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IN THE MATTER OF ARBITRATION BETWEEN

Claimant(s),	**ARC CASE NO.:**
vs.	**BINDING ARBITRATION AWARD**
Respondent(s).	

After reviewing and considering all the evidence in this matter, the Arbitrator makes the following decision:

The Parties

Claimants are and
Respondents are
, and (hereinafter).

The Allegations of the Parties Post Arbitration

Claimants claim they have proved their damages for personal injuries, loss of earnings past and future, loss of earning capacity and loss of consortium proximately caused by the medical negligence of the Respondents.

Respondents state that Claimants have failed to meet their required burden of proof on negligence, causation or damages.

Applicable Law

- Burden of Proof

- Except as provided by law, a party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the claim of relief or defense that he is asserting. California Evidence Code (CEC) section 500. As used in Section 500, the burden of proof means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. Comment to CEC 500.

- The burden of proof in civil cases requires proof by a *preponderance of evidence.* CEC section 115; Weiner v. Barnett (1955) 135 Cal App 2d 607, 612.

Preponderance of Evidence

- Preponderance of Evidence simply requires the trier of fact to believe that the existence of a fact is *more probable* than its nonexistence. In re Angelia P. (1981) 28 Cal 3d 908, 918; Glage v. Hawes Firearms Co. (1990) 226 Cal App 3d 314, 325.

Elements of General Negligence

- The basic elements of a negligence action are: 1. The defendant had a *legal duty* to conform to a standard of conduct to protect the plaintiff, 2. The defendant *failed to meet this standard of conduct*, 3. The defendant's failure was the *proximate or legal cause* of the resulting injury, and 4. The plaintiff was *damaged*. Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 917; Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal. 4th 666, 673.

Medical Negligence

- From a theoretical standpoint, "medical negligence" is still considered "negligence". Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal 4th 992, 997-998. C.C.P section 340.5 and Civil Code sections 3333.1 and 3333.2 (MICRA) together define *"professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death,* provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the by the licensing agency or licensed hospital." Comment to CALJIC 500

- Claimant's have the burden of proving each element of their claim against for medical negligence by a preponderance of evidence.

Findings of Fact Based on the Evidence

- Claimant underwent four surgeries at in connection with her treatment for her heart condition: April 24, 2016, July 7, 2016, July 20, 2016 and September 1, 2016.

- Dr. was 's treating cardiologist at during all relevant times. Dr. was the cardiologist at who implanted Ms. 's 1st pacemaker on April 24, 2016. Dr. was also the cardiologist who explanted / removed the 1st pacemaker from Ms. on July 7, 2016.

- There has been no claim or evidence that committed medical negligence in connection with the April 24, 2016 pacemaker implantation (1st surgery). 's heart condition required implantation of a cardiac pacemaker on April 24, 2016.

- The removal of the 1st cardiac pacemaker on July 7, 2016, (2d surgery) was necessary once the pacemaker pocket infection was diagnosed. The pocket infection could not be completely sterilized without removal of the pacemaker itself. The expert testimony was in accord that there was no alternative to removal of Ms. 's 1st pacemaker.

- There is no claim or evidence that Dr. committed medical negligence in either the implantation or removal of Ms 's 1st pacemaker device

- The 3d surgery ("clean out" surgery) of July 20, 2016 was done because the pacemaker pocket infection caused damage to tissue at the "base of the pocket".

- There has been no claim or evidence that committed medical negligence in connection with the implantation of the new (2d) cardiac pacemaker (4th surgery) on September 1, 2016. 's heart condition required that a 2d pacemaker be implanted since the 1st pacemaker was removed) on July 7, 2016.

- The 2d pacemaker was placed in Ms. 's right chest area. There is no evidence or claim that the placement of the 2d pacemaker on her right side - instead of her left side - was inappropriate or constituted medical negligence. The 1st pacemaker had been implanted in Ms. 's left chest area during the 1st surgery on April 24, 2016.

- There is no evidence that *caused* 's infection. The expert testimony agrees that the infection began when the 1st pacemaker was implanted;

that infections can occur in the absence of negligence; and the risk of infection during surgery cannot be reduced to "0 %".

- Pacemaker Pocket Infections are rare. Post-operative pacemaker infections occur in .05 to 1% of patients.

- Explants (removals) of pacemakers are rare.

- Staphylococcus pseudintermedius bacteria is rare in humans. There is no claim that was negligent in not testing for or recognizing that bacteria in Ms. .

- 's kidney infection in 2017 is unrelated to her pacemaker pocket infection.

- is not more susceptible to further infection after the 1• infection was cured.

- is not in increased risk of future infection due to the pacemaker pocket infection.

- did not cause or contribute to the pacemaker pocket infection.

Legal Analysis of Issues:

Claimant's specific claim in this matter is that " was negligent because it failed to timely diagnose and treat 's infection, causing severe damages to the claimants". Claimant's Closing Arbitration Brief (hereinafter Cl. Brief) 11:24.

Claimants have the burden of proof on these issues.

