7 indicate Dr. based his conclusions and opinions regarding need for surgery upon the lab
8 tests of October 13, 2011, and the ultra sound of the same date.

9 , P.A. testified that he saw on December 1, 2011, for a "pre op" meeting
10 and appointment. He could not recall any specific questions she may have asked him. He ordered some
11 labs in preparation for surgery. He also testified regarding some post-surgery visits he had
12 with her, however, they are not relevant to this award since they occurred after the surgery and are not
13 an issue in this case.

14 , M.D. testified on behalf of Respondents' and as indicated above the Arbitrator
15 limited his testimony to issues involving "informed consent". He indicated that while there are
16 "alternatives" to gallbladder surgery they are rare and usually not recommended for young people. He
17 did opine that he believed the Respondents' gave sufficient information for her to make an
18 "informed consent" regarding the surgery of December 6th. He did say that usually a patient would be
19 told the results of an ultra sound.

20 Turning now to the issue of whether gave an "informed consent" for the surgery on
21 December 6th we look to the case of Cobbs v. Grant, 8 Cal. 3rd 229 (1972) which is one of the seminal
22 cases on the subject. Cobbs, supra 8 Cal 3rd at p. 245 states "The scope of the physician's
23 communications to the patient, then must be measured by the patient's need, and that need is whatever
24 information is material to the decision." Once all the information "material to the decision" has been
25 given to the patient the test then becomes "what would a prudent person in the patient's position have
26 decided if adequately informed of all significant perils" and information. Cobbs, supra 8 Cal 3rd at p.
27 245 After considering all the evidence received in this matter, both oral and documentary, the Arbitrator
28

1 finds that the Claimant, _____, did not give an "informed consent" to the surgery performed on
2 her on December 6, 2011, for the reasons hereinafter set forth.

3 The weight of the evidence clearly shows that _____ was never told, prior to the surgery, the
4 test results from her blood draw on October 13th which showed her Lipase and liver levels going down
5 and beginning to approach normal, nor was she told the results of her CT Scan taken on October 23rd
6 which showed her gallbladder and pancreas were normal. The medical records indicate Dr. _____ knew
7 on October 28th, when she saw _____, that her Lipase level had dropped to 77 and that her CT Scan
8 was normal, yet she (Dr. _____) did not communicate any of this information to _____ Dr.
9 testified that when he saw _____ on November 14th he "believed he knew the results of her recent
10 tests, including the blood test of November 1st which showed her Lipase level to be normal at 30, as
11 were all of her other tests", yet he did not tell _____ about any of these results. If, on the other hand,
12 he did not know the results of _____ most recent tests, perhaps he should have to make sure she had
13 all the information necessary for her to give an "informed consent" for the surgery of December 6th.
14 Further, Dr. _____ did not inform _____ that Respondents' own literature says that gallbladder removal
15 surgery is usually not necessary with only a single acute attack and that people can live a lifetime
16 without a further gallstone attack. Respondents' literature also indicates that if a first attack of gallstone
17 pain is mild, it is often safe to wait until a second attack before considering surgery. Finally, Dr.
18 testified that he based his decision as to whether _____ needed gallbladder surgery solely on the
19 blood tests from October 12th and the ultra sound taken on October 13th. It is puzzling to the Arbitrator
20 why none of the "good test" results were ever disclosed to _____

21 It is also interesting to note that one of reasons given by Dr. _____ for believing _____ should
22 have the gallbladder surgery of December 6th was to remove the gallbladder and "stones" within it so
23 _____ would not have any future attacks, yet after the surgery, the pathology report shows that there
24 were no "stones" in _____ gallbladder nor in the tray upon which it was placed after it was removed.
25 Perhaps, this shows that the surgery was not really necessary in the first place.

26 As set forth above, the weight of the evidence clearly shows that _____ was not informed
27 about any of her "good test results", any other options besides surgery for her one attack of pancreatitis,
28 nor Respondent's own literature which states that people may only have one gallstone attack in their

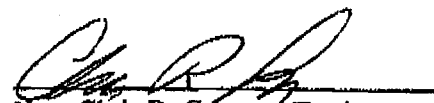
1 lifetime and that it is safe to wait for a second attack before having surgery. testified that had
2 she been given all this information she would not have consented to the surgery of December 6th and the
3 Arbitrator finds that a prudent person in her same position would not have consented to the surgery
4 either.

