

Dee v PCS Property Management

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Plaintiff resided in Defendants' property from January to June, 2001. In May of 2001, testing revealed the presence of mold, including stachybotrys. Plaintiff vacated the premises, and later sued for fraud, negligence, negligent and intentional infliction of emotional distress, and other claims.

Prior to trial, defendants filed numerous motions in limine to limit or preclude plaintiff's experts from testifying. Defendants moved under People v Kelly (1976) 17 Cal.3d 24, to exclude causation testimony and under Evidence Code section 801, as well. Kelly requires three prerequisites for admission of evidence obtained through a new scientific technique: (1) proof that the technique is generally accepted as reliable in the relevant scientific community, (2) proof that the witness testifying about the technique and its application is a properly qualified expert on the subject, and (3) proof that the person performing the test in the particular case used correct scientific procedures. (People v Bolden (2002) 29 Cal.4th 515.

The trial court excluded portions of the testimony of plaintiff's medical toxicologist, clinical toxicologist, and neuropsychologist, following an Evidence Code section 402 hearing in which each testified.

The medical toxicologist was precluded from testifying about the increased risk of developing cancer after exposure to mold. The clinical toxicologist was not permitted to testify as to the connection between mold exposure and the onset of cognitive impairment, fatigue, headaches and fibromyalgia. Finally, the neuropsychologist was unable to testify that exposure to mold led to brain damage or brain injury.

The case was tried to a jury. Plaintiff testified about various health effects she claimed developed after she was exposed to mold in her apartment. Plaintiff's experts supported her claim, while defendants' experts disputed causation. The jury returned a verdict in favor of defendants, finding no negligence, nor any liability on the remaining claims. Defendants were awarded costs in the amount of \$331,167.52.

Plaintiff appealed the verdict on several grounds, including a claim of error in excluding the expert testimony. The Second DCA reviewed the appeal and addressed the claim of error. Under Evidence Code section 801, the court may exclude evidence where there is no reasonable basis for the opinion. Even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. (Lockheed Litigation Cases (2004) 115 Cal.App.4th 558)

An expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities. (Jennings v Palomar Pomerado Health Systems, Inc. (2003) 114 Cal. App. 4th 1108)

Here, the medical toxicologist sought to testify that plaintiff's exposure to mycotoxins caused her symptoms and her susceptibility to cancer without any evidence she was exposed to mycotoxins. The opinion of each of the three experts relied on an incorrect premise, and thus their opinions lacked evidentiary value. Thus, the opinions of each were based on speculation and conjecture. When an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value. (See, Geffcken v D'Andrea (2006) 137 Cal. App. 4th 1298)

Plaintiff also claimed error in the exclusion of evidence of her fear of cancer claim. In addition to submitting faulty evidence, the Second DCA pointed out that in the absence of a present physical injury or illness, recovery of damages for fear of cancer in a negligence action should be allowed only if the plaintiff pleads and proves that the fear stems from a knowledge, corroborated by reliable medical and scientific opinion, that it is more likely than not that the feared cancer will develop in the future due to the toxic exposure. (Potter v Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965)

Here there was no evidence Plaintiff had experienced a fear due to the toxic exposure. She provided no reliable medical or scientific opinion that it

was more likely than not that the feared cancer would develop as a result of her exposure to mold. Therefore, it was properly excluded. On these grounds, and all others raised by Plaintiff, the judgment is affirmed.

The Justices modified the opinion after publication (provided in full in the attached PDFversion) removing the discussion on excluding the fear of cancer claim.

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