Respondents' state the issue similarly: "The issue to be decided regarding negligence has been framed. Therefore, the only standard of care issue to be decided is, should Mrs. 's pacemaker pocket infection have been diagnosed at any time between May 26, 2016 and July 7, 2916". Respondents' Closing Brief (hereinafter Resp. Brief) 11:7-9.

Standard of Care for Medical Specialists

- Dr is a cardiologist. As such, Dr. is held to the standard of care for medical specialists.

- CACI 502: Standard of Care for Medical Specialists (in part)

"A (cardiologist) is negligent if she fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful (cardiologists) would possess and use in similar situations."

Specialists are held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances. Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d. 154. This standard adds a further level to the general standard of care for medical professionals. Comment to CACI 502.

Breach of Standard of Care

- Based on all the evidence, including *all* the expert testimony, the Arbitrator finds that Dr. breached the standard of care for cardiologists in the diagnosis and treatment of . The breach in the standard of care was Dr. 's failure to diagnose Ms. 's pacemaker pocket infection the first week of June, 2016.

- The expert testimony by Dr. and Dr. was persuasive on the issue of whether Dr. breached her duty of care in this matter.

- Dr. testified that: *Ms. 's infection could have been diagnosed the 1st week of June, 2016,* as opposed to a month later; that Dr. "could have done more" for Ms ; that Dr. did not adequately address Ms. 's emails concerning her pain five weeks post-surgery; routine pacemaker patients "do not hurt a month after pacemaker surgery"; Ms. 's described pain was "out of proportion" to the 1st pacemaker surgery; that the pain and discomfort should have been "a big red flag"; usually there is not discomfort after a week; should not have had swelling a month after the 1st surgery;

- Dr. testified that the medical records of the 2d surgery (removal of 1st pacemaker) showed that when the pacemaker was removed, the pocket infection appeared "grossly purulent", i.e., discharging pus.

- Dr. testified that when he examined Ms. on July 7, 2016, he knew immediately that her wound was infected; it had the "standard signs of infection"; the wound was "red, warm and boggy"; the wound was "fluctuant" and the fluid in the wound could be moved on his manipulation; the ultrasound scan showed fluid present in the wound.

- credibly testified that when Dr. examined her on July 7, 2016 he told her that she "should have come in earlier". Dr. stated that he did not recall making that statement.

Causation:

- Based on all the evidence, including *all* of the expert testimony, the Arbitrator finds that Dr. 's breach of the standard of care was a *substantial factor* that caused injury to .

CACI 430 - Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. Mitchell v. Gonzales (1991) 54 Cal.3d 1041,1052.

Whether a defendant's conduct actually caused an injury is a question of fact that is ordinarily for the jury. Causation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. *It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not*". Raven H. v. Gamette (2007) 157 Cal. App. 4th 10. (emphasis added)

"The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes *more likely than not that the injury was a result of its action.*" Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal. App. 3d 396. (emphasis added)

Under the applicable substantial factor test, it is not necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury with absolute certainty so as to exclude every other possible cause to a plaintiff's illness. Cooper v. Takeda Pharmaceuticals America, Inc. 239 Cal. App. 4th 555.

Claimants case is predicated upon the allegation that the delay in diagnosing and treating Ms. 's pacemaker pocket infection (PPI) caused Ms. damage. Claimant's experts testified that had the diagnosis been made the 1st week of June, 2016, rather than on July 7, 2016, would have had a *better result* medically.

Certainly, once the PPI was finally diagnosed, Ms. 's 1st pacemaker had to be removed from her chest. There was no other medical alternative. However, that is not

the issue. The issue is whether the delay in diagnosing Ms. 's infection caused her harm.

Dr. testified that an earlier diagnosis of 's infection would have led to an earlier explantation (removal) of the 1- pacemaker;

Dr. testified the delay in diagnosing 's infection caused harm; an earlier diagnosis would not have required a separate "clean out" surgery; he has never seen a case of a separate "clean out" surgery; that an earlier diagnosis of the infection would not have required an extended period of antibiotics; that she would have had a faster recovery.

No Comparative Fault

- The Arbitrator finds that there was no evidence of comparative fault on the part of Claimants or

Damages:

Cal Civil Code § 3359

Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

Cal Civil Code 3333

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Cal Civil Code 3333.2

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Economic Loss

- Past Economic Loss

- Claimant presented evidence by a preponderance of evidence standard that she is entitled to past economic loss, including lost earnings/medical expenses. Exhibit A, Exhibit V, Testimony, and Exhibit OO together show past economic loss of $57, 500.

- Future Economic Loss

- Claimant did *not* meet her burden of proof in proving *future* lost wages by a preponderance of evidence.

- First, the opinions given by Claimant's forensic economist, , during the Arbitration were not credible within the meaning of CEC 780. Mr. appeared to be frequently confused and unprepared during his testimony. 's original arbitration testimony had to be continued because he prepared a 2d report that changed some of his opinions expressed in his 1st report due to errors in the 1st report. As a result, a 2d deposition had to be taken of in the middle of the Arbitration. He admitted on cross examination that he was unaware of facts brought to his attention by Respondent's attorney. He also admitted to mathematical errors during his testimony. Respondents expert, pointed out a number of errors in 's reports. These errors are set forth in Respondents Closing Brief: 25: 3-14.

