Docket No. 10-15326

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VAN A. PENA,

Plaintiff-Appellant,

v.

TIMOTHY MEEKER, et al.,

Defendants-Appellees.

On Appeal from a Jury Verdict in the United States District Court
for the Northern District of California

No. C 00-4009 CW
The Honorable Claudia Wilken, Judge

BRIEF OF APPELLEE

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I. JURISDICTION

Defendant agrees that this appeal is timely and that this Court has jurisdiction.

II. STATEMENT OF THE CASE

Plaintiff was a physician on staff at Sonoma Developmental Center ("SDC," "the hospital," or "the Center"), a residential hospital for the developmentally disabled. On October 31, 2000, plaintiff filed a First Amendment retaliation lawsuit against numerous employees at the Center, relating principally to plaintiff having been placed on a paid administrative leave. That original suit was not brought against the herein defendant and appellee Judith Bjorndal, M.D., who had just became the hospital's Medical Director in the fall of 2000.

In July 2001 Dr. Bjorndal fired plaintiff because of his misconduct in connection with writing a Do Not Resuscitate (DNR) Order for a failing, elderly resident who was understood to desire cardio-pulmonary resuscitation (CPR). On June 6, 2002, plaintiff filed a supplemental complaint against Dr. Bjorndal asserting her personal liability on the theory that his termination was attributable to retaliation for alleged First Amendment activity, actionable under 42 U.S.C. section 1983.

The defendants brought a motion for summary judgment, and on December 12, 2003, the district court granted summary judgment in favor of

defendant Dr. Bjorndal and some but not all of the defendants named in the original action. Plaintiff then settled with all defendants save and except Dr. Bjorndal, and appealed the district court's ruling in her favor. This Circuit initially reversed, but following defendant's filing a Petition for Rehearing, the panel vacated its Memorandum disposition and remanded the case to the district court for reconsideration in light of the United States Supreme Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Dr. Bjorndal then filed a second summary judgment motion on the basis of *Garcetti*, which was granted in part and denied in part. Defendant filed an appeal of that order on the ground that it erroneously denied the defendant the protection of qualified immunity, but that appeal was dismissed as untimely.

The case then proceeded to a jury trial from November 16 through December 4, 2009. After a week of deliberations, the jury of eight indicated it could not reach a unanimous verdict. The parties then stipulated that they would accept a verdict of six jurors (the same plurality that would obtain in a civil action in a California state court), whereupon a defense verdict was rendered. The jury found on special verdict that neither the prior lawsuit nor plaintiff's photography of patients was a substantial or motivating factor in Dr. Bjorndal's decision to terminate plaintiff's employment.

III. STATEMENT OF THE ISSUES

I. SUMMARY JUDGMENT RULINGS

A. Did The District Court Properly Determine That A Physician Reporting Possible Medication Errors To His Supervisor And Asking Her To Check The Medical Record Was Acting Pursuant To His Official Duties?

B. Did The District Court Properly Adjudicate A Claim Of Retaliation For Protected Speech When There Was No Evidence That The Defendant Was Aware Of That Speech Or Was Hostile To It?

II. EVIDENTIARY RULINGS

A. Did The District Court Properly Exclude A Third Party's Alleged Hearsay Statement When There Is No Evidence That Defendant Was Ever Made Aware Of That Statement?

B. Did The District Court Properly Refuse Admission Into Evidence Of A Series Of Sensational Newspaper Articles When There Is No Evidence That Defendant Ever Read The Articles?

III. JURY INSTRUCTIONS

A. Did The District Court Properly Refuse To Give A Jury Instruction That Would Have Falsely Implied That A Physician Can Override A Patient's Choice For End-of-Life Care?

B. Did The District Court Properly Refuse To Give A Jury Instruction That Constituted Argument To The Jury?

IV. ADDENDUM TO BRIEF

Appellee submits an addendum bound separately from this brief.

V. STATEMENT OF FACTS

Elizabeth R was a resident for her entire adult life at Sonoma Developmental Center. She was in the top one percent of patients at SDC in terms of intellectual functioning TT 147:1-13 (SER 60)[1]. She was described as a prim and proper English lady who had a love of singing and reading. TT 935:10-937:4 (SER 110-112). Beginning in late 2000 with a decline in her health, she became the subject of a Bioethics Committee and other interdisciplinary staff deliberations regarding whether a Do Not Resuscitate (DNR) Order should be written for her. Pl. Exh. #15 (SER 285). Input was obtained from her primary physician, attending nurses, social workers, psychologists, and the Client's Rights Advocate assigned to her case. *Ibid.* Dr. Pena, a weekend relief doctor at the hospital, had no involvement in these proceedings.

Throughout 2000 and early 2001, these investigations concluded that Elizabeth had clearly expressed a wish for CPR and that, accordingly, DNR status would be inappropriate for her. *Ibid.* Her primary care physician for the last five of six years of her life was Dr. Kashyup Thakor, who knew her well. TT 782:5022 (SER 94). He and other staff met with Elizabeth to

[1] "SER" refers to the appellee's supplemental excerpts of record.

explore her understanding of cardiac-pulmonary resuscitation (CPR) and its implications, as well as her wishes in this regard, and again concluded that she had a sufficient understanding of the process and desired that CPR be attempted should her heart or lungs fail. TT 798:9-16; 799:5-7; 819:3-820:6 (SER 98, 99, 100, 101).

On Saturday, March 3, 2001, attending staff summoned Dr. Pena, who was the sole physician providing weekend coverage at the Center, because they feared that Elizabeth was dying. TT 544:11-18 (SER 82). Dr. Pena then called Elizabeth's primary treating physician, Dr. Kashyup Thakor, at home to discuss her status. TT 560:14-22 (SER 83). During this telephone conversation, Dr. Thakor told the plaintiff that Elizabeth was a patient who didn't want a DNR Order; instead, she wanted CPR attempted. TT 785:22 - 786:24; 787:13-16 (SER 95-97) Throughout the duration of this litigation and at trial, Dr. Pena refused to acknowledge that Dr. Thakor so advised him or that he had recommended he call Medical Director Dr. Bjorndal to get her guidance in light of their fuzzy recollection of the hospital's DRN policy. TT 729:11-25 & 731:6-13 (SER 90&91).