5 The issue of damages presents a somewhat more difficult problem. It is well recognized that the
6 mere fact had a surgery she (and a prudent person) would not have consented to constitutes
7 "harm" for which she is entitled to compensation. Tortorella v. Castro 149 Cal. App. 4th 1 (2006).
8 However, contends that in addition to having the surgery she now suffers from a number of
9 other medical problems that she believes were caused by the surgery. After considering all the evidence
10 in this matter, the Arbitrator finds that has not met her burden to prove that these other medical
11 conditions which she complains of were caused by the surgery of December 6th. While may
12 believe these other complaints were caused by the surgery, her belief alone is not sufficient to meet her
13 burden of proof. There was no medical evidence, oral or documentary, put forth during the hearing to
14 establish to a "reasonable degree of medical probability" that her complaints or present medical
15 condition were caused by the surgery of December 6th. The Arbitrator does agree that is
16 entitled to recover her economic loses such as paying for someone to care for her son and her out of
17 pocket "co-pays". The Arbitrator does not believe she is entitled to recover her "lost wages" claim since
18 it was covered by her "sick time" at work.

19 The Arbitrator finds that Claimant, is entitled to an award against the
20 Respondents in the sum of \$2,650.00 for economic damages and the sum of \$60,000.00 for non-
21 economic damages or a total award of \$62,650.00. Each side to bear their own costs and attorney's fees.

22 **NOTHING IN THIS ARBITRATION DECISION PROHIBITS OR RESTRICTS THE**
23 **CLAIMANT FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS, RESULTS,**
24 **TERMS AND CONDITIONS OF THIS DECISION TO THE DEPARTMENT OF MANAGED**
25 **HEALTH CARE.**

26
27 Dated: August 19, 2013

28 
Hon. Chris R. Conway (Ret.)
Arbitrator

1 HON. CHRIS R. CONWAY (RET.)
2 Judicate West
3 402 W. Broadway
4 Suite 2400
5 San Diego, CA 92101
6 Tel: (619) 814-1966
7 Fax: (619) 814-1967

8 Arbitrator

9 **IN THE MATTER OF BINDING ARBITRATION**

10 **BETWEEN**

11 **Claimants,**

12 **vs.**

13 **Respondents.**

14) **ARBITRATION AWARD**
15)
16) Judicate West No. A189405-3
17) Arbitration No. 12249
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19 This is a binding arbitration between the Claimants, and , and
20 the Respondents, and
21 , based upon claims of medical negligence or medical malpractice
22 asserted by the Claimants against the Respondents. The matter was arbitrated before the undersigned as
23 the agreed upon Arbitrator from August 11 to August 15, 2014, and from August 18 to August 22, 2014.
24 During the Arbitration Hearing, the Claimants were represented by attorney and the
25 Respondents were represented by attorneys, and .

26 At the Arbitration Hearing, the following individuals were sworn and testified: ;
27 , M.D.; ; , M.D.; ; ;
28

1 , PhD; , PhD; , RN;
2 , PhD; , M.D.; , PhD; , CPA; ;
3 , M.D.; , Sr.; , PhD and AuD; , M.D.;
4 , PhD; , M.D.; , M.D.; , M.D.;
5 , M.D.; , R.N.; and , J.D., CPA. also
6 testified via an offer of proof authenticating emails obtained from computer at his
7 former employer, . At the conclusion of the hearing, all counsel reviewed all the
8 documentary evidence offered during the hearing and stipulated to the admissibility of various Exhibits
9 left with the Arbitrator. The Arbitrator now renders his award as hereinafter set forth.