- Second, the opinions expressed by Mr. on Ms. 's future loss earnings and ability to work involved speculation and unproven assumptions. The Arbitrator agrees with the opinion expressed by Respondents expert witness ( ) on the issue of future lost wages claimed by . Mr. opined that the lack of specific medical information on claimant's ability to return to work made the claim of future lost wages speculative. As pointed out in Respondent's Closing Brief: 24: 18-19; "There was no medical testimony of any sort that Mrs. could never work again, or that with the treatment she is currently receiving she will not be able to work in the future".

- An expert's testimony about a plaintiff's earning capacity must be grounded in reasonable assumptions, not speculative or conjectural data. Even when the witness qualifies as an expert, he does not possess a carte blanche to express any opinion within the area of his expertise. A damage award must not be speculative, remote, imaginary, contingent, or merely possible. Licudine v. Cedars-Sinai Medical Center (2016) 3 Cal. App. 5th 881, 887.

- Lastly, based on the provisions of CEC sections 801 and 802 "the trial court act[s] as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." Sargon Enterprises v. University of Southern California (2013) 215 Cal.App.4th 1495, 1504.

- For these reasons, the Arbitrator denies Claimants claim for future wage loss damages, including any claim for loss of future earning capacity.

Non-economic Damages

Non economic damages are meant "to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." Cal Civil Code 3333.2

Past non-economic damages

has presented evidence by a preponderance of evidence that she is entitled to reasonable damages for past non-economic damages in the amount of Two hundred fifty thousand dollars ($250,000).

Future non-economic damages

has *not* presented sufficient evidence by a preponderance of evidence standard that she is entitled to damages for future non-economic damages.

The Arbitrator found the opinions of Dr. , an expert who testified on behalf of Respondents, persuasive. Dr. is board certified in both Neurology and Psychiatry.

In his report (Ex. 834-843) and in his testimony at the Arbitration, Dr. 's diagnosis of 's current and continuing pain is due to a "chronic pain syndrome". He stated that he could not identify any neuropathic pain; that there was no "neuro-disfunction"; there was no atrophy; that it was unusual for a patient to have this type of pain described by Ms., for this long a period of time; he could find no organic reason for her pain; he could find no inflammatory source for her pain.

Two other experts, both psychologists – Dr. and Dr. – also testified in the Arbitration. Neither psychologist was persuasive on the issue of Ms. 's current and continuing pain.

Dr , claimant's expert, was licensed in 2016, the same year as Ms. 's surgeries at . testified that she had no medical,

standard of care or causation opinions. Her opinion was that the delay in diagnosis by "contributed" to Ms 's pain and emotional distress. On cross examination, could not state how much delay contributed to Ms. 's pain.

Dr. , Respondent's expert, also testified. The Arbitrator did not find her testimony credible. 's opinion is that she has a "somatic symptom disorder"; that the results of the tests administered by to Ms show that Ms. is "over reporting"; "maybe non- credible reporting"; that is "not motivated to work", that Ms 's childhood development events "caused" 's somatic disorder; and that the prior surgeries were not as important to her disorder as her childhood events. Her testimony had little weight.

Economic Damages

- Past economic loss

- lost earnings $ 57, 500.
- lost profits $ 0
- medical expenses $ 0
- other past economic loss $ 0

Total Past Economic Damages: $ 57, 500.

- Future economic loss

- lost earnings $ 0
- lost profits $ 0
- medical expenses $ 0
- other future economic loss $ 0

Total Future Economic Damages: $ 0

Non-Economic Damages

Past noneconomic loss, including physical pain/mental suffering: $ 250, 000

Future noneconomic loss, including physical pain/mental suffering: $ 0

Total Non-Economic Loss: $250,000

Mr has presented evidence on his separate derivative claim against for loss of consortium.

In California, each spouse has a cause of action for loss of consortium, caused by a negligent or intentional injury to the other spouse by a third party." Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d, 408

"There are four elements to a cause of action for loss of consortium: '(1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; (2) a tortious injury to the plaintiff's spouse; (3) loss of consortium suffered by the plaintiff; and (4) the loss was proximately caused by the defendant's act". Vanhooser v. Superior Court (2012) 206 Cal. App. 4th 921.

has proved each element of his cause of action for loss of consortium by a preponderance of evidence. Mr. is awarded damages against as follows:

Economic Loss

Past economic loss
- lost earnings $ 0
- lost profits $ 0
- medical expenses $ 0
- other past economic loss $ 0

Total Past Economic Damages: $ 0

Future economic loss
- lost earnings $ 0
- lost profits $ 0
- medical expenses $ 0
- other future economic loss $ 0

Total Future Economic Damages: $ 0

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Non-economic loss

Past noneconomic loss, including physical pain/mental suffering: $ 75,000

Future noneconomic loss, including [physical pain/mental suffering: $ 0

Total Loss: $75,000

Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision (or Settlement Agreement) to the Department of Managed Health Care.

Dated: October 1, 2018

By _____
William Kolin, Judge (Ret.)
Arbitrator