Shortly after noon on March 3, 2001, plaintiff reversed Elizabeth's long-standing code status by inserting a Do Not Resuscitate Order in Elizabeth's chart. Def. Tr. Exh. #108 (SER 300). At trial, Dr. Pena continued to insist that at that time, and even continuing into the present, he

had absolutely no information from any source about Elizabeth's wishes on the subject of CPR and DNR Orders. TT 719:4-720:3 & 723:7-9 (SER 87-89). He took this stance despite the fact that he admitted to having read, before writing his DNR Order that reversed Elizabeth's status, the IPP Review (Individual Program Plan) report that emerged from the interdisciplinary deliberations of January 23, 2001, that stated, in pertinent part:

> "Team me to revisit the DNR issue that was reviewed 11/17/00 by Bioethics. Some team members expressed opinions that Miss R might not fully understand what the CPR process entailed. Team members that were at the November meeting said they felt that she did understand, in a very basic way, what CPR was. The Client's Rights Advocate said that she felt that Miss R did understand the outcome of her decision. The Unit MD said that she was very appropriate for a DNR based on her current diagnoses. The LOC staff discussed what they felt Miss R's understanding of the process was and the team agreed that she did understand the choice she had made and they would honor her request. No DNR request will be made by the team. Pl. Tr. Exh. 15 (SER 285).

According to Dr. Gary Gathman, the Center's Chairman of Bioethics, these meeting notes effectively constituted an Advanced Directive of Elizabeth's. TT 122:16-24 (SER 55).[2] When asked at trial what he thought

[2] Throughout the litigation, plaintiff has advanced a red herring that Elizabeth's chart contained no advanced directive in the sense of a formal, signed legal document. Advanced directives of that kind are virtually never (continued…)

this language in the IPP Review referred to if not precisely Elizabeth's wishes on the subject of end-of-life care, plaintiff steadfastly denied the plain and obvious meaning of the words in front of him. TT 714:13-716:14 (SER 84-86).

Having issued his DNR Order, Dr. Pena then telephoned his Medical Director, Dr. Bjorndal, at home, but gave her deceptively incomplete information that left her ignorant of Elizabeth's wishes and the hospital's history of addressing the DNR issue for her. TT 430:13-433:21 (SER 62-65). Three staff members got wind of what was happening, and intervened by placing a conference call to Dr. Bjorndal to advise her that a DNR Order had been issued for a patient who wanted the opposite. TT 433:25-435:16 (SER 65-67). Alarmed by this revelation, Dr. Bjorndal telephoned Dr. Pena and advised him that she had just learned that Elizabeth did not want DNR status and that the DNR Order had to be put on hold. Dr. Bjorndal was taken aback that plaintiff did not express any surprise at this revelation, but only responded by saying that Elizabeth was "not competent." TT 436:1-20 (SER 68). Nevertheless, since he said nothing to the contrary, Dr. Bjorndal

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(…continued)
used at the hospital. However, informal advanced directives, which may simply involve a conversation in which the patient has articulated his or her preferences for end-of-life care, are the most common, but equally compelling, form of advanced directives encountered at SDC. TT 134:14-135:24` (SER 56-57).

assumed that he would follow her advice that the DNR Order had to be suspended until a full review could occur following the weekend. As she put it, this was not a "Saturday type of decision." *Ibid.*

Hearing that Elizabeth was failing and that a DNR Order had been written for her, Elizabeth's social worker, Ms. Terri Sievers, rushed from home to the hospital to be with her. She confronted the plaintiff with the fact that Elizabeth was a patient who didn't want a DNR Order, but Dr. Pena was agitated and dismissive. TT 937:13-941:10 (SER 112-116). At trial, Dr. Pena continued to deny that Ms. Sievers (as well as Dr. Thakor and the IPP Review document) had confirmed that Elizabeth was a patient who was opposed to being put on DNR status. TT 755:15-756:5 (SER 92-93).

Believing that the situation was resolved for the moment, Dr. Bjorndal was surprised to then receive a call an hour later from the Client Rights Advocate (CRA) who reiterated the concern that DNR status had been initiated for a client who desired resuscitation. TT 438:4-16 (SER 69). Dr. Bjorndal advised her that the situation had already been addressed and corrected, but the CRA stated she had just been on the ward and the DNR Order was still in place. Dr. Bjorndal immediately called plaintiff again to find out what was going on, at which point he refused to rescind the DNR

Order on "ethical" grounds, and said she could countermand it if she so desired, which she did.[3] TT 438:17-439:13 (SER 69-70).

The following week, SDC's Executive Director Ruth Maples placed plaintiff on paid administrative leave while this most serious matter could be investigated. TT 869:16-873:2 (SER 102-106). She chose an investigator from outside the facility, with whom she had previous experience and whom she respected. *Ibid.* & SER 232. The investigator issued a report on May 5, 2001, which was highly condemnatory of plaintiff's behavior. Def. Tr. Exh. 104 (SER 286-299). The investigation concluded that Dr. Pena had violated hospital policy and Elizabeth's rights by unilaterally writing the DNR Order, that he gave defendant misleadingly truncated information about the circumstances under which the Order was written, and that he lacked credibility in the information and statements he gave during the investigation. *Ibid.*

Following receipt of the May 5, 2001 investigation report, Dr. Bjorndal concluded that Dr. Pena had violated Hospital policy and disregarded Elizabeth's wishes in regard to CPR, and she generally lost confidence in

[3] It is certainly true that no one involved in Elizabeth's care in the final weeks of her life expected that the administration of CPR was likely to be successful. Nevertheless, these outcomes cannot be predicted with certainty, and the trial evidence showed that even in cases of severe renal failure, patients have been known to unexpectedly rally. TT 95:5-15 & 137:12-138:24 (SER 54A& 58-59).

plaintiff's trustworthiness. Accordingly, on June 26, 2001, Dr. Bjorndal terminated plaintiff's employment. TT 487:14-495:24 (SER 73-81).

VI. SUMMARY OF ARGUMENT

Both of the District Court's challenged rulings on summary judgment were correct. First, the Court found that a staff physician's memorandum to his supervisor complaining of the possible link between a patient's complications and her regimen of medications, and asking her to look into the matter, was a communication undertaken pursuant to that physician's official duties within the meaning of the Supreme Court's *Garcetti* decision, and thus not entitled to First Amendment protection. It is undeniable that the plaintiff's official duties required him to report any suspected abuse or neglect, and the mechanism he chose to accomplish that task is immaterial to the constitutional issue presented. That speech cannot support a Section 1983 claim.