10 The subject of this Arbitration is certain medical care and treatment Claimant,
11 (hereinafter,) received from Respondents (hereinafter,) during the period from July 29,
12 2011, through September 9, 2011. contends that was negligent in their care and treatment
13 of an ear infections suffered shortly before July 29, 2011, resulting in his becoming infected with
14 "strep-pneumonia bacteria, which in turn infected the honeycombed, bony structure adjacent to the
15 middle ear known as the mastoid, which eroded to the point that the infection breached the skull and, in
16 turn, released strep-pneumonia bacteria into his brain, causing a meningitis infection" which left him
17 severely brain damaged or impaired. (Quoted from Claimant's Arbitration Brief). wife,
18 (hereinafter,) alleges a claim for loss of consortium as a result of the brain injury
19 suffered as set forth above. denies Claimant's contention and contends that they were not
20 negligent in the care and treatment of .

21 testified that shortly before July 29, 2011, he attended a business convention in Atlanta,
22 Georgia, and that during the flight to Atlanta his left ear began to hurt. He further testified that he called
23 his wife and had her arrange an appointment for him with a doctor at upon his return from
24 Atlanta. The medical records indicate that saw doctors at on July 29, 2011; August 10,
25 2011; August 24, 2011; and September 9, 2011, for his left ear problem. These visits are as set forth
26 below.

27 According to the medical records, saw , M.D. on July 29, 2011. Dr.
28 chart notes (Exhibit 1) indicate the reason for visit was "left ear pain x 5 day". The

1 notes further indicate that told Dr. that he had gone "on a trip to Atlanta by plane and
2 just returned with severe pain in his left ear, started after swimming 5 days ago. Patient cannot hear
3 from his left ear." According to Dr. testimony and his chart notes he physically examined
4 and noted "Left ear: There is tenderness. A foreign body is present. Erythema, cerumen
5 impaction, exostosis of the external auditory canal pain on pulling the pinna." Except as noted above
6 Dr. physical exam was basically normal. Dr. assessment was "OTITIS
7 EXTERNA". Following his exam, Dr. issued the following orders, "PERFORM EAR
8 WASH - Premed with auralgan if possible" and prescribed the following medications: "Neomycin-
9 Polymyxin (CORTISPORIN); Antipyrine-Benzocaine (AURAL GAN/AUROTO); Cephalexin
10 (KEFLEX); and VICODIN". Dr. chart notes that he told to contact him in 2-3 weeks
11 if not better and that he should follow up or call if he is worse in 2-3 days with Dr. or
12 "available provider, or urgent care". testified that he does not recall Dr. telling him the
13 foregoing. also testified that at the time of his visit with Dr. he was "having balance
14 issues" but he believes he did not tell Dr. about them.
15 next saw Dr. on August 10, 2011, (Exhibit 3) and noted "persistent ear pain,
16 hearing decreased on Lt ear since end of July, not improving with cortisporin otic, keflex, worsening
17 symptoms, travels by plane recent." Dr. examined and noted "He is oriented to person,
18 place, and time and well-developed, well-nourished, and in no distress. No distress". Dr.
19 continued his diagnosis of OTITIS EXTERNA and changed medications, including adding
20 prednisone, and issued orders for an INSERTION OF EAR WICK, and CULTURE, NON STERILE
21 SITE. It is noted that one of the medications Dr. prescribed was for Mucus Relief Sinus
22 which the testimony indicated was to address any middle ear problems.
23 On August 24, 2011, returned to where he was seen by
24 M.D., who was a physician resident at the time. Dr. noted in her chart notes that "
25 is a 49 year old male who developed otalgia and decreased hearing a month ago following
26 swimming and surfing. Also flew to Atlanta. Developed dysequilibrium as well. Was treated with
27 keflex and topical drops. Did not follow dry ear precautions, but stopped surfing. Would try to remove
28 ear drops with Kleenex so they wouldn't drain out. Currently has pulsatile tinnitus and decreased

1 hearing in his left ear. No vertigo or otorrhea other than drops. No prior ear surgeries. Has known
2 exostoses, but no prior ear infections. Has known septal perforation - history of recreational drug use
3 and trauma in college. Asymptomatic." (Exhibit 4). It appears Dr. physical examined and
4 noted "No acute distress". She also noted "No fever or chills." The notes also indicate that she used an
5 otomicroscope to examine left ear and she observed that it was "75% occluded by exostoses
6 circumferentially. Edema and erythema. White drop debris suctioned. Tympanic membrane barely
7 visible centrally. Not mobile with Valsalva, but slightly mobile with pneumotoscopy." Dr.
8 assessment was that had otitis externa, possibly otitis media and she counseled him on proper dry
9 ear precaution and drop administration. She prescribed Ciprodex drops for 2 weeks and told him to
10 return in 3 weeks for an audiogram. (Exhibit 4).

