Garibay v Hemmat
4/1/08

Summary Judgment; Burden of production; medical malpractice

Plaintiff appeals from a summary judgment in favor of defendant, based on an expert declaration. The case arises from a bilateral tubal ligation by Dr. Hemmat to prevent plaintiff from ever becoming pregnant. After the May, 2004, surgery, plaintiff became pregnant in November 2004, and delivered a child in July of 2005.

Defendant filed a motion for summary judgment, asserting that defendant complied with the standard of care. The only evidentiary support was a declaration from Dr. Frumovitz, a board certified obstetrician and gynecologist. It stated the expert had reviewed the medical records, stated he was familiar with the standard of care for physicians, and had performed the surgery many times himself. In his opinion, based on his training and experience, as well as a review of the pertinent records, the defendant doctor complied with the applicable standard of care.

Plaintiff opposed the summary judgement on the basis it was improper and a largely inadmissible expert declaration from Dr. Frumovitz. Plaintiff filed objections, asserting the declaration lacked authentication, was hearsay, was barred by the best evidence rule and was improper expert opinion. The court sustained two objections, striking two paragraphs from the declaration, but overruled the remainder and granted the motion.

The moving party in a summary judgment motion has the initial burden of production to make a *prima facie* showing (sufficient to support the position of the moving party) of the nonexistence of any triable issue of material fact. (*Aguilar v Atlantic Richfield Co.* (2001) 25 Cal 4th 826). To meet the burden of production, the moving party in a medical malpractice case must present expert testimony to prove or disprove that the defendant performed in accordance with the prevailing standard of care. (*Kelly v Trunk* (1998) 66 Cal. App. 4th 519).

Here the sole support for the motion was Dr. Frumovitz declaration which stated he had reviewed the medical records. Neither the medical records nor the operative report were in evidence. Although hospital and

medical records are hearsay, they can be admitted under the business records exception to the hearsay rule. (*In re Troy D.* (1989) 215 Cal. App. 3d 889). Such records must be properly authenticated. Evidence Code section 1271 provides the business records exception to the hearsay rule, requiring a showing of four factors.

Without the records and without testimony providing for authentication, Dr. Frumovitz declaration has no evidentiary basis. Consequently his expert medical opinion has no evidentiary value. An expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural. (*Bushling v Fremont Medical Center* (2004) 117 Cal. App. 4th 493)

Although experts may properly rely on hearsay in forming their opinions, they may not relate the hearsay statements of another (such as in medical records) as independent proof of the fact. (*Korshak v Atlas Hotels, Inc.* (1992) 2 Cal. App. 4th 1516). Physicians can testify as to the basis of their opinion, but this is not intended to be a channel by which testifying physicians can place the opinion of out of court (hearsay) physicians before the trier of fact. (*Whitfield v Roth* (1974) 10 Cal.3d 874).

Since Dr. Frumovitz had no personal knowledge of the underlying facts of the case and attempted to testify to facts derived from medical records not properly before the court his declaration had no evidentiary foundation. With much of the declaration inadmissible, defendant s summary judgment failed to meet the burden of production. The grant of summary judgment is reversed.