

193  
193.00  
CHK  
MECLURE  
01CC02195  
CI CIVIL FILING FEE  
PCP 11A02 02/14/2001 10:57  
PLEADING MUST INCLUDE THE ASSIGNED JUDGE AND DEPARTMENT DESIGNATION AS SHOWN UNDER THE CASE NUMBER. ALL PARTIES MUST COMPLY WITH THE ORANGE COUNTY SUPERIOR COURT RULES.

1 WILLIAM C. KERSTEN, SBN 140524  
MICHAEL P. GREEN, SBN 168565  
2 **KERSTEN & ASSOCIATES**  
38 Corporate Park  
Irvine, California 92606-5130  
(949) 222-0033

5337851

Attorney for Plaintiff A. Jerry Lehrer

**FILED**  
SUPERIOR COURT OF CALIFORNIA-  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

FEB 13 2001

ALAN SLATER, Clerk of the Court  
*N. Quach*  
BY N. QUACH

MM

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ORANGE

A. JERRY LEHRER /  
Plaintiff

vs.

14 MERCER McCLURE, M.D. / THOMAS  
15 TOOMA, M.D. / and DOES 1 through 100,  
16 inclusive,  
17 Defendants.

Case No. 01CC02195

COMPLAINT FOR DAMAGES:

- 1. PROFESSIONAL NEGLIGENCE
- 2. BREACH OF FIDUCIARY DUTY
- 3. FRAUD

JUDGE RANDELL L. WILKINSON  
DEPT. C19

Plaintiff A. Jerry Lehrer alleges as follows:

**GENERAL ALLEGATIONS**

- 1. At all times herein mentioned, Defendant Mercer McClure ("Defendant McClure"), was, and is, a physician, licensed to practice medicine under the laws of the State of California and engaged in the practice of medicine in the City of Orange, County of Orange, California.
- 2. At all times herein mentioned, Defendant Thomas Tooma, M.D., ("Defendant Tooma") was, and is, a physician, licensed to practice medicine under the laws of the

1 State of California and engaged in the practice of medicine in the City of Newport  
2 Beach, County of Orange, California.

3 3. Plaintiff is ignorant of the true names and capacities of Defendants sued  
4 herein as DOES I -100, inclusive, and therefore sues these Defendants by such  
5 fictitious names. Plaintiff will amend this complaint to allege their true names and  
6 capacities when ascertained. Plaintiff is informed and believe and thereon allege that  
7 each of the fictitiously named Defendants is negligently responsible in some manner for  
8 the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were  
9 proximately caused by the negligence hereinafter alleged.

10 4. At all times herein mentioned, Defendants Tooma and McClure were agents,  
11 employees, and /or joint venturers with each other, and in doing the things herein  
12 mentioned, were acting within the course and scope of their authority as such agents,  
13 employees, and/or joint venturers with the consent of their co-defendants

14 5. On or about May 18, 1999, Plaintiff consulted with Defendant McClure for  
15 the purpose of evaluation and treatment of his vision condition. At the time of the  
16 consultation, Plaintiff was a 68 year old male, with a long-term condition in his eyes  
17 commonly know as "farsightedness", and had an astigmatism.

18 6. On or about May 18, 1999, Plaintiff inquired with Defendant McClure about  
19 the possibility of Laser Surgery to correct his condition of "farsightedness" and  
20 astigmatism. In response to Plaintiff's inquiry, Defendant McClure told Plaintiff that he  
21 was an excellent candidate for laser surgery to correct the "farsightedness" and  
22 astigmatism conditions.

23 7. Defendant McClure's representation to Plaintiff that he was an "excellent"  
24 candidate for laser vision corrective surgery was, in fact, false. The true facts were  
25 that Plaintiff was not an excellent candidate for laser vision corrective surgery, given  
26 his age and vision condition. Based upon Defendant McClure's representation, Plaintiff  
27 elected to proceed with laser vision corrective surgery, and indicated the willingness of  
28 such to Defendant McClure.

2-11-02  
Trial / asc

1 8. In response to Plaintiff's indication of willingness to proceed with laser vision  
2 corrective surgery, on or about May 18, 1999, Defendant McClure referred Plaintiff to  
3 Defendant Tooma for laser corrective surgery.

4 9. Plaintiff is informed and believes that Defendant Tooma is a physician,  
5 specializing in laser vision corrective surgery. Plaintiff is further informed and believes  
6 that at the time of the above-mentioned referral, Defendants Tooma and McClure were  
7 engaged in some sort of business venture wherein Defendant Tooma encouraged and  
8 solicited referrals for laser vision correction surgery in exchange for payment of  
9 monetary compensation. Plaintiff is further informed and believes that Defendant  
10 McClure, in furtherance of the business arrangement between Defendants McClure and  
11 Tooma, paid Defendant McClure a referral fee for referring Plaintiff to Defendant Tooma  
12 for laser vision corrective surgery.