11 On the morning of September 9, 2011, went to the
12 where he was given an audiogram test administered by Audiologist, , PhD,
13 AuD. Upon the conclusion of the test Dr. impression was: "AD: normal hearing; AS: normal
14 to severe mixed hearing loss." (Exhibit 5) Dr. testified that prior to administering the test she
15 looked in both of ears with an otomicroscope and he did not complain of any ear pain. She also
16 testified she performed a bone conduction test on mastoid bone and that his mastoid transmitted
17 sound to his inner ear through the mastoid bone. She further testified that when she examined
18 left ear, his ear drum did appear to be "moving in and out".

19 Later on September 9, 2011, saw Dr. again for a second time (Exhibit 6).
20 , who is mother, testified that she drove her son to his afternoon appointment with Dr.
21 Dr. noted that told her "His hearing slightly improved, but a week ago he
22 developed severe rotatory vertigo that lasted for 24 hours. Nausea but no vomiting. Started getting
23 better after 24 hours. Has constant dysequilibrium now." She also noted on physical exam that
24 was in "No acute distress" and that when she examined left ear under otomicroscope she
25 observed "80% occluding exostoses, No otorrhea. TM visible through central slit in exostoses. Mobile
26 with pneumatic otoscopy. No effusion. No vertigo with pneumatic otoscopy. Fistula test negative. No
27 nystagmus" She then prescribed a "trial of Prednisone" and some other medications.
28

1 work from shortly before September 14, 2011, until January 2012, when he went back to work for his
2 father. , and all testified that employment with
3 was terminated in March 2013. , who is brother, and both
4 testified that went to work for a company partially owned and run by
5 in March or April, 2013, essentially doing the same kind of job he had been doing at
6 also testified that he is still working at however, his brother is
7 providing him with assistance from other individuals concerning his job duties.

8 The Arbitrator believes that all of the foregoing fairly accurately sets forth the chain of events
9 that transpired between July 29, 2011, and the present time and which form the basis of this litigation.
10 As set forth in the third paragraph of this award, Claimant's contend that negligent care and
11 treatment of during the period in question caused him to develop meningitis and his resultant brain
12 issues. The Arbitrator believes that all the evidence clearly indicates that has suffered some
13 mental impairment as a result of the meningitis. There may be some disagreement between the parties
14 concerning the nature and extent of that impairment, but it is clear that it exists to at least some extent.
15 The Arbitrator will now address the issues of liability, causation and damages in the balance of this
16 award.

17 California law is clear that the Claimants have the burden of proof to prove that was
18 negligent in their care and treatment of medical condition, that is that their conduct fell below the
19 "standard of care" and that such negligence caused harm to for which he is entitled to
20 compensation according to proof. In determining whether Claimant's burden has been met, California
21 law provides, among other things that:

22 "A medical practitioner is negligent if he or she fails to use the level of skill, knowledge, and
23 care in diagnosis and treatment that another reasonably careful medical
24 practitioner would use in the same or similar circumstances. This level of skill,
25 knowledge and care is sometimes referred to as the "standard of care."

26 CACI 501

27 The law further requires that the standard of care be based solely on the testimony of expert
28 witnesses. CACI 501 states:

1 "He must determine a level of skill, knowledge, and care that other reasonably
2 careful medical practitioners would use in the same or similar circumstances,
3 based only on the testimony of the expert witnesses who have testified in this case."
4

5 CACI 505 tells us:

6 "A medical practitioner is not necessarily negligent just because his or her efforts
7 are unsuccessful or he or she makes an error that was reasonable under the
8 circumstances. A medical practitioner is negligent only if he or she was not as
9 skillful, knowledgeable, or careful as other reasonable medical practitioners would
10 have been in similar circumstances."
11

12 Lastly, CACI 506 provides that:

13 "A medical practitioner is not necessarily negligent because he or she chooses one
14 medically accepted method of treatment or diagnosis and it turns out that another
15 medically accepted method would have been a better choice."
16