Similarly, the District Court was correct in ruling that a complaint plaintiff allegedly made to the California Department of Public Health was not actionable under Section 1983. That is because there is no evidence that the defendant ever saw or was told about the complaint, the Department of Public Health's investigation and resulting Statement of Deficiencies, or the Center's plan of correction. Plaintiff's complaint by its very nature is confidential between him and the Department of Public Health. A party

cannot prove retaliation by a party without establishing that the accused had knowledge of the protected activity in the first place. Plaintiff was unable to establish any such knowledge, let alone hostility to the information and retaliation because of it.

The District Court's two challenged evidentiary rulings were well within the exercise of sound discretion; and indeed, the opposite rulings would have constituted clear error. First, the District Court excluded a hearsay statement allegedly made in 1999 (a year before defendant Bjorndal began employment at SDC to Mr. Contreras by either the Center's clinical director or executive director purportedly asking Contreras to "dig up the dirt" on plaintiff so he could be fired. There is no evidence of any kind that this alleged statement was ever reported to appellee, let alone acted upon by her. There is simply no plausible legal theory that would justify the admission of this evidence in a personal suit against her.

The only other challenge plaintiff mounts to the District Court's evidentiary ruling is its refusal to receive in evidence a series of inflammatory and sensational newspaper articles about events at Sonoma Developmental Services. The only evidence in the case is that the defendant never read these articles. Plaintiff's argument that they should be received in evidence as "context" because the defendant subscribed to the newspaper,

lived in the community, and published her father's obituary in that same newspaper is wholly unreasonable.

Equally unreasonable is plaintiff's objection to the Court's refusal to give two jury instructions he requested. The first instruction was inapposite to the case, and misstated the content and context of a Probate Code statute which it purported to explicate. Moreover, the proffered instruction mistakenly implied, contrary to the dictates of California law, that a physician might have the legal right to override a patient's decision to have cardio-pulmonary resuscitation attempted, rather than Do Not Resuscitate status, if he felt that was in the patient's best interests.

The second so-called "Coszalter" instruction plaintiff requested (but only after the jury had been fully instructed and was in deliberations) was completely argumentative and essentially sought to spotlight inferences that the jury might draw from the evidence that were favorable to the plaintiff. Moreover, it was completely unresponsive to the questions the jury posed to the Court. The Court's jury instructions were balanced and fair, and gave plaintiff the full opportunity to argue his case and the circumstantial evidence he believed supported it, which he did.

VII. ARGUMENT

I. THE DISTRICT COURT'S SUMMARY JUDGMENT RULINGS WERE PROPER

A. Standard of Review

This Court exercises *de novo* review of a grant of summary judgment or adjudication. That review of course is limited to the record that was before the district court at the time of its ruling. *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997); *Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994); *Lippi v. City Bank*, 955 F.2d 599, 604 (9th Cir. 1992).

Thus, plaintiff quite improperly cites to trial evidence in an effort to undermine the district court's summary judgment ruling made years earlier. *See Harkins Amusement Enter. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), citing *Morrison v. Char*, 797 F.2d 752, 757 (9th Cir. 1986); *Komatsu, Ltd. v. States S.S. Co.,* 674 F.2d 806, 812 (9th Cir. 1982).

B. The District Court Properly Ruled That Plaintiff's February 21 Memo Was Not Citizen Speech Protected By The First Amendment

Plaintiff challenges the district court's finding that a memorandum he wrote to his immediate supervisor (Medical Director Judith Bjorndal, M.D.) expressing concerns about a patient's status and medications was done pursuant to his official duties as an attending physician. In that memorandum plaintiff recounted a patient's complications and current

status, and raised a concern that the patient's complications may have been contributed to by the medications being prescribed for her. It then asked Dr. Bjorndal to please look into the matter. ER 268.[4]

It is difficult to conceive of a clearer case of an employee acting pursuant to his official duties than a staff physician at a residential hospital for the developmentally disabled reporting the suspected abuse or neglect of a patient. Sonoma Developmental Center's Abuse, Mistreatment Or Neglect Prevention & Reporting Policy provided (effective August 2000)(Exh. B to Bjorndal Decl. in Support of Second SJ Motion)(SER 257-265).

> Abuse, mistreatment or neglect of any person living at Sonoma Developmental Center (THE HOSPITAL) is **STRICTLY PROHIBITED**.
>
> Any staff person having knowledge of abuse, mistreatment or neglect shall first insure that every effort is made to secure medical/nursing attention for the person identified. At the first opportunity, staff shall then report the events in question to appropriate authorities.

Since plaintiff was first employed at SDC in 1991, plaintiff had been advised of his duty to report all cases of suspected abuse or neglect, a

[4] Plaintiff's assertion that the district court "excluded all evidence of this memorandum from the jury" (Appellant Brf. p. 2) is simply wrong. Dr. Bjorndal testified to receiving the memo and as to how she responded to it, and plaintiff was allowed to try to impeach her on that testimony. TT 425:10-15 & 912:3-914:23 (SER 61 & 107-109). Moreover, plaintiff referred to the memo in his closing argument and went so far as to argue – albeit improperly -- timing between this unprotected speech and plaintiff's termination. TT 1093:12-22 (SER 167).

requirement that persisted throughout his employment. (Pl. Depo. 180:5-15)(SER 236)

> Q. Was it your understanding that as an employee at the Sonoma Developmental Center, you were required to report incidents of dependent adult abuse under penalty of possible criminal misdemeanor if you did not do so?
>
> A. As I answered previously, I don't recall as I sit here now signing this document or reading it in 1991, although I believe I did. And as I answered previously, it is the duty of a physician to report abuse to anyone, a criminal activity against anyone. Whether or not there are penalties, that is the duty of the physician, and I do that.

Moreover, plaintiff confirmed that "ordinary ethics" as well as licensing regulations compelled physicians to report abuse and neglect, and plaintiff complied with that duty without exception. Pena Depo. 702:11-25 (SER 243).

> Q. Was it your practice to prepare an incident report every time you encountered a situation where you suspected that a client would be or might have been abused or suffered an injury as a result of medical neglect?
>
> A. I believe I've answered that question in previous deposition. And one is commanded to do that by ordinary ethics as well as licensing regulations in the State of California. And, thus, I report all injuries of a suspicious nature.
>
> Q. And you conformed with that requirement, as you understood it?

> A. Best of my knowledge to conform with, yes, I did, every time.