13 10. On or about June 18, 1999, Defendant Tooma performed laser vision  
14 corrective surgery upon Plaintiff. The results were poor, and Plaintiff suffered  
15 decreased vision in both eyes, problems with focusing vision in both eyes, double  
16 vision in the left eye, corneal rippling in the right eye, and clouding of vision in both  
17 eyes.

18 11. From June of 1999 to March of 2000, Plaintiff underwent treatment with  
19 Defendants to reverse and/or undo the effects of the laser vision corrective surgery  
20 upon his vision. During this time, Defendants continuously and repeatedly informed  
21 Plaintiff that the poor results were the natural consequences of the surgery, and were  
22 not a source of concern.

23 12. In March of 2000, Plaintiff underwent independent evaluation for his vision  
24 condition and was informed that he had developed irregular astigmatism  
25 postoperatively, and that further surgical procedures to correct the vision problem were  
26 not feasible until new and different technological and/or medical advances were made.  
27 Plaintiff was further informed that the corneas of each eye had developed significant  
28 clouding postoperatively.



1 expenses, all to his special damage in an amount according to proof.

2 20. As a further proximate result of the acts of Defendants, Plaintiff was  
3 prevented from attending to his usual occupation as a Marketing Director from May  
4 1999 and continuing for an as yet undetermined period. Plaintiff thereby has lost and  
5 will lose earnings in an as yet unascertained amount. Plaintiff will seek to amend this  
6 complaint at such time as the amount is ascertained. As a further proximate result of  
7 the acts of Defendants, and each of them, Plaintiff's present and future earning  
8 capacity has been greatly impaired. The exact amount of this loss is not known to  
9 plaintiff at this time, and Plaintiff will move to amend this complaint to state the  
10 amount when it becomes known to him, or on proof thereof.

11 21. On November 7, 2000, Plaintiff, pursuant to the provisions of Section 364  
12 of the Code of Civil Procedure, caused to be served on Defendants a notice of  
13 Plaintiffs' intention to commence this action. A copy of the notice is attached hereto  
14 as Exhibit "A" and made a part hereof.

15 **SECOND CAUSE OF ACTION**  
16 **FRAUD**  
17 **(Against All Defendants)**

18 22. Plaintiff realleges and incorporates herein by reference paragraphs 1  
19 through 21 of this Complaint.

20 23. On or about May 18, 1999, Defendant McClure represented to Plaintiff that  
21 Plaintiff was an excellent candidate for laser vision corrective surgery to correct his  
22 vision problems of "farsightedness" and astigmatism.

23 24. On or about May and June 1999 Defendant Tooma represented to Plaintiff  
24 that Plaintiff was an excellent candidate for laser vision corrective surgery to correct his  
25 vision problems of "farsightedness" and astigmatism.

26 25. The representations of Defendants McClure and Tooma were, in fact, false.  
27 The true facts were that given Plaintiff's age, and the fact that he was farsighted, and  
28 had astigmatism, laser corrective surgery was contraindicated, and Plaintiff was not an  
excellent candidate.

1 26. When Defendants made these representations, they knew them to be false  
2 and made these representations with the intention to deceive Plaintiff and induce him  
3 to act in reliance on these representations in the manner hereafter alleged, or with the  
4 expectation that Plaintiff would so act.

5 27. Plaintiff, at the time these representations were made by Defendants and at  
6 the time Plaintiff took the actions herein alleged, was ignorant of the falsity of  
7 Defendants' representations and believed them to be true. In reliance on these  
8 representations, Plaintiff was induced to and did undergo laser vision corrective  
9 surgery, and rendered payment to Defendants for such. Had Plaintiff known the actual  
10 facts, he would not have taken such action. Plaintiff's reliance on defendant's  
11 representations was justified because he is not a medical practitioner, and was not  
12 aware of the medical parameters and consequences of laser vision corrective surgery,  
13 and, in fact, relied upon Defendants for such expert opinion and advice. In fact,  
14 Plaintiff did not discover the true facts until December of 2000, when Plaintiff was  
15 informed that his sister, who is of similar age, and possessed of the identical vision  
16 problems as Plaintiff, was informed that she was not an ideal candidate for laser vision  
17 corrective surgery, and such was contraindicated by her age and vision problems.

18 28. As a proximate result of the acts of Defendants, and each of them, Plaintiff  
19 suffered decreased vision in both eyes. As a result, Plaintiff suffered great physical and  
20 emotional pain and suffering.