17 With the foregoing in mind, let us look at the testimony of the various experts who have testified
18 in this case.

19 _____, M.D., who is Board Certified in otolaryngology and head and neck surgery,
20 and who also performs cosmetic plastic surgery on patients, testified on behalf of the Claimants' on the
21 issue of Standard of Care. Dr. _____ offered opinions that both _____, M.D.'s and
22 _____, M.D.'s care and treatment of _____ fell below the standard of care. As to Dr. _____, Dr.
23 _____ opined that his care and treatment fell below the standard of care because the chart notes (Exhibit
24 1) had a "prompt" indicating that _____ was in a "pneumococcal high risk group" and that Dr.
25 _____ should have addressed that issue, including determining whether the pneumococcal vaccine should have
26 been given to _____ at the July 29, 2011, visit. Dr. _____ also opined that he believed Dr.
27 _____ misdiagnosed _____ ear problem. Dr. _____ opined that he believed _____ had Otitis Media on his first
28 visit not Otitis Externa as Dr. _____ diagnosed but he did not seem to indicate what more Dr.

1 should have done since he testified that ordering an "ear wash" as Dr. did was
2 within the standard of care as was prescribing Keflex for (although Dr. said may not
3 have been the best antibiotic to give, he did opine that using it was not below the standard of care).
4 Presumably, Dr. would have had the same complaint regarding the failure to address the
5 "pneumococcal high risk" prompt on second visit with Dr. on August 10,2011
6 (Exhibit 3), although Dr. did not raise that issue in his testimony concerning the August 10th
7 visit.

8 Dr. had several opinions regarding Br. care and treatment of , beginning
9 with her first visit with him on August 24, 2011 (Exhibit 4). He opined that symptoms on that
10 date were consistent with an inner ear problem, not otitis externa. For example, he sites references to
11 currently having "pulsatile tinnitus" and "dysequilibrium" which he contends are inconsistent with
12 otitis externa but are consistent with an inner ear infection. Based upon the foregoing, Dr. opined
13 that Dr. fell below the standard of care in not ordering a CT Scan of ear on that date and
14 or at a minimum prescribing antibiotics and directing him to come back in a week. Dr. opined
15 that had a CT Scan been ordered it would have shown fluid in the inner ear and in the mastoid which
16 would dictate "aggressive antibiotic treatment". Dr. was also critical of Dr.
17 recommended treatment on August 24th in that he opined the recommended treatment only treated the
18 outer ear (i.e. otitis externa), not the middle ear where he believed the problem lay. In support of his
19 position he cited the portion of Dr. chart notes where she reported that the left ear was
20 examined "under otomicroscope" and found that the "tympanic membrane barely visible not mobile
21 with valsalva, but slightly mobile with pneumotoscope" which he believed meant there was a problem in
22 the inner ear, not the outer ear.

23 Dr. opined that Dr. continued treatment of during his visit with her on
24 September 9, 2011 also fell below the standard of care. He opined that Dr. did not perform a
25 "thorough exam" of ear on that date and had she done so the standard of care would require her
26 to order a CT Scan and to hospitalize , neither of which happened on that date. Dr. further
27 testified that in his opinion the destruction of mastoid near the left ear had been going on for
28 several weeks. He believed that there was fluid in mastoid on September 9th and also probably

1 on August 24th and that a CT Scan performed on either of those dates would have shown the fluid
2 which in turn would have dictated, as set forth above, an aggressive treatment with antibiotics. Dr.
3 opined that had such a course of treatment been undertaken on either of those dates, would
4 not have developed meningitis.

5 Dr. testified that after seeing on September 9th, she spoke to
6 M.D., who was her "attending physician" about condition, but she disagreed with Dr.
7 diagnosis. Dr. opined that Dr. was not in a position to offer any diagnosis since he did
8 not see the patient, however, Dr. did not opine that speaking to Dr. fell below the
9 standard of care.

10 In summary, it appeared to the Arbitrator that Dr. believed both Dr. and Dr.
11 misdiagnosed ear problem and failed to properly treat it, including ordering a CT Scan,
12 all of which were below the standard of care.

