CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Chakalis v Elevator Solutions, Inc. 5/18/12

Apportionment of Fault to Un-Named Parties; Burden of Proving Medical Malpractice with Expert Testimony

Plaintiff Katerina Chakalis rented an apartment owned by the Fountain Springs Homeowners Association in West Hollywood. She and defendant Elevator Solutions, Inc. (ESI) later warned Fountain Springs HOA about potential problems with the elevator in plaintiff's building. On July 1, 2005, while she was riding in the elevator when it failed and dropped six floors. The elevator ceiling became dislodged and landed on plaintiff, causing a laceration in her head. Plaintiff also alleged she was soaked with hydraulic oil in the incident. Plaintiff was taken to Cedars Sinai Hospital. Plaintiff was seen by Dr. Kenneth Corre about three hours after her admission. Dr. Corre examined plaintiff and then discharged her, finding only tenderness in the plaintiff's back and the laceration.

On July 5th, plaintiff returned to the hospital to have her stitches removed. Dr. Corre was again on duty, and he treated and examined her. Plaintiff complained of numerous ailments, including headache, left shoulder pain, low back pain, feeling dysphoric, and hydraulic oil poisoning. Dr. Corre found plaintiff's laceration was healing well and deemed her "absolutely healthy and minimally symptomatic." He diagnosed her as having sustained a concussion, neck and low back strain, and insomnia, and that her complaints were way out of proportion to his findings. Dr. Corre expressed doubt about the oil poisoning claim because none of the doctors or nurses examining plaintiff on the night of the event described smelling or seeing any abnormal fluid on her body, breath or clothing.

On July 21st, Plaintiff was seen by Dr. James Dahlgren, a specialist in

toxicology. He had never treated a patient with alleged hydraulic oil poisoning. After his diagnosis confirmed hydraulic oil poisoning, Dr. Dahlgren placed plaintiff on a detoxification treatment plan, which included chelation to remove heavy metals from her body. Urine samples confirmed elevated arsenic and mercury levels in the plaintiff's body. Later, plaintiff brought a sample of the oil she claimed spilled on her during the accident. A test of the substance did not reveal either arsenic or mercury. Nonetheless, Dr. Dahlgren maintained the detoxification program. The doctor also obtained a copy of the material safety data sheet for the oil, which stated the oil was not expected to be harmful, other than possible skin irritation. He did not talk to the plaintiff or change his diagnosis with this information.

Plaintiff went on to treat with several other health professionals for a variety of physical and psychological ailments. Among other conditions, she developed Stevens-Johnson syndrome, which causes a severe skin rash. Plaintiff's psychologist, Dr. Snyder diagnosed depression and post traumatic stress disorder. Plaintiff reported to him that Dr. Dahlgren's chelation therapy was painful and caused anxiety. Dr. Snyder referred plaintiff to Dr. Miller for pain management and Dr. Miller prescribed 8-10 vicodin per day. Plaintiff was hospitalized in the psychiatric ward at Cedars Sinai in October 2006 due to a concern about suicidal ideation. In November 2006, plaintiff experienced acute liver failure and she received a liver transplant. The biopsy of her liver revealed the failure was the result of acetaminophen toxicity. The pathologist characterized the failure as rapid, within a week, not the result of chronic, long term illness. Expert testimony later established regular strength vicodin has 500 milligrams of acetaminophen. When plaintiff was admitted with liver failure she had 35,000 milligrams of acetaminophen in her system.

At trial the defense vigorously disputed the cause and extent of plaintiff's injuries. In addition to Dr. Corre, the defense called Dr. Clark, a board certified medical toxicologist, and Dr. Levine, a board certified neurologist and psychologist. Dr. Clark was highly critical of Dr. Dahlgren's diagnosis and treatment of plaintiff. With tests showing insignificant amounts of mercury and arsenic, he testified the chance of plaintiff being exposed to those substances was very low. Thus, the detoxification program and the chelation therapy were unnecessary. He was also critical of Dahlgren's prescription for provigil, a drug

with known side-effects, including Stevens-Johnson syndrome.

The defense asked Dr. Clark if Dr. Dahlgren's care fell below the standard of care. Plaintiff's counsel objected on the basis of relevance, and after a side-bar, the objection was sustained. Dr. Levine then took the stand, and testified about his examination of the plaintiff two months before her acute liver failure. She described 13 separate bodily complaints. Dr. Levine testified that most, if not all, of plaintiff's complaints had a strong psychiatric basis and the nature and extent of the complaints exceeded reasonableness.

During deliberations, the jury asked the trial court if it could assign a percentage of responsibility to a person not listed as a defendant. The court stated that it could do so. The jury then returned a special verdict form assigning fault to Fountain Springs HOA and two individual defendants, as well as a small percentage to the plaintiff. The award included $143,689 in past medicals, $600,000 in past economic loss, and $50,000 in future economic loss. The jury also apportioned 52% of the fault to Dr. Dahlgren, whose name was written into the special verdict form. Plaintiff's subsequent motion for new trial was denied, and plaintiff appealed.

The Second Appellate District, Division Three, began its analysis by reviewing California's system of comparative fault. The rule of joint and several liability was eventually modified in 1986 by Proposition 51, which created an exception to the joint and several rule. Civil Code section 1431.2(a) now states that liability for non-economic damages among joint tortfeasors is several only, and that each defendant shall be liable only on the basis of its allocated share of fault. In *Wilson v Ritto* (2003) 105 Cal.App.4th 361, plaintiff sued a physician for malpractice. At trial, the defendant physician's expert criticized a different physician but did not testify that physician violated the standard of care. After both sides rested, the defendant moved to add the other physician to the verdict form as a joint tortfeasor. The trial court denied the motion.