21 29. As a further proximate result of the acts of Defendants, and each of them,  
22 Plaintiff has sustained injury to his health, strength, and activity, all of which injuries  
23 have caused, and continue to cause, Plaintiff great mental, physical, and nervous pain  
24 and suffering. Plaintiff is informed and believes and thereon alleges that such injuries  
25 will result in some permanent disability to him. As a result of such injuries, Plaintiff has  
26 sustained general damages in an amount according to proof.

27 30. As a further proximate result of the acts of Defendants, and each of them,  
28 Plaintiff has incurred, and will continue to incur, medical, hospital, and related  
expenses, all to his special damage in an amount according to proof.

1 31. As a further proximate result of the acts of Defendants, Plaintiff was  
2 prevented from attending to his usual occupation as a Marketing Director from May  
3 1999 and continuing for an as yet undetermined period. Plaintiff thereby has lost and  
4 will lose earnings in an as yet unascertained amount. Plaintiff will seek to amend this  
5 complaint at such time as the amount is ascertained. As a further proximate result of  
6 the acts of Defendants, and each of them, Plaintiff's present and future earning  
7 capacity has been greatly impaired. The exact amount of this loss is not known to  
8 plaintiff at this time, and Plaintiff will move to amend this complaint to state the  
9 amount when it becomes known to him, or on proof thereof.

10 **THIRD CAUSE OF ACTION**  
11 **BREACH OF FIDUCIARY DUTY**  
12 **(Against All Defendants)**

13 32. Plaintiff realleges and incorporates herein by reference paragraphs 1  
14 through 31 of this Complaint.

15 33. From May of 1999 through May of 200, Defendants, and each of them,  
16 were Plaintiff's physicians, retained for the purpose of rendering medical advice and  
17 providing medical treatment to Plaintiff.

18 34. By virtue of Defendants' employment by Plaintiff, Defendants owed to  
19 Plaintiff a fiduciary duty, and by virtue of Plaintiff's having placed confidence in the  
20 fidelity and integrity of Defendants in entrusting Defendants with the ability and  
21 authority to render expert opinion and provide medical treatment to Plaintiff, a  
22 confidential relationship existed at all times herein mentioned between Plaintiff and  
23 Defendants.

24 35. Despite having voluntarily accepted the trust and confidence reposed in them  
25 by Plaintiff with regard to Plaintiff's medical condition, and the treatment thereof, and  
26 in violation of this relationship of trust and confidence, Defendants abused the trust  
27 and confidence of Plaintiff by failing to disclose the fact that they had a financial  
28 relationship and interest between themselves in performing the recommended laser  
vision corrective surgery. Furthermore, Defendant McClure, in recommending that

1 Plaintiff receive laser vision corrective surgery from Defendant Tooma, and in referring  
2 Plaintiff to Defendant Tooma for said surgery, and in violation of the trust and  
3 confidence reposed in him by Plaintiff with regard to Plaintiff's medical condition, and  
4 the treatment thereof, placed his financial interests above the Plaintiff's medical  
5 interests and recommended Plaintiff for a surgery for which he was not an ideal  
6 candidate, and received financial compensation from a third party for said  
7 recommendation upon Plaintiff's reliance thereon. Once Plaintiff underwent the  
8 contraindicated surgery, on the advice and recommendation of Defendants,  
9 Defendants, in further breach of the fiduciary duty owed to Plaintiff, failed to inform  
10 Plaintiff that the adverse affects to his vision were the result of the contraindicated  
11 surgery, and instead obtained Plaintiff's consent to further medical treatment by  
12 informing him that the adverse effects to his vision were the natural and expected  
13 consequences of the surgery, and were easily remedied. In reliance upon the  
14 Defendants, and each of them, Plaintiff did not seeking alternative opinion and  
15 consented to the recommended treatments and surgeries.

16 36. Defendants did the acts herein alleged with the intent to deceive and defraud  
17 Plaintiff. Defendant did these acts with the intent to induce reliance by Plaintiff in the  
18 continuing fidelity of Defendants as physicians, entrusted with the duty and obligation  
19 to provide Plaintiff with competent medical treatment and advice.

20 37. Plaintiff in fact placed confidence and reliance in Defendants until on or  
21 about December 2000, when Plaintiff discovered that his age and vision condition  
22 made the initial surgery contraindicated, as alleged above. Plaintiff reasonably relied on  
23 the Defendants in view of their Physician-Patient relationship.

24 38. As a proximate result of the acts of Defendants, and each of them, Plaintiff  
25 suffered decreased vision in both eyes. As a result, Plaintiff suffered great physical and  
26 emotional pain and suffering.