13 , M.D., who is an infectious disease physician, testified on behalf of the Claimants'.
14 Dr. opined that at some point it was "more likely than not" that mastoid bone became
15 infected leading to mastoiditis which in turn lead to meningitis. He further opined that bacterial
16 meningitis progresses rapidly and that it probably started on September 13, 2011. He also opined that
17 giving a patient an antibiotic could help in such a situation, however, he could not say with any certainty
18 if there was sufficient evidence in this case to have given it to following his September 9th visit
19 with Dr. Dr. did testify on cross examination that there was some doubt as to exactly
20 what was going on with left ear on September 9th and that his belief may have had
21 mastoiditis on September 9th is based upon "looking back", i.e. looking at the evidence after the fact.

22 While the Arbitrator believes Dr. was an "honest" witness it is noted that in many of his opinions
23 and comments he used words like "possibly", "probably", "maybe" and "may" all of which cause some
24 concern whether those opinions or beliefs rise to the level of proof necessary in a medical malpractice
25 action.

26 , M.D., who is a Board Certified Internal Medicine physician, testified
27 on behalf of and opined that Dr. care and treatment of on the July 29, 2011
28 visit met the standard of care and that Dr. was not in any way negligent in his care and

1 treatment of on that date. She further opined that the standard of care did not require Dr.
2 to give the pneumococcal vaccine on July 29, 2011, and in fact if did have some
3 kind of ear infection whether it be otitis externa or otitis media giving the vaccine to would have
4 been contraindicated since it potentially could make the condition worse. She stated that you simply do
5 not give vaccine to someone who may already be sick; you give it before they get sick. She agreed with
6 Dr. that ordering the ear wash was not below the standard of care. She also agreed with Dr.
7 that prescribing an antibiotic on the July 29th visit was appropriate and not below the standard of
8 care.

9 Referencing the August 10th visit, Dr. again testified that Dr. care and
10 treatment of did not fall below the standard of care. According to her, had normal vital
11 signs on that date and there was no evidence of any serious illness. In addressing the pneumococcal
12 vaccine issue again, Dr. opined again that the standard of care did not require Dr. to
13 administer the vaccine at that time for all the same reasons she stated concerning the July 29th visit. She
14 also noted that when was offered the vaccine on September 9th, he refused or declined to have it
15 administered to him. The Arbitrator believes it is reasonable to assume that if refused the vaccine
16 on September 9th, he would have refused it on any of his prior visits to referenced in this award.

17 As to both visits with Dr., that is the one on July 29th and again on August 10th, Dr.
18 opined that there was no reason to believe had otitis media, as Dr. believed,
19 based upon his vital signs. She also stated that otitis media is uncommon in adults, you usually see it in
20 children.

21 , M.D., who is Board Certified in otolaryngology and head and neck surgery and
22 who is Chairman of the Head and Neck
23 Department, testified on behalf of concerning the standard of care. Prior to his testimony, Dr.
24 reviewed all of the medical records at issue in the case and reviewed depositions of the various
25 parties and other witnesses. Dr. testified that mastoiditis is extremely rare today due to the
26 wide use of antibiotics. He further testified that those individuals who do get mastoiditis are usually
27 very sick, have high fevers, lots of ear pain with redness and swelling behind the ear, nausea and
28 vomiting, and puss draining from the ear. Dr. opined that had pneumococcal disease

1 which in turn caused the mastoiditis. He further opined that this process occurred over a 48 to 72 hour
2 time period prior to admission to on September 14, 2011.

3 Dr. went on to opine that both Drs. and complied with the standard of
4 care at all times when they were treating . He further believed that did not have a
5 pneumococcal infection on September 9, 2011. He testified that Dr. diagnosis on August 24th
6 of otitis externa was consistent with the symptoms had on that date. He believed did not
7 have otitis media on that date, as testified to by Dr. , because ear drum was slightly
8 mobile, while if he had had otitis media it would not have been mobile. Dr. further disagreed
9 with Dr. that Dr. should have thought about "mastoiditis" on her August 24th visit with
10 because he, according to Dr. , did not have any symptoms of mastoiditis at that time. He
11 noted that based on the chart notes was not in "acute distress" at that time nor was there any
12 evidence of redness or swelling behind left ear and he was not in "great pain", all of which are
13 symptoms he would have had if he had mastoiditis at that time.