The Court of Appeal upheld the trial court's ruling. It stated that wrongdoing in the context of medical treatment is measured by the standard of care within the medical community. Apportionment among doctors under Civil Code section 1431.2 requires evidence of medical malpractice, not only to named defendants, but also as to nonparty doctors. The same burden of proving fault

applies regardless of whether a joint tortfeasor is a defendant or a nonparty. (*Wilson*, at p. 369) Here, defendants argued that *Wilson* is distinguishable because the nature of the defendants' negligence (elevator maintenance) was different than Dr. Dahlgren's alleged negligence (medical). (*Henry v Superior Court* (2008) 160 Cal.App.4th 440) The Justices explained that the burden of apportioning fault to Dr. Dahlgren fell squarely on defendants. Defendants were required to prove that Dr. Dahlgren breached the medical standard of care. The element of breach in a medical malpractice claim can generally only be proven with expert testimony. (*Landeros v Flood* (1976) 17 Cal.3d 399)

It is undisputed that there was no expert testimony that Dr. Dahlgren's treatment of plaintiff fell below the standard of care. Plaintiff thus contends there was insufficient evidence to find Dr. Dahlgren at fault. Under the doctrine of invited error, however, a party may not object to the sufficiency of the evidence to support a finding against him when the lack is the result of improper exclusion of evidence at his own instance. A party who prevented proof of a fact by his erroneous objection will not be permitted to take advantage of his own wrong, and a reviewing court will assume that the fact was duly proved. (*Watenpaugh v State Teachers' Retirement* (1959) 51 Cal.2d 675) The doctrine of invited error is based on the principle of estoppels. (*Norgart v Upjohn Co.* (1992) 21 Cal.4th 383)

Here, plaintiff prevented defendants from proving that Dr. Dahlgren failed to meet the standard of care by objecting to a question posed to defendants' expert witness regarding that issue. This objection was not well taken. Contrary to the trial court's ruling, whether Dr. Dahlgren failed to meet the applicable standard of care was relevant to the issue of apportioning fault for plaintiff's injuries to Dr. Dalhgren. Plaintiff therefore is stopped from arguing on appeal that defendants failed to prove Dr. Dahlgren did not meet the standard of care.

The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise, (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage. (*Johnson v Superior Court* (2006) 143 Cal.App.4th 297) The Justices explained that *Wilson* focused on the element of breach. It did not specifically

address the other elements, including causation. The Court opined that the rationale of *Wilson* should be applied to the other elements as well. If, for example, a doctor's medical malpractice did not proximately cause any harm to the plaintiff, the trier of fact cannot apportion fault to that doctor pursuant to Civil Code section 1431.2. The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. (*Miranda v Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326) Defendants did not satisfy the requirement.

Defendants claim that much of plaintiff's physical pain and mental suffering were caused by Dr. Dahlgren's alleged medical malpractice. There was evidence that the chelation therapy prescribed by Dr. Dahlgren was unnecessary and painful, and that plaintiff feared the therapy. There was also evidence that plaintiff's belief she had hydraulic oil poisoning was confirmed by Dahlgren's diagnosis; that this diagnosis was incorrect; and that many of plaintiff's health problems had a very strong psychiatric basis to them. Defendants also argue much of plaintiff's suffering can be tied to her liver failure which was caused by an overdose of acetaminophen just weeks after the hospital admission to monitor her for risk of suicide. Defendants trace plaintiff's mental deterioration to Dr. Dahlgren's misdiagnosis.

The fatal flaw with defendants' argument is that there was no expert testimony regarding the element of causation. While defendants' experts were critical of Dr. Dahlgren's treatment, they did not actually offer an expert opinion that it was a substantial factor in causing plaintiff's injuries within a reasonable medical probability. Defendants therefore failed to meet their burden of showing Dr. Dahlgren was comparatively at fault for plaintiff's damages for purposes of Civil Code section 1431.2.

A motion for new trial should be granted if there is an insufficiency in the evidence to justify the verdict, or the verdict is against the law, and this error materially affects the substantial rights of the moving party. (CCP section 657) Here the verdict was not supported by substantial evidence and was against the law because the jury found Dr. Dahlgren 52 percent at fault without expert testimony establishing that Dr. Dahlgren's alleged medical malpractice was a substantial factor in causing plaintiff's injuries. The error materially affected

plaintiff's rights because it reduced the amount of her recovery. The trial court thus erred in denying plaintiff's motion for new trial.

It is the trial court's duty to see that the jury is instructed about the applicable law regarding the major subjects raised by the evidence, including affirmative defenses. (*Paverud v Niagara Machine & Tool Works* (1987) 189 Cal.App.3d 858) In this case the parties did not request instructions regarding the requirements of proving medical malpractice and the trial court did not give any. The jury thus was not informed about important controlling legal principles relating to Dr. Dahlgren's fault, if any, for plaintiff's injuries. On remand, if the defendants contend Dr. Dahlgren is comparatively at fault in a jury trial, the jury must be instructed on the requirements for proving a medical malpractice claim against him.

The judgment is reversed with respect to Fountain Springs HOA and the other individual defendants and the case is remanded for a new trial. In the interests of justice, each party shall bear their own costs.

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