In writing his February 21 memorandum, plaintiff was unquestionably performing his duties and conveying the observations he had made as an attending physician. Only in that capacity was he privy to the patient's medical chart, the progression of her medical problems, the dates and circumstances of diagnostic findings, consultations and her regimen of medications. The Supreme Court's analysis in *Garcetti v. Ceballos*, 547 U.S. 410, 421-422 (2006) is closely analogous:

> The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Garcetti involved a Los Angeles deputy district attorney, assigned as a calendar deputy, who claimed he was retaliated against for writing memoranda and making statements highly critical of inaccuracies contained in a police affidavit used to obtain a search warrant. The high court noted that it was probative, but not dispositive, that Ceballos had voiced his views inside the office rather than publicly, and that his speech concerned the subject matter of his employment. *Id.* at 420-421:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a

> calendar clerk. . . . That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

The plaintiff argued below, as here, that the *Garcetti* doctrine is completely deflected simply because plaintiff wrote a memorandum to Dr. Bjorndal, rather than filling out a pre-printed special incident form which was used at the hospital to report abuse or neglect. Plaintiff did so, he claims, because he believed that the memo would more effectively communicate his concern than the special incident form. Pl. Decl. ¶ 12; ER 251. It makes no sense whatsoever to suggest that by using a memo instead of a pre-printed form, plaintiff's reporting of suspected neglect or medical malfeasance is somehow rendered disconnected from his official duties as an attending physician and transformed into "citizen speech" protected by the First Amendment. Nothing in *Garcetti* or its progeny provides that the form of a communication determines whether the *Garcetti* doctrine applies. It would be an exceedingly strange rule of law that construed an employee to be acting pursuant to his official duties when he uses a predictably

ineffective means to report neglect, but outside the scope of those duties if he uses a means calculated to succeed.

Nor does any precedent endorse plaintiff's absurdly cramped reading of *Garcetti* which would confine the concept of "official duties" to only those actions that can be shown to have been the result of a strict and express mandate by the employer. After all, nothing in *Garcetti* suggests that the district attorney was required to write the particular memo that he chose to write, and the high court did not evaluate whether the attorney was correct or misguided in reaching the conclusions his memo set forth. Such inquiries are immaterial: "If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action." *Garcetti, supra,* at 423.

In evaluating plaintiff's February 21 memo, the district court reached a conclusion that was reasonable and unavoidable: "In writing the memorandum, Plaintiff was performing his duties and conveying his observations as an attending physician. It is immaterial whether it was done on a pre-printed form or in a typed memorandum. Because the memorandum was written pursuant to Plaintiff's official duties, the Court finds that this expression is not protected by the First Amendment and grants summary judgment in favor of Dr. Bjorndal on this ground." ER 11.

C. The District Court Properly Found That There Was No Evidence That Defendant Was Aware Of Any Complaint By Plaintiff To The Department Of Public Health Let Alone That She Retaliated Against Plaintiff Because Of Any Such Complaint

Curiously, plaintiff protests the supposed exclusion from evidence of his complaint to the Department of Heath, but neither at the summary judgment proceedings nor at trial did plaintiff ever offer that complaint in evidence. Pena Decl. ¶¶ 7 & 8 (ER 249-250); Plaintiff's Exhibit List (SER 281). Instead of providing the Court with his complaint, he offered only his own characterization of it, namely that there were photographs of patient injuries that had been removed from the records (ER 250), a description that has now mushroomed into "the hospital . . . attempting to cover-up patient abuse and neglect by removing from patient records photographs taken of the suspicious patient injuries." Appellant's Brief p. 24.

In any event, it was defendant who then brought before the district court the Department of Health's Statement of Deficiencies and Plan of Correction. Senne Decl. & Exh. A thereto. (SER 270-274). That Statement of Deficiencies said nothing about abuse, neglect or suspicious injuries, nor of photographs of patient injuries being illegally removed from records. The Statement simply noted that "Two (2) of four (4) medical records reviewed lacked photographs of residents on specific progress notes" and that there was no policy addressing the removal of entries in records. *Ibid.* The

Statement says nothing about the content of the photographs, who took them, or whether they should have been taken in the first place. It in no way addressed whether, or under what circumstances, attending physicians should photograph patients.. It did note, however, that "Staff interview revealed that consent for photography must be obtained before residents are photographed. There was no documented consent for photography filed within these residents' charts." Similarly, the Center's Plan of Correction does not promulgate or modify any SDC policy regarding taking photographs of residents, but simply provides a protocol for removing material, including photographs, from records. *Ibid.* Removing materials from patient records was not the subject of Dr. Bjorndal's October 25 discussion with plaintiff. Bjorndal Reply Decl. ¶ 3 (SER 276).

The only evidence before the Court was that Dr. Bjorndal had no memory of having seen or been advised of the Statement of Deficiencies. Bjorndal Reply Decl. ¶ 3 (SER 276). Certainly plaintiff presented no evidence that anyone had apprised her of it. Ms. Mary Giusti, the employee who signed off on the Center's Plan of Correction, did not recall any involvement of Dr. Bjorndal in the matter, and saw no reason why she would have been involved, given that she first started work at the hospital on September 25, 2000, less than a week before the Department's response to the Statement was issued, and months after the subject events and DPH's

investigation occurred. Giusti Reply Decl. ¶¶ 3 & 4 (SER 279-280). Moreover, this was hardly a grave matter that one would expect to necessarily be brought to the Medical Director's attention; rather, it was the lowest possible level of violation for which the Department can be cited, involving no monetary penalty and considered to have a minimal relationship to the health or safety of facility clients. Giusti Reply Decl. ¶ 2. (SER 279-280). Additionally, the Plan of Correction indicated that it was the Executive Director who issued the corrective directive establishing a protocol for the removal of materials, including photographs, from clinical records. Giusti Reply Decl. ¶ 4 (SER 279-280). Thus, there is no evidence from which a trier of fact could reasonably draw any inference that the defendant was aware of DPH's investigation or conclusion. Even if the evidence before the district court had demonstrated that Dr. Bjorndal had been informed of the matter, there was nothing that linked it to the plaintiff. Complaints to DPH are confidential, and neither the complaint itself nor the identity of the complainant is disclosed by the Department of Public Health to the facility involved. Decker Decl. ¶ 2 (SER 277-278). The Statement of Deficiencies itself does not mention Dr. Pena, nor does it identify any of the patients about whose records it reports.