27 39. As a further proximate result of the acts of Defendants, and each of them,  
28 Plaintiff has sustained injury to his health, strength, and activity, all of which injuries  
have caused, and continue to cause, Plaintiff great mental, physical, and nervous pain

1 and suffering. Plaintiff is informed and believes and thereon alleges that such injuries  
2 will result in some permanent disability to him. As a result of such injuries, Plaintiff has  
3 sustained general damages in an amount according to proof.

4 40. As a further proximate result of the acts of Defendants, and each of them,  
5 Plaintiff has incurred, and will continue to incur, medical, hospital, and related  
6 expenses, all to his special damage in an amount according to proof.

7 41. As a further proximate result of the acts of Defendants, Plaintiff was  
8 prevented from attending to his usual occupation as a Marketing Director from May  
9 1999 and continuing for an as yet undetermined period. Plaintiff thereby has lost and  
10 will lose earnings in an as yet unascertained amount. Plaintiff will seek to amend this  
11 complaint at such time as the amount is ascertained. As a further proximate result of  
12 the acts of Defendants, and each of them, Plaintiff's present and future earning  
13 capacity has been greatly impaired. The exact amount of this loss is not known to  
14 Plaintiff at this time, and Plaintiff will move to amend this complaint to state the  
15 amount when it becomes known to him, or on proof thereof.

16 **WHEREFORE, Plaintiff prays for an award of damages as follows:**

17 **ON THE FIRST CAUSE OF ACTION**

- 18 1. For general damages in a sum according to proof;
- 19 2. For special damages a sum according to proof;
- 20 3. For costs of suit incurred herein; and
- 21 4. For such other and further relief as the court may deem proper.

22  
23 **ON THE SECOND CAUSE OF ACTION**

- 24 1. For general damages in a sum according to proof;
- 25 2. For special damages a sum according to proof;
- 26 3. For costs of suit incurred herein; and
- 27 4. For such other and further relief as the court may deem proper.

1 ON THE THIRD CAUSE OF ACTION

- 2 1. For general damages in a sum according to proof;  
3 2. For special damages a sum according to proof;  
4 3. For costs of suit incurred herein; and  
5 4. For such other and further relief as the court may deem proper.

6  
7 Dated: February 12, 2001

KERSTEN & ASSOCIATES

8  
9 BY: 

MICHAEL P. GREEN

Attorneys for Plaintiff A. Jerry Lehrer

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 CARROLL, KELLY, TROTTER, FRANZEN & McKENNA  
MICHAEL J. TROTTER (State Bar No. 139034)  
2 JEFFREY T. BELL (State Bar No. 184876)  
111 West Ocean Boulevard, 14th Floor  
3 Long Beach, California 90802  
(562) 432-5855 (562) 432-8785 Facsimile

4 Attorneys for Defendant Mercer McClure, M.D.

#  
**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER  
DEC 21 2001

ALAN SLATER, Clerk of the Court  
*C. Montoya*  
BY C. MONTOYA

5  
6  
7  
8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
9 CENTRAL JUSTICE CENTER, COUNTY OF ORANGE

10  
11 A. JERRY LEHRER,  
12 Plaintiff,

13 vs.

14 MERCER McCLURE, M.D.;  
THOMAS TOOMA, M.D.; and DOES  
15 1 through 100, inclusive,  
16 Defendants.

CASE NO. O1CC02195

Judge Randall L. Wilkinson  
Department C19

**DEFENDANT MERCER McCLURE,  
M.D.'S REPLY TO PLAINTIFFS'  
OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION**

Complaint Filed: 2/13/01

DATE: December 26, 2001  
TIME: 1:30 P.M.  
DEPT: C-19

17  
18  
19  
20  
21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 **1. Plaintiff's Statute of Limitations Argument Is Wrong**

23 Plaintiff's statute of limitations argument is premised on the notion that the defendants  
24 do not understand or have failed to recognized the basis for plaintiff's First Cause of Action for  
25 Professional Negligence-namely that plaintiff is making an informed consent claim not a claim  
26 that the defendants negligently performed the surgery.(Plaintiff's Opposition, Pg. 7, lines 13-20.)  
27 Plaintiff's argument is not misplaced. No where in plaintiff's First Cause of Action does  
28

1 plaintiff allege that the defendants breached the standard of care because they failed to obtain  
2 plaintiff's informed consent. Instead, plaintiff alleges that the defendants were negligent in their  
3 treatment of the plaintiff.(Plaintiff's Complaint, Par. 16.)