14 As noted above, Dr. had opined that a CT Scan should have been ordered for
15 following the September 9th visit, or following any of his earlier visits at . Dr. disagreed
16 with Dr. opinion on the basis that did not have any of the signs or symptoms on those
17 visits which would have indicated a need for a CT Scan. Dr. also testified that he believed
18 had an active infection in his mastoid on September 9th. Dr. testified that this contention is
19 "impossible" because if he did he would have been extremely sick, have a temperature of 104 plus,
20 might not be conscience, would not be able to walk or stand and would have a "dead" ear. Dr.
21 believed that none of these symptoms were present on September 9th. He further opined that
22 developed a pneumococcal infection within 24 to 72 hours prior to September 14th which caused
23 to develop mastoiditis which in turn caused his meningitis. In support of his theory, Dr.
24 pointed to the fact that went to Legoland with his family on either September 11th or 12th and if
25 he had been as sick as Dr. believes at that time he simply would not have been able to go with the
26 family.

27 In further support of his opinions, Dr. refers to the CT Scan taken of left ear area
28 on September 14, 2011, (Exhibit 102) which he testified showed some of the air cells in the mastoid are

1 "intact" and not completely eroded away as Dr. believed. In Dr. opinion this CT Scan
2 shows a "very acute situation" not something going on over a long period of time as opined by Dr.
3 . Dr. also sites to the pathology report (Exhibit 116) which shows that had
4 "pneumococcal disease" which developed over a 24 to 72 hour period, not something that "brewed or
5 simmered" for several days or weeks as Dr. opined. In summary, Dr. opined that Dr.
6 "time line" as to what happened to and how he wound up with meningitis just "doesn't
7 work" for the reasons set forth above.

8 Dr. was critical of Dr. for not reviewing medical chart before the
9 September 9th visit, in fact he opined that Dr. breached the standard of care in not doing so,
10 however, he further opined that this breach had no bearing on the outcome of this case.

11 , M.D., who specializes in Internal Medicine and Infectious Diseases and who
12 is Board Certified in those areas, testified on behalf of . She opined that no one at
13 breached the standard of care regarding not administering a pneumococcal vaccine to on any of
14 the visits in question because the standard of care does not require or mandate the administration of the
15 vaccine to someone like , it is only a recommendation. She further opined that in this case
16 administering the vaccine may very well have been contraindicated because if in fact had some
17 kind of infection when he went to ; the vaccine could have made the condition worse, for the
18 reason that you don't give someone who is already sick the vaccine. Dr. further opined and
19 agreed with Dr. that pneumococcal infection started after his last visit with Dr.
20 on September 9th. She also believed he did not have otitis media before September 9th. Dr.
21 also considered the fact that went to Legoland a day or two after September 9th, which he would
22 not have been able to do if he had a pneumococcal infection at that time.

23 medical experts also raised an issue concerning the prescribing of prednisone back on
24 August 10th by Dr. , which in their opinion, might have suppressed his immune system further
25 causing the later problems with ear. Dr. and Dr. testified that they did not
26 believe based on the dose of prednisone given to , that it would have in any way suppressed his
27 immune system.

1 Let us now turn the initial question: Were any of the Respondents negligent in their care and
2 treatment of starting with his visit with Dr. on July 29, 2011, and ending with his visit
3 with Dr. on September 9, 2011? After a very careful review and consideration of all of the
4 evidence received in this Arbitration, and after considering the applicable law as set forth above, the
5 Arbitrator, reluctantly, finds that the Claimants' have not met their burden of proof as to the foregoing
6 question for the reasons hereinafter set forth.

7 First, as set forth in CACI 501, we must look to the testimony of the experts who testified on
8 each side in this matter to determine whether or not any of physicians breached the applicable
9 standard of care concerning their care and treatment of . Drs. and testified on behalf
10 of the Claimants that did breach the applicable standard of care and therefore they were negligent
11 in the care and treatment of . Drs. , , and testified that none of
12 physicians breached the applicable standard of care and that it was not negligent in its care and treatment
13 of .