A First Amendment retaliation plaintiff must prove that his constitutionally protected speech was a substantial or motivating factor in

his termination. *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). It is self-evident that a person cannot be motivated by something of which she is not even aware. Thus, it is plaintiff's burden to establish a defendant's awareness of any speech that he contends was the animus for that defendant's retaliation. *Keyser v. Sacramento Unified Sch. Dist.*, 265 F.3d 741, 750-751 (9th Cir. 2001.) Of course, a party cannot create disputed issues of material fact with speculation, and it does not suffice to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the inference to be drawn from the evidence is speculation or conjecture, then the underlying evidence is not relevant. *Alcala v. Woodford*, 334 F.3d 862, 886-888 (9th Cir. 2003); 2 Jones & Rosen, Rutter Group Practice Guide, Federal Civil Trials and Evidence, Relevance, §8.18, at p. 8B-5.

Plaintiff has never offered his alleged complaint to the Department of Public Health in evidence. He has no evidence that Dr. Bjorndal was aware of any such complaint, let alone that she was for some reason hostile to it and retaliated against him for it. The district court's summary judgment ruling was eminently sound.

II. THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE REASONABLE AND SQUARELY WITHIN HER SOUND DISCRETION

A. Standard of review

Evidentiary rulings of a trial court are reviewed for abuse of discretion. *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 1008 (9th Cir. 2007); *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). To obtain reversal, Plaintiff must also show that the evidentiary error was prejudicial, meaning that it likely tainted the verdict. *Tritchler, supra,* at 1155; *Mahone v. Lehman*, 347 F.3d 1170, 1172 (9th Cir. 2003).

Here, plaintiff can show neither error nor prejudice. Indeed, the evidence he argues should have been admitted was highly inflammatory and prejudicial, concerned events that preceded Dr. Bjorndal's employment at the hospital, and was unknown to defendant. To have admitted such evidence in a case seeking to impose personal liability on a section 1983 retaliation defendant would have been reversible error.

B. The Contreras Testimony Was Properly Excluded

As we understand his argument, plaintiff asserts that his witness Ed Contreras should have been permitted to testify that in 1999, a year before Dr. Bjorndal even came to work at the hospital, the then-Clinical Director Patricia Rees and/or the then-Executive Director Tim Meeker told Contreras

to "dig up the dirt" on Dr. Pena so he could be fired.[5] Defendant was not privy to any such conversation, did not even work at the Center at the time, and no one claims to have ever told her about it.

Plaintiff makes a contorted and far-fetched argument that this testimony would constitute "circumstantial evidence" that a jury should consider "in determining whether it was more likely than not that Meeker would have warned Bjorndal about Pena's protected activities and encouraged her to order Pena to stop taking photographs of patient injuries." Appellant Brf. p. 28. This is but an unbridled flight of the imagination. Plaintiff presented no documentary or testimonial evidence that Meeker "warned" Bjorndal about Pena's activities or that he "encouraged her" to order plaintiff to stop taking photographs. Indeed, plaintiff himself admitted that it was members of the nursing staff, not Executive Director Mr. Meeker, who first objected on privacy grounds to his practice of taking photographs of patients and placing them in their medical charts. Pl. Depo. at 301:23-302:25 & 304:4-22 (SER 221-224). The jury expressly found that plaintiff's photographing patients

[5] Patricia Rees retired before Dr. Bjorndal was hired as Medical Director in September 2000. Mr. Meeker retired in December 2000, seven months before plaintiff was fired. Both Rees and Meeker were named defendants in plaintiff's original Section 1983 lawsuit, and plaintiff settled all claims against them (and against all other defendants save and except Dr. Bjorndal) in 2004.

was not a substantial or motivating factor in defendant's termination decision. ER 95.

By the time that the DNR issue arose regarding Elizabeth and plaintiff was fired, Mr. Meeker and Ms. Rees were long since retired, and had nothing to do with those events or Dr. Bjorndal's evaluation of those events. The Court's exclusion of Mr. Contreras testifying to an alleged hearsay statement in 1999 of Mr. Meeker or Ms. Rees to Mr. Contreras was entirely reasonable and proper.

C. The Newspaper Articles Were Properly Excluded

Lastly, plaintiff complains about the exclusion from evidence of a whole series of sensational articles and editorials published in the Sonoma Index Tribune. ER 94.1-94.33. Dr. Bjorndal testified that she didn't respect the editorial board of that publication and rarely read them. TT 174:4-8 (ER 183). When shown the articles and editorials, she consistently testified she had no recollection of having seen or read them.

Nevertheless, plaintiff makes the argument – although on what legal theory remains entirely obscure -- that the articles should have come into evidence because Dr. Bjorndal lived in the community, subscribed to the newspaper, and published her father's obituary in that paper. Cynically, plaintiff asserts to this Court that had these articles not been excluded from evidence, the jury might have concluded that Dr. Bjorndal's was "aware" of

the "licensing, funding and public relations problems that the hospital was experiencing as a result of Pena's reports of patient abuse." Appellant Brief p. 30. The jury certainly could not have learned any such thing from these articles, nor could Dr. Bjorndal even had she read them in their totality– Dr. Pena's name appears in but one article where he is quoted by an Officer Rhodes with reference to an occurrence from July of 1999 that preceded defendant's employment at the Center by more than a year.

Without a foundation that defendant had at least read the articles in question, there is no legal theory that could plausibly support their admission.[6] The only purpose of plaintiff wishing to introduce this sensational journalism is for their prejudicial value, hoping to taint Dr. Bjorndal with guilt by association. The startling proposition that the contents of newspapers articles gain wholesale admission into evidence in a

[6] As the trial court pointed out, the articles wouldn't necessarily become admissible in evidence just because the defendant had read them. TT 159:15-17 (ER 173). Plaintiff seems to suggest that he would be entitled to prove Dr. Bjorndal's familiarity with the articles by ridiculing her assertion that she had no recollection of reading them. Supreme Court precedent has established for well over a century that "disbelief of their testimony could not supply a want of proof." *Bunt v. Sierra Butte Gold Min. Co., Ltd.,* 138 U.S. 483 (1891); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951). Similarly, "[s]peculation cannot supply the place of proof." *Moore, supra,* at 578, citing *Galloway v. United States*, 319 U.S. 372, 395.

court of law because one of the parties subscribes to that newspaper has no support in the precedents and nothing in reason recommends it.