4 It is well settled law that a motion for summary judgment or adjudication cannot be  
5 denied on grounds not raised by the pleadings.(Government Employees Ins. Co. v. Superior  
6 Court, (2000) 79 Cal.App.4th 95, 98.) Since plaintiff did not raise the issue of informed consent  
7 in his First Cause of Action, plaintiff cannot rely on an informed consent allegation to defeat this  
8 motion for summary judgment/adjudication.

9 Furthermore, plaintiff does not dispute any of the undisputed facts set forth by the  
10 defendants. Based on these facts, it is undisputed that plaintiff suspected wrongdoing on the part  
11 of the defendants shortly after the procedure in June/July 1999. Although the law recognizes  
12 that a patient's duty to investigate a suspicion of wrongdoing is diminished when the  
13 physician/patient relationship continues, the patients duty to investigate is not eliminated  
14 completely.(See, Sanchez v. South Hoover Hospital, (1976) 18 Cal.3d 93, 102.) Especially,  
15 when the plaintiff has admitted that he knew a defendant committed negligence shortly after a  
16 surgical procedure.

17 Finally, plaintiff is attempting to argue that, while he admits suspecting wrongdoing  
18 shortly after the surgery(on a theory of negligent performance of the surgery), he did not  
19 suspected wrongdoing on a negligent informed consent theory until nearly a year and a half later.  
20 As stated by the court in Jolly v. Eli Lilly & Co,

21 "Under the discovery rule, the statute of limitations begins to run when the  
22 plaintiff suspects or should suspect that her injury was caused by wrongdoing, that  
23 someone has done something wrong to her. . .A plaintiff need not be aware of the  
24 specific 'facts' necessary to establish the claim [such as failure to test, failure to  
25 warn, failure to diagnose]; that is a process contemplated by pretrial discovery.  
26 Once plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue,  
27 she must decide whether to file suit or sit on her rights. So long as a suspicion  
28

1 exists, it is clear that the plaintiff must go find the facts, she cannot wait for the  
2 facts to find her.”((1988) 44 Cal.3d 1103, 1110-1111.)

3 In this matter, there is no dispute that the plaintiff sat on his rights and waited for the facts  
4 to find him. He knew immediately that he had been the victim of medical negligence, but did  
5 nothing to pursue his claim for nearly two years. Therefore, plaintiff’s professional negligence  
6 claim is time barred.

7 **2. Plaintiff’s Fiduciary Duty Argument Lack Merit**

8 Again, plaintiff begins with alleging that the defendants fail to understand the claim be  
9 asserted by the plaintiff. However, if the court reviews the complaint, no where in plaintiff’s  
10 Breach of Fiduciary Duty Cause of Action does plaintiff allege that the claim is being brought  
11 on the grounds that the defendants failed to disclose the potential outcomes from the surgery as  
12 suggested by plaintiff. As pointed out above, plaintiff cannot oppose this motion on grounds that  
13 are not asserted in the plaintiff’s complaint.

14 **3. Plaintiff’s Fraud Argument Lacks Merit**

15 As set forth in defendants’ evidentiary objection, Mr. Lehrer has admitted in his  
16 deposition that several of the key assertion in his declaration are not true. These statements  
17 involve what he was told by the defendants about the procedure before consenting to the  
18 procedure. Since plaintiff’s only evidence in opposition to this cause of action are the statements  
19 of Mr. Lehrer, which he admits some are untrue, the court should disregard Mr. Lehrer’s entire  
20 declaration. Without Mr. Lehrer’s declaration, plaintiff’s has no evidence to oppose this motion.

21 ///  
22 ///  
23 ///  
24 ///  
25 ///  
26 ///  
27 ///

28

1 **4. Conclusion**

2 Based on the foregoing, defendant MERCER MCCLURE, M.D. respectively requests  
3 that this court grant defendant summary judgment in its entirety.

4 DATED: December 21, 2001

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23


24

25

26

27

28

  
MICHAEL J. TROTTER  
JERREY T. BELL  
Attorneys for Defendant  
MERCER MCCLURE, M.D.

1 WILLIAM C. KERSTEN, SBN 140524  
2 MICHAEL P. GREEN, SBN 168565  
3 **KERSTEN & ASSOCIATES**  
4 38 Corporate Park  
5 Irvine, California 92606-5130  
6 (949) 222-0033

7 Attorney for Plaintiff A. Jerry Lehrer

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

APR 20 2001

ALAN SLATER, Clerk of the Court

BY T. RUIZ

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ORANGE

11 A. JERRY LEHRER

12 Plaintiff

13 vs.

