

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Johnson v Chiu 9/29/11

Motions in Limine; Evidentiary vs. Dispositive Motions

Plaintiff alleged medical malpractice following a series of laser treatments, claiming the laser machine emitted “a loud booming sound” that impacted her right ear resulting in hearing loss and vertigo. She asserted that her injuries were caused by Dr. Chiu’s negligent examination, care and treatment. The complaint also alleged in a separate cause of action that she was injured by negligent repair and maintenance of the laser machine, naming only Doe defendants.

Defendant moved for summary judgment on the first cause of action, the only one in which he was named. He claimed to have complied with the applicable standard of care. The day before plaintiff filed her opposition, she amended the complaint to add Chiu as a defendant in the negligent repair and maintenance claim. Her opposition alleged the motion should be denied because the defendant negligently maintained the equipment, and defendant is entitled to summary judgment only when all theories of liability have been negated. She provided an expert declaration outlining the lack of maintenance shown in the records and depositions, which led to the conclusion the lack of maintenance was a substantial factor in causing the noise that injured plaintiff.

The trial court granted defendant’s motion on the malpractice cause of action, treating it as a motion for summary adjudication, but denied relief on the maintenance cause of action. Defendant later answered and filed another summary judgment motion on the maintenance claim. That motion was denied by the trial court, and the case was assigned to trial. Defendant moved in limine to dismiss the negligent maintenance claim, but the trial judge denied the motion. Defendant Chiu took a writ to the Appellate Court, which was also

denied. The matter then came up for trial again, and Defendant renewed the in limine motion to dismiss the maintenance cause of action. The motion was granted by the new trial judge, and plaintiff appealed.

The Fourth District Court of Appeal began its discussion by noting that a motion in limine is properly “made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence.” The purpose of a motion in limine is “to avoid the obviously futile attempt to “unring the bell” in the event a motion to strike is granted in the proceedings before the jury. (Edwards v Centex Real Estate Corp. (1997) 53 Cal.App.4th 15) What in limine motions are not designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure. (Amtower v Photon Dynamics, Inc. (2008) 158 Cal.App.4th 1582) Motions in limine deal with evidence. An in limine motion that seeks to exclude all evidence pertaining to part or all of a cause of action based on an argument that plaintiff lacks evidence to support part or all of the cause of action is but a disguised motion for summary adjudication. (R & B Auto Center, Inc. v Farmers Group, Inc. (2006) 140 Cal.App.4th 327)

The Justices determined that defendant’s motion in limine sought dismissal of plaintiff’s sole remaining cause of action for negligent maintenance on the ground that the medical malpractice cause of action had previously been dismissed and the case of Flowers v Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992) precludes the plaintiff from labeling the previously adjudicated malpractice cause of action as “negligent maintenance.” In Flowers, plaintiff was placed on a gurney with the side railing lowered. After being injured from a fall, plaintiff sued the hospital for general negligence and premises liability. On appeal to the California Supreme Court, the Justices there found the Appellate Court erred in perceiving a conceptual distinction between “ordinary” and “professional” negligence. The Appellate Court had allowed separate and independent theories of liability on these claims, even when based on the same facts asserted by plaintiff. The alleged negligence there consisted of one act, the failure to raise a guard rail on the gurney.

Here, plaintiff alleged Dr. Chiu committed medical malpractice when he “negligently and carelessly examined, cared for, followed up on, and treated

her... to cause injuries and damages.” The negligent maintenance cause of action alleged Chiu was responsible for the repair and maintenance of the laser machine and knew it could cause injuries if not properly repaired. The complaint alleged his negligent repair did in fact cause plaintiff’s injuries and damages. Unlike *Flowers*, plaintiff alleged **distinct facts in support of the two causes of action**. Accordingly, the successful summary judgment on the malpractice claim did not adjudicate the separate claim for negligent maintenance.

Additionally, even if the allegations in the two causes of action could be said to constitute but one cause of action for negligence, when the trial court granted the motion on the malpractice claim, it did not have plaintiff’s evidence on the maintenance claim. It appears that is why the trial judge treated the summary judgment as a summary adjudication on the malpractice claim only. Later, when defendant brought his summary judgment on the maintenance claim, the court considered plaintiff’s evidence and denied relief because defendant did not establish that he was entitled to judgment as a matter of law.

This case presents a text book example of the inappropriate use of in limine motions. “To have the sufficiency of the pleading or the existence of triable issues of material fact decided in the guise of a motion in limine is a perversion of the process.” (*R & B Auto Center, Inc.*, at p. 371) Although this procedural issue was not preserved on appeal, and was thus withdrawn, *Flowers*, does not compel judgment in favor of defendant on his so-called motion in limine. Accordingly, the trial court erred in granting the defendant’s motion in limine to dismiss the negligent maintenance cause of action.

The judgment is reversed and the matter remanded for further proceedings consistent with the opinion. Plaintiff shall recover her costs on appeal.

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