III. THE DISTRICT COURT'S RULINGS ON JURY INSTRUCTIONS WERE PROPER

A. STANDARD OF REVIEW

A party's complaint that specific instructions were requested but not given is reviewed for abuse of discretion. *Tuttle v. Metropolitan Gov't of Nashville,* 474 F.3d 307, 321 (6th Cir. 2007); *Duran v. City of Maywood,* 221 F.3d 1127, 1130 (9th Cir. 2000). A trial judge's refusal to give a requested instruction is reversible error when (1) the instruction not given accurately reflects the law, (2) other delivered instructions do not substantially cover the omitted instruction, and (3) the refusal impairs the requesting party's theory of the case. *Id.* at p. 322. A reversal of judgment is warranted only when the jury instructions, considered as a whole, are confusing, misleading, or prejudicial. *Ibid; Coleman v. B-G Maintenance Mgmt. of Colorado, Inc.,* 108 F.3d 1199, 1202 (10th Cir. 1997).

In determining whether the charge was erroneous, the appellate court must consider it as a whole. *Swinton v. Potomac Corp.,* 270 F.3d 794, 807 (9th Cir. 2001). Thus, if the instructions taken together properly express the law, no reversible error has occurred even if an isolated clause may be inaccurate, ambiguous, incomplete, or otherwise subject to criticism. *Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc.,* 278 F.3d 523, 529 (5th Cir.

2002); *Watkins v. Bowdin,* 105 F.3d 1344, 1356 (11th Cir. 1997); *Smalley v. Duluth, Winnipeg & Pac. Ry. Co.,* 940 F.2d 296, 297-298 (8th Cir. 1991).

B. THE COURT'S JURY INSTRUCTIONS FAIRLY AND ADEQUATELY COVERED THE ISSUES PRESENTED AND CORRECTLY STATED THE LAW

A party has a right to have the jury instructed on its theory of recovery or defense if that theory is supported by facts in the evidence and is legally correct. *H.H. Robertson Co. v. V.S. General Contractors, Inc.*, 950 F.2d 572, 578 (8th Cir. 1991); *Williams v. Jader Fuel Co., Inc.,* 944 F.2d 1388, 1402 (7th Cir. 1991). The basic requirement is that the jury instructions fairly and adequately cover the issues presented, correctly state the applicable law, and not be misleading. *Clem, supra,* 566 F.3d at p. 1181; *Duran, supra,* 221 F.3d at p. 1130; *Gulliford, supra,* 136 F.3d at p. 1348.

Thus, refusing a jury instruction that is proper in form and supported by the evidence is not prejudicial where the applicable law is stated adequately in other instructions. See *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 592 (6th Cir. 1986); *Fernandez v. Fitzgerald,* 711 F.2d 485, 487 (2nd Cir. 1983). Further, in determining the adequacy of the jury instructions, the appellate court will consider not only the instructions as a whole, but also the opening statements, the evidence, and the closing

arguments to determine if the jury was adequately informed of the applicable law. (*Smalley, supra,* 940 F.2d at pp. 297-298.

Here there can be no question that the trial court's instructions, considered as a whole, fairly and adequately covered the issues presented and clearly stated the applicable law, both as to the substantive issues and as to the manner in which the jury was to consider the evidence. The appellant had a full and fair opportunity to argue his case to the jury based upon the evidence and the applicable law. Appellant brought to trial a single claim for relief under section 1983 of Title 42 of the United States Code, namely that his First Amendment rights were infringed when defendant terminated his employment as a physician at the hospital. Appellant alleged that the appellee fired him because of two instances of protected speech: (1) a lawsuit he had previously filed alleging that he had been retaliated against for speaking out on patient abuse and malpractice and (2) his photographing of patients' injuries to document injuries.[7]

The court instructed the jury on plaintiff's claims,[8] including the applicable elements of the claim,[9] the burden of proof on his claim,[10] and the

[7] AOB, at p. 1; Joint Proposed Jury Instructions, filed October 23, 2009, at p. 6; Final Jury Instructions, filed November 30, 2009, at p. 2. (ER 109-122).

[8] TT 1043:5-1058:2 (SER 117-132).

rules for consideration of evidence, including circumstantial evidence.[11] Appellant does not contend that any instructions were incorrect or incomplete. In addition, the court submitted the case to the jury on a special verdict form, which accurately set out the issues to be decided and the burden of proof.[12] Again, appellant does not contend that the special verdict form was objectionable. Moreover, appellant's counsel was able to fully present his client's views on the issues to be decided and the circumstantial evidence upon which he was relying during his opening statement and closing argument.[13] Plaintiff has not and cannot make a showing that the

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(…continued)

[9] Concerning the elements required for plaintiff to recover, the trial court instructed the jury: "In order to prove Dr. Bjorndal deprived him of his First Amendment rights, Dr. Pena must prove the following by a preponderance of the evidence: (1) Dr. Bjorndal took an adverse employment action against Dr. Pena; and (2) Dr. Pena's protected speech was a substantial motivating factor for the adverse employment action. . . .A substantial or motivating factor is a significant factor." TT 1049:15-25 (SER123).

[10] TT 1048:9-11; 1049:15-17 (SER 122-123).

[11] The court had previously instructed the jury on the kinds of evidence it could consider in making its required determinations: "Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence." TT 1046:8-17 (SER 120).

[12] ER 95-97; TT 1056:19-1058:18

[13] TT 20:1-52:5;1058:21-1101:4; 1132:24-1137:9 (SER 1-52; 132-175; 206-211).

instructions, taken as a whole, were inadequate or that he was denied a full and fair opportunity to present his evidence and theory of the case to the jury. The court's declination of the appellant's proffered instructions, which as discussed below were improper, could not and did not unfairly prejudice the appellant's case.

1. APPELLANT'S REQUESTED PROBATE INSTRUCTION WOULD HAVE DISTORTED APPLICABLE LAW AND CONFUSED THE JURY

Appellant asserts that his requested instruction on Probate Code section 4654 was necessary to "balance" the following instruction the Court gave regarding the rights of developmentally disabled persons:

> Developmentally disabled persons residing in a state hospital have the right to give or withhold consent for treatments and procedures, unless a judicial order or other law provides for another person to make these decisions for the patient. ER 116.

Plaintiff asserts that the above instruction, which concededly accurately reflects California law on the subject, needed to be "balanced" with an instruction that in fact would distort California law, namely:

> With regard to a person's end of life health care decisions, a doctor is not required or authorized to provide health care contrary to generally accepted health care standards. Appellant Brf. p. 32.