14 MERCER McCLURE, M.D.; THOMAS  
15 TOOMA, M.D.; and DOES 1 through 100,  
16 inclusive,

17 Defendants.

Case No. 01CC02195

ASSIGNED FOR ALL PURPOSE TO  
JUDGE RANDELL L. WILKINSON  
DEPARTMENT C-19

PLAINTIFF'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO  
DEMURRER OF DEFENDANT THOMAS  
TOOMA TO THE SECOND AND THIRD  
CAUSES OF ACTION OF PLAINTIFF'S  
COMPLAINT

DATE: May 2, 2001  
TIME: 1:30 P.M.  
DEPT: C-19

Trial date: None Set  
Complaint filed: 3/13/01

23 **1. INTRODUCTION**

24 Plaintiff, by his complaint, alleges that he was afflicted with vision problems known  
25 as "farsightedness", and astigmatism. (Complaint, Page 2, ¶ 5, line 20). Plaintiff further  
26 alleges that Defendants were engaged in a joint venture wherein Defendant Tooma  
27 encouraged and solicited referrals for laser vision correction surgery in exchange for

1 payment of monetary compensation. (Complaint, Page 3, ¶ 9, lines 9-11). Plaintiff further  
2 contends that in response to his inquiry regarding corrective laser surgery, he was told  
3 that he was an "excellent" candidate for laser corrective surgery by both Defendant  
4 McClure, (Complaint, Page 2, ¶ 6, lines 22-25), and Defendant Tooma (Complaint, Page  
5 24, ¶9, lines 25-26).

6 Plaintiff contends that the true facts were that he was not an excellent candidate  
7 for laser corrective surgery. (Complaint, Page 5, ¶ 25, line 26 to page 6, ¶ 25, line 2).  
8 Plaintiff further contends that Defendants, and each of them, intentionally misrepresented  
9 the likelihood of success for the purpose of their own financial gain, and in so doing,  
10 placed their economic interests before Plaintiff's medical interests. (Complaint, Page 6, ¶  
11 26, lines 3-6), (Complaint, ¶35, page 8, lines 3-9).

12 From these facts, Plaintiff alleges causes of action for Fraud (Second Cause of  
13 Action) and Breach of Fiduciary Duty (Third Cause of Action) against Defendants.

14 Defendant Tooma demurs to the Third cause of action on the grounds that he was  
15 not bound to disclose his financial relationship with Defendant McClure to Plaintiff, and  
16 demurs to the Second Cause of Action on the grounds that Defendant Tooma did not  
17 guarantee results to Plaintiff.

18 Plaintiff respectfully submits that Defendant Tooma misses the point. Plaintiff  
19 alleges Fraud and Breach of Fiduciary Duty on the basis of Defendant Tooma's intentional  
20 misrepresentations of Plaintiff's candidacy for the laser corrective surgery. Plaintiff was  
21 not an excellent candidate at all, and had the true facts been disclosed, Plaintiff would not  
22 have undergone the surgery.

## 23 **2. PLAINTIFF HAS ADEQUATELY PLED A CAUSE OF ACTION FOR FRAUD**

24 In support of his cause of action for fraud, Plaintiff pleads as follows:

- 25 • Defendants represented that Plaintiff was an excellent candidate for laser corrective  
26 surgery. (Complaint, Page 5, ¶ 23-24, lines 21-26);
- 27 • Defendant's Representations were false. (Complaint, Page 5, ¶ 25, line 27 to Page  
28 6, ¶ 25, line 2);

- 1 • Defendants intentionally misrepresented the true facts for the purposes of inducing
- 2 Plaintiff to undergo the surgery; (Complaint, Page 6, ¶ 26, lines 3-6);
- 3 • In reliance upon Defendant's misrepresentations and ignorant of the true facts,
- 4 Plaintiff underwent the surgery; (Complaint, Page 6, ¶ 27, lines 7-10);
- 5 • Had Plaintiff known the true facts, he would not have undergone the surgery;
- 6 (Complaint, Page 6, ¶ 27, lines 10-11);
- 7 • Plaintiff's reliance upon Defendants' representations was justified; (Complaint,
- 8 Page 6, ¶ 27, lines 11-14);
- 9 • Plaintiff's discovery of the true facts was delayed; (Complaint,
- 10 Page 6, ¶ 27, lines 14-18);
- 11 • Plaintiff was damaged by his reliance upon Defendants' misrepresentations;
- 12 (Complaint, Page 6, ¶ 28, ¶29, Page 7, ¶30, 31).