14 In reviewing Dr. testimony concerning Dr. it appears his main criticisms were
15 that: Dr. failed to address an issue of whether he should have either discussed or administered
16 a pneumococcal vaccine to on the visit of July 29, 2011: that he (Dr.) had misdiagnosed
17 illness, calling it "otitis externa" when in fact it was "otitis media": and that Dr. should
18 have ordered a CT Scan or given antibiotics and have him come back in a week. The Arbitrator
19 notes that Dr. did prescribe an antibiotic for on the July 29th visit. The Arbitrator found
20 Dr. testimony as to any negligence or breach of the standard of care by Dr. to be
21 somewhat confusing or unclear. Dr. commented on the fact that he did not feel Dr. was
22 in any position to offer a diagnoses as to since he didn't see the patient. It is unclear if Dr.
23 is saying that in talking to Dr. , Dr. was somehow negligent or did he just make his
24 remark as a general comment? It does not appear to the Arbitrator that Dr. comments regarding
25 Dr. rise to the level of saying he breached the standard of care in some regard and therefore
26 was negligent. Lastly, most of Dr. criticism seemed directed toward Dr. for failing to
27 properly treat illness and for failing to order a CT Scan.

1 As to Dr. , the Arbitrator finds that the Claimants have not met their burden of proof
2 concerning any negligence on his part. The greater weight of the evidence shows that administering a
3 pneumococcal vaccine to someone like is not mandatory and failure to do so does not breach the
4 applicable standard of care. The Arbitrator further notes, as set forth above, that was offered the
5 vaccine on September 9th and refused to have it given to him. It is reasonable to assume that since he
6 declined the vaccine on September 9th he would have declined it if offered earlier. The Arbitrator finds
7 Dr. to be the more creditable witness concerning any issue related to an "alleged" failure to
8 make a proper diagnosis on the part of Dr. as to on either July 29th or August 10th. Dr.
9 testified that there was no breach by Dr. of the standard of care in treating

10 With regard to Dr. , the Arbitrator again finds that the Claimants' have not met their
11 burden of proof concerning any negligence on her part. When weighing the testimony of Dr.
12 against that of Dr. , and to some extent that of Dr. , the Arbitrator believes the sequence
13 of events as set forth by Dr. is the more reasonable and creditable. The Arbitrator set forth
14 above in greater detail the testimony of Dr. and that of Dr. , including where they
15 differed from that of Dr. , and does not feel it necessary to do so again. The greater weight of the
16 evidence indicates that the pneumococcal infection which had on September 14th did not develop
17 until sometime after September 9th, which was the last time he saw any of the physicians.

18 In conclusion, the Arbitrator wishes the Claimants to know that this was a very difficult case to
19 decide. The Arbitrator has a great deal of empathy and sympathy for Mr. and Mrs. , however,
20 as all the attorneys know empathy and sympathy cannot form the basis of any decision in this matter.
21 The Arbitrator spent countless hours reviewing all the evidence, both oral and documentary, before
22 arriving at his decision after much thought and deliberation. The Arbitrator also wishes to compliment
23 all counsel. The Arbitrator believes that the case was tried in a very professional and ethical fashion,
24 which unfortunately does not always happen. All counsel were well prepared and courteous to each
25 other, which was much appreciated by the Arbitrator.

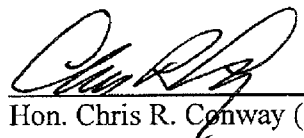
26 By reason of the foregoing the Arbitrator finds in favor the Respondents,
27 , and the ,
28 and against the Claimants, and , in light of this finding any finding as

1 to the issues of causation and damages are moot. The Arbitrator does reserve jurisdiction over any other
2 issues in this matter that may arise subsequent to the issuance of this Arbitration Award.

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NOTHING IN THIS ARBITRATION DECISION PROHIBITS OR RESTRICTS THE ENROLLEE FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS, RESULTS, TERMS, AND CONDITIONS OF THIS DECISION TO THE DEPARTMENT OF MANAGED HEALTHCARE.

Dated: September 17, 2014



Hon. Chris R. Conway (Ret.)
Arbitrator