Preliminarily, it should be noted that plaintiff's requested instruction does not accurately reflect the content of Probate Code section 4654, which

makes no reference whatever to end-of-life care.[14] Probate Code section 4654 is part of California's Health Care Decisions Law ("HCDL"), which governs the decisions of surrogates entrusted by law with making health care decisions for patients incompetent to make their own decisions.[15] The HCDL specifically provides that it does not affect the law governing health care in an emergency situation or the law governing the right of an individual to make health care decisions while competent to do so. Cal. Prob. Code, §4651. Appellant was never Elizabeth's surrogate; in fact she was never under a guardianship or conservatorship in all her years residence at the hospital.

Second, the trial court properly refused appellant's instruction because it would imply that appellant had a right to defy California law and the policies of the hospital for which he worked, which clearly required Elizabeth's election for CPR to be honored. Although Elizabeth was developmentally disabled, unless a surrogate was duly appointed to act for

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[14] California Probate Code section 4654 provides: "This division does not authorize or require a health care provider or health care institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or health care institution." Appellant's brief mistakenly cites this law as section 4564, which does not exist. (AOB, at p. 32.)

[15] Division 4.7 of the California Probate Code [§§4600-4806) constitutes the California Health Care Decisions Law. (Cal. Prob. Code, §4600.)

her, she had the same right to make decisions about her health care as do all other Californians, including specifically the right to give or withhold consent for medical procedures. Cal. Wel. & Inst. Code, §4502; 17 Cal. Code. Regs., §50510. Once a person has made a request of a hospital to provide CPR, the hospital is under a duty to provide that procedure. Health & Safety Code, §1317(a). The hospital's policies conformed to this law and provided that, in the absence of a DNR order duly approved under the Center's procedures, administration of CPR was mandatory for any patient who went into cardiac arrest.[16] Furthermore, before a physician could make a DNR order for a patient, there had to be a prior review and approval by the hospital's bioethics committee, the medical director, and the Center's executive director. The evidence established that, notwithstanding the Center's DNR policy and the absence of a DNR order approved under the Center's policies, the appellant issued a DNR order for Elizabeth, contrary to her wishes.[17]

Since the appellant violated the Center's DNR policies and issued a DNR order in defiance of those policies and Elizabeth's wishes , he can find no refuge in Probate Code section 4654. The exercise of the fundamental right to control decisions relating to her own medical care is "exclusively

[16] Def. Tr. Exh. 14 (SER 286).
[17] Pl. Tr. Exh. 15 (SER 285).

[the patient's] and over which neither the medical profession nor the judiciary have any veto power." *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1135 (*1986*). The right is grounded in the right of privacy in both the state and federal constitutions. "It's exercise requires no one's approval. It is not merely one vote subject to being overridden by medical opinion." *Id.* at p. 1137. "[I]f the right of the patient to determine her medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." *Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 (1984). Indeed, plaintiff's bioethics expert, Dr. Gary Johanson, acknowledged that CPR is the default position that is universally used in hospitals, such that CPR can and should be initiated in any patient who does not have DNR status, whereas the withholding of CPR requires a physician's order. TT 700:8-23 (SER 83A).

Appellant's requested instruction would have falsely implied to the jury that appellant had a right to defy California law, his patient's wishes, and his employer's policies if he thought that would best further her interests. The requested instruction was properly refused.

Lastly, it is important to note that plaintiff was not fired for failing to provide health care that was contrary to generally accepted health care standards, and Dr. Bjorndal has never criticized any care that he did provide

to this patient.[18] A DNR Order cannot be viewed as merely a physician's election of the proper course of care, it is a binding instruction to the medical staff to withhold all efforts at resuscitation, *i.e.,* to stand back and let the patient die. When Sonoma Developmental Center encountered the situation of a dying patient who had no legally appointed surrogate and who was understood to have chosen CPR rather than DNR status, that emergency service had to be provided. California Health and Safety Code section 1317 requires that all hospitals provide CPR upon a patient's request if they are able to do so. [19] If they are seen to be in conflict, this more specific statute for emergency health care services prevails over the more general statute governing surrogate health care decisions. "Ordinarily, where a specific [statutory] provision conflicts with a general one, the specific governs." *Edmond v. U.S.*, 520 U.S. 651, 657 (1997), citing *Busic v. U.S.*, 446 U.S.

[18] Indeed, Elizabeth never deteriorated into code status while in Dr. Pena's presence.

[19] California Health and Safety Code section 1317(a) provides: "Emergency services and care shall be provided to any person requesting the services or care, or for whom services or care is requested, for any condition in which the person is in danger of loss of life, or serious injury or illness, at any health facility licensed under this chapter that maintains and operates an emergency department to provide emergency services to the public when the health facility has appropriate facilities and qualified personnel available to provide the services or care." There is no dispute that SDC is such a hospital.

398, 406 (1980); see, also, *U.S. v. Hahn*, 359 F.3d 1315, 1321 (10th Cir. 2004).

For all of these reasons, plaintiff's suggested jury instruction was properly declined.

2. APPELLANT'S REQUESTED "*COSZALTER*" INSTRUCTION WAS ARGUMENTATIVE

The trial court may reject an instruction that is argumentative. *United States v. Mata,* 491 F.3d 237, 241 (5th Cir. 2007); *United States v. Risch*, 87 F.3d 240, 242 (8th Cir. 1996) (same); *S.A. Healy Co. v. Milwaukee Metro Sewage Dist.,* 50 F.3d 476, 480 (7th Cir. 1995); see also *People v. Earp*, 20 Cal.4th 826, 888, 85 Cal.Rptr.2d 857, 978 P.2d 15 (1999) ("Upon request, a trial court must give jury instructions that pinpoint the theory of the defense, but it can refuse instructions that highlight specific evidence as such. Because the latter type of instruction invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence, it is considered argumentative and therefore should not be given." (citations and quotation marks omitted); *United States v. Parker*, 991 F.2d 1493, 1497 (9th Cir. 1993) ("A 'theory of defense' instruction need not be given when it is simply a recitation of the facts told from the defendant's perspective."); *United States v. Nevitt*, 563 F.2d 406, 409 (9th Cir. 1977) ("The instruction

tendered by the Parkers, and rejected by the court, was more like a closing argument than a statement of applicable law.").