13 The elements of fraud are (1) a false representation or concealment of a material  
 14 fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge  
 15 of its falsity or without sufficient knowledge on the subject to warrant a representation  
 16 (3) with the intent to induce the person to whom it is made to act on it; the person must  
 17 (4) act in justifiable reliance on the representation (5) to his or her damage. South Tahoe  
 18 Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal.  
 19 Rptr. 286. Plaintiff respectfully submits that he has adequately pled a cause of action for  
 20 fraud.

21 In arguing for demurrer, Defendant Tooma makes statements such as "Medicine is  
 22 an art, not an exact science", and "Despite the best of surgical care, patients have  
 23 complications all of the time" and "Seventy Year Old Patients successfully undergo laser  
 24 correction surgery all of the time". While all of this may be true, these statements are  
 25 extraneous to the complaint, and are functionally non-existent. A general demurrer admits  
 26 the truth of all factual material allegations properly pleaded in the challenged pleading,  
 27 regardless of possible difficulties of proof. Blank v. Kirwan (1985) 39 Cal. 3d 311, 318,  
 28 216 Cal. Rptr. 718, 703 P.2d 58; Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d

1 394, 399, 113 Cal. Rptr. 585, 521 P.2d 841 ; StorMedia Inc. v. Superior Court (1999)  
2 20 Cal. 4th 449, 453 n.3, 84 Cal. Rptr. 2d 843, 976 P.2d 214.

3 Taking all factual allegations pleaded as true, Plaintiff respectfully submits that he  
4 has properly pled a cause of action for fraud against Defendant Tooma.

5  
6 **3. PLAINTIFF HAS ADEQUATELY PLED A CAUSE OF ACTION**  
7 **FOR BREACH OF FIDUCIARY DUTY**

8 Defendant Tooma demurs to Plaintiff's Third Cause of Action, (for Breach of  
9 Fiduciary Duty) on the grounds that Plaintiff's cause of action is based upon a failure to  
10 disclose the financial relationship between Defendants Tooma and McClure. Defendant  
11 Tooma is in error.

12 In support of his cause of action for breach of fiduciary duty, Plaintiff alleges as  
13 follows:

- 14 • Defendants were Plaintiff's physicians, and as such, were Plaintiff's fiduciaries;  
(Complaint, Page 7, ¶ 33, ¶34 lines 17 to 25);
- 15 • Defendants failed to disclose that they had a financial relationship between  
16 themselves, (Complaint, Page 8, ¶ 35, lines 1-3), failed to disclose that the  
17 surgery that they were recommending was contraindicated by Plaintiff's age and  
18 vision condition, (Complaint, Page 8, ¶ 35, lines 9-11), and failed to inform  
19 Plaintiff that the adverse affects to his vision were the result of the contraindicated  
20 surgery, and instead obtained Plaintiff's consent to further medical treatment by  
21 informing him that the adverse effects to his vision were the natural and expected  
22 consequences of the surgery, and were easily remedied, (Complaint, Page 8, ¶ 35,  
23 lines 11-18);
- 24 • Defendants failed to disclose these facts for the purpose of deceiving Plaintiff.  
(Complaint, Page 8, ¶ 36, lines 18-21);
- 25 • Plaintiff was damaged by Defendants' failures to disclose; (Complaint, Page 8, ¶  
26 38, lines 25-28, Page 9, ¶ 39-¶41, lines 1-17).

1 The elements for the cause of action for constructive fraud are the following: (1)  
2 fiduciary relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive;  
3 and (4) reliance and resulting injury (causation). The intent to deceive does not require an  
4 intent to defraud; rather, it is implied from the failure to disclose. Stokes v. Henson  
5 (1990) 217 Cal. App. 3d 187, 197, 265 Cal. Rptr. 836.

6 The allegations in a complaint must be accepted as true for purposes of demurrer.  
7 Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal. App. 3d 1624, 1626-1627, 272  
8 Cal. Rptr. 623. Accepting all of Plaintiff's allegations as true, Plaintiff respectfully  
9 submits that the Complaint adequately states a cause of action for Breach of Fiduciary  
10 Duty against Defendant Tooma.

11 Defendant Tooma's demurrer to the cause of action for Breach of Fiduciary Duty  
12 centers on the allegation that Defendant Tooma informed Plaintiff of all that he was  
13 required to, and the alleged failures to inform are de minimis and of no import. Plaintiff  
14 respectfully disagrees. A physician's duty to disclose to a patient information material to  
15 the decision whether to undergo treatment is the central constituent of the legal doctrine  
16 known as "informed consent." Arato v. Avedon (1993) 5 Cal. 4th 1172, 1182-1184, 23  
17 Cal. Rptr. 2d 131.

18 The scope of a physician's duty to inform his patient was discussed in Cobbs v.  
19 Grant (1972) 8 Cal. 3d 229, 242-244, 104 Cal. Rptr. 505, wherein the court stated as  
20 follows:

21 Preliminarily we employ several postulates. The first is that  
22 patients are generally persons unlearned in the medical sciences  
23 and therefore, except in rare cases, courts may safely assume  
24 the knowledge of patient and physician are not in parity. The  
25 second is that a person of adult years and in sound mind has  
26 the right, in the exercise of control over his own body, to  
27 determine whether or not to submit to lawful medical treatment.  
28 The third is that the patient's consent to treatment, to be  
effective, must be an informed consent. And the fourth is that  
the patient, being unlearned in medical sciences, has an abject  
dependence upon and trust in his physician for the information  
upon which he relies during the decisional process, thus raising

1 an obligation in the physician that transcends arms-length  
2 transactions.

3 From the foregoing axiomatic ingredients emerges a necessity,  
4 and a resultant requirement, for divulgence by the physician to  
5 his patient of all information relevant to a meaningful decisional  
6 process. In many instances, to the physician, whose training  
7 and experience enable a self-satisfying evaluation, the particular  
8 treatment which should be undertaken may seem evident, but it  
9 is the prerogative of the patient, not the physician, to determine  
10 for himself the direction in which he believes his interests lie. To  
11 enable the patient to chart his course knowledgeably,  
12 reasonable familiarity with the therapeutic alternatives and their  
13 hazards becomes essential.

14 Therefore, we hold, as an integral part of the physician's overall  
15 obligation to the patient there is a duty of reasonable disclosure  
16 of the available choices with respect to proposed therapy and of  
17 the dangers inherently and potentially involved in each.

18 Here, Plaintiff has alleged a failure to inform of the risks of the surgery. Indeed,  
19 Plaintiff has alleged even more than that and has alleged a failure to inform that surgery  
20 was contraindicated. This is clearly a failure of the Defendant Physicians to provide  
21 reasonable disclosure to their patient.

22 Plaintiff further alleges that this failure to disclose was motivated by a desire for  
23 monetary gain by the Defendant physicians, and in disregard for Plaintiff's right to be  
24 informed. This is evidenced by the financial dealings between the Defendant Physicians.  
25 Defendant Tooma alleges that he had no duty to inform Plaintiff of his business  
26 relationship with Defendant McClure. Plaintiff respectfully disagrees.

27 In Moore v. Regents of University of California (1990) 51 Cal. 3d 120, 129, 131-  
28 132, 271 Cal. Rptr. 146, 793 P.2d 479, the Court dealt with the issue of a physicians  
failure to disclose an economic interest in the patient's treatment. In holding that there  
was a duty to disclose such an economic interest, the Moore (supra) Court held as  
follows:

A physician seeking a patient's consent for a medical procedure  
must, to satisfy his or her duty to the patient and to obtain the

1 patient's informed consent, disclose personal interests unrelated  
2 to the patient's health, whether research or economic, that may  
3 affect his or her medical judgment. A physician's failure to  
4 disclose personal interests may give rise to a cause of action for  
5 performing medical procedures without informed consent or  
6 breach of fiduciary duty.

7 Moreover, apart from a simple legal duty to inform Plaintiff of the financial  
8 relationship between the parties, Defendant Physicians violated their ethical duties by  
9 becoming involved in the relationship in the first place.

10 The Ethical Code of the American Medical Association, Section E-6.02 (Exhibit One)  
11 states as follows:

12 The payment by or to a physician solely for the referral of a  
13 patient is fee splitting and is unethical.

14 The Ethical Code of the American Medical Association, Section E-6.03 (Exhibit  
15 Two) states as follows:

16 Clinics, laboratories, hospitals or other health care facilities that  
17 compensate physicians for referral of patients are engaged in  
18 fee splitting, which is unethical.

19 Separate and apart from the duty to inform Plaintiff of the contraindication of the  
20 surgery, Plaintiff would respectfully submit to the Court that Defendant Tooma had an  
21 ethical and legal duty to inform him of the financial relationship between himself and  
22 Defendant McClure. Combining the two failure to inform together, Plaintiff would  
23 respectfully submit to the Court that he has clearly pled with sufficient particularity a  
24 cause of action for Breach of Fiduciary Duty.

25 ///

26 ///

27 ///

28 ///


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

4. CONCLUSION

For All of the reasons stated above, Plaintiff Jerry Lehrer respectfully requests that the Court overrule the Demurrer of Defendant Thomas Tooma to the Second and Third Causes of Action of Plaintiff's Complaint.

Dated: April 20, 2001

KERSTEN & ASSOCIATES

BY:   
Michael P. Green  
Attorneys for Plaintiff Jerry Lehrer