Here, appellant offered two so-called *"Coszalter"* instructions[20] after the jury submitted the following question to the court during deliberations:

> "If only one reason in the adverse action for firing Dr. Pena has merit, does that nullifies Pena whole argument? Meaning In order to find in favor of the plaintiff, is it necessary that every reason cited in adverse action terminating Dr. Pena lacks merit?" (Original emphasis and grammar.)[21]

In response, appellant proposed giving the jury one of the following instructions, based on the *Coszalter* case:

> ". . . . "OPTION NO. 2: Not necessarily. What you are being asked to decide is whether Dr. Bjorndal fired Dr. Pena for the reasons that she gave at the time she fired him or whether her true motivation was to retaliate against Dr. Pena for engaging in conduct protected by the First Amendment, i.e., photographing patients or filing a previous lawsuit. If you conclude that Dr. Pena has proven that it is more likely than not that some or all of the reasons Dr. Bjorndal gave for Dr. Pena's termination are false or pretextual, you may, but are not

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[20] In *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003), this Court discussed three types of circumstantial evidence with which a plaintiff may attempt to establish a retaliatory motivation on a defendant's part: (1) proximity in time, (2) employer's expressed opposition to plaintiff's speech, and (3) the employer's proffered explanations for the adverse employment action were false and pretextual. (*Id.* at p. 977.) The Court did not discuss, much less formulate, any jury instruction regarding the consideration of these types of circumstantial evidence. Appellant's proposed instruction concerned only the third type.

[21] ER, at p. 139.

> required, to conclude that Dr. Bjorndal's true motivation was retaliation for Dr. Pena's protected activity. . . .OPTION NO. 3: Not necessarily. What you are being asked to decide is whether Dr. Bjorndal fired Dr. Pena for the reasons that she gave at the time she fired him or whether her true motivation was to retaliate against Dr. Pena for engaging in conduct protected by the First Amendment, i.e., photographing patients or filing a previous lawsuit. If you conclude that Dr. Pena has proven that it is more likely than not that some or all of the reasons Dr. Bjorndal gave for Dr. Pena's termination are false or pretextual, you may, but are not required, to conclude that Dr. Bjorndal's true motivation was retaliation for Dr. Pena's protected activity. If you conclude that Dr. Pena's protected activity was a substantial or motivating factor for his termination, Dr. Bjorndal may avoid liability only if you conclude that she has proven that it is more likely than not that she had a non-retaliatory reason to fire Dr. Pena and that she would have fired him for that non-retaliatory reason, despite his protected activity."[22]

Appellant's proposed instructions did not address what other inferences the jury may draw if the jury found that some, but not all, of the reasons in the adverse action were false or pretextual. For example, if the jury found that one or more of the reasons stated at the time of appellant's termination were true, the jury could also have drawn the inference that such reason, or reasons, was the true motivation for the appellee's decision to fire appellant, and not retaliation for any speech he made. Appellant's proposed instructions only pointed out the inferences that could be drawn in

[22] ER, at pp. 128-129.

appellant's favor, not all the inferences that could be drawn from the same findings. Accordingly, the appellant's proposed instructions were biased and essentially constituted an argument in appellant's favor.

As set out in the special verdict form, given to the jury at the time it retired to deliberate, the proper factual issues, regarding the appellee's motivation, for the jury to decide were:

> "Was Dr. Pena's photography of patients a substantial or motivating factor in Dr. Bjorndal's decision to terminate Dr. Pena's employment?" and "Was Dr. Pena's prior lawsuit a substantial or motivating factor in Dr. Bjorndal's decision to terminate Dr. Pena's employment?[23]

The jury's questions raised a concern in the trial court that the jury was not focusing on the specific factual issues that the jury was required to answer[24] and that the appellant's proposed instruction would only confuse the jury.[25] Accordingly, the court advised the jury that the questions they asked were not the questions that they needed to answer and reiterated the language from the special verdict which set out the specific questions that the jury was required to answer.[26] These instructions reminded the jury of the actual factual issues they had to decide and enabled the jury to focus on

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[23] ER, at pp. 95-96.
[24] ER, at p. 123 (TT, at 1144:3-12).
[25] ER, at p. 124.1 (TT, at 1146:5-7).
[26] ER, at p. 126 (TT, at 126:8-25).

them, based upon all the evidence. The trial court properly rejected the appellant's one-sided, argumentative proposed instructions and redirected the jury's attention to the true issues it needed to decide.

Denial of the appellant's proposed so-called"*Coszalter"* instruction did not affect the appellant's ability to present his case. In his opening argument, appellant's counsel had admitted that he had no direct evidence of Dr. Bjorndal's motivation and that, accordingly, Dr. Pena's case was built on circumstantial evidence.[27] At trial, the court allowed appellant to introduce circumstantial evidence that the reasons stated in the written adverse action notice to Dr. Pena regarding his firing were mere pretexts. In his closing argument, appellant's counsel strenuously argued that the circumstantial evidence he had adduced on appellant's behalf proved those reasons were in fact false and served only as pretexts for the appellant's firing. That the jury rejected appellant's evidence and argument does not establish that appellant did not have a fair trial. Under the instructions as a whole, the jury was adequately apprised of the appellant's theory of the case and the standards for evaluating evidence, including circumstantial evidence. Accordingly, the appellant has suffered no prejudice from the trial court's rejection of his "*Coszalter*" instruction.

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[27]AOB, at p. 34, fn. 20; ER, at p. 125 (TT, at 19-25)..

VIII. CONCLUSION

For all the foregoing reasons, the decision of the District Court and the jury's verdict should be affirmed.

IX. STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: July 21, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR C 00-04009 CW

I certify that: (check (x) appropriate option(s))

☐ 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains __9,004_____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

☐ This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

☐ 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

July 21, 2010
Dated/

/s/ Terry Senne
Terry Senne
Deputy Attorney General

EDMUND G. BROWN JR.
Attorney General

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DEPARTMENT OF JUSTICE

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July 2, 2010

Via Facsimile and US Mail

Lawrence J. King, Esq.
6 "C" Street
Petaluma, CA 94952

RE: Pena, et al. v. Meeker, et al.
Ninth Circuit Docket No. 10-15326

Dear Mr. King:

This will confirm that we have been granted an extension of time through July 21, 2010, to file our answering brief in this case. Your optional reply brief will be due 14 days thereafter.

Best regards.

Sincerely,

/s/ Terry Senne

TERRY SENNE
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

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