## ***Muller v Fresno Community Hospital & Medical Center***

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Trial Practice; Expert Witnesses; Rebuttal Witness; Medical Malpractice

Muller sustained severe injuries to his left arm in a rollover collision on I-5. Initially he was treated at Defendant Fresno Community Hospital s facility, but later transferred to Los Angeles for additional care. At the UCLA Med Center, his left arm was amputated. He sued FCH and the Los Angeles facilities along with various doctors in both Fresno and LA. The Los Angeles area defendants received a defense verdict. Fresno Community Hospital and its doctors also received a defense verdict, but it was reversed in an unpublished opinion.

The case turned on the question of whether the compartment syndrome developed by plaintiff in the left arm was mistreated by the Fresno physicians. All experts agreed that failure to timely diagnose a compartment syndrome in a hospital setting with a conscious patient was below the standard of care. It was also agreed that if a cast is too tight, it can cause or aggravate an existing compartment syndrome. The question was whether plaintiff sustained such an undiagnosed injury while at FCH.

In the first trial, Dr. London acted as an expert for some of the Los Angeles area physicians. As a board-certified orthopedic surgeon, he opined that plaintiff did sustain a compartment syndrome at FCH and that if not treated in 6-12 hours, it results in death of the muscles in the affected compartment. He testified Dr. Shantharam s performance fell below the standard of care for failing to diagnose and treat plaintiff s compartment syndrome. Other experts for the LA defendants shared all or some of this opinion.

In the second trial, following the earlier reversal, at the end of the defense case, FCH and the individual Fresno area doctors called an expert who testified plaintiff never sustained a compartment syndrome. Instead, the expert concluded plaintiff sustained a secondary infection at the LA facilities, and the Fresno based providers met the standard of care. The next day, a second expert testified that compartment syndrome will kill all of the muscle in the compartment, so that the amputation would have to take place in the next compartment, proximal to the injury. In other words, compartment syndrome in the forearm would require amputation above the elbow.

In this case, the expert continued, plaintiff had live muscle below the elbow joint, and the amputation took place below the elbow. Therefore, the plaintiff did not have a compartment syndrome. Defendant Dr. Shantharam was called to the stand at the end of the defense case. He confirmed there was live muscle below the elbow, and testified plaintiff did not have a compartment syndrome when he left Fresno. The defense case then rested.

At that point, plaintiff s counsel indicated a desire to call Dr. London as a rebuttal witness. The defense objected, and plaintiff s counsel argued that the testimony about the existence of live muscle below the elbow as proof of the absence of a compartment

syndrome had never been presented previously by the defense. Counsel expected Dr. London to say the site of the amputation is not determinative of whether compartment syndrome existed.

In written opposition the next morning, the defense referred to CCP section 2034.310(b) as authority for excluding impeachment testimony, ...that contradicts opinion. The defense maintained the subject had been raised in one of its experts depositions. The trial court ruled that plaintiff was offering contrary evidence, not foundational facts, and Dr. London would be excluded. The jury then returned a defense verdict, finding specifically that plaintiff did not have compartment syndrome at Fresno Community Hospital.

On plaintiff s motion for new trial, the trial court reversed itself and agreed with plaintiff that Dr. London s testimony was improperly excluded. Dr. London was a designated expert and the exclusion under 2034.310(b) applied only to non-designated experts. Additionally, defendants were unable to demonstrate that before trial they had informed the plaintiff they would be presenting testimony that the location of the amputation was a factor in determining the existence of compartment syndrome. Since plaintiff did not know of the defense, he did not present evidence on the issue in his case in chief and was unable to cross-examine earlier defense witnesses on the subject. Exclusion of Dr. London was thus prejudicial, as the testimony would likely have affected the outcome of the trial.

Dr. Shantharam appealed the granting of the new trial motion, asserting the defense theory had been propounded through the testimony of one of its experts. The Second DCA responded that the deposition answer was far too guarded to amount to a clear statement that the below the elbow amputation ruled out a compartment syndrome. One answer from a deposition does not amount to a clearly articulated theory, especially when the answer requires interpretation before it adds up to a theory.

A trial is not a game of gotcha in which one guarded answer in a deposition can be transformed into a compelling theory of defense propounded for the first time on the last day of trial. Given that a trial is a quest for the truth and not an ordeal by battle, the jury should in all likelihood have been allowed to hear about this new theory as long as the element of surprise was counterbalanced by giving the plaintiff an opportunity to study this new theory and to respond to it. Instead, the defendants did all they could to benefit from the surprising turn in their expert s testimony and to deny plaintiff a fair opportunity to react to that surprise.

The Justices continued that if one takes the defendants literally at their word and assumes that the deposition testimony was in fact a statement of the below the elbow amputation theory, one is presented with a cleverly disguised deposition answer, planted like a mine well before trial, and then exploded deliberately by the defendants at the end of the trial. Such conduct, the proverbial trial by ambush, is entirely unacceptable. The single deposition answer was not a statement of the theory that a below elbow amputation rules out a compartment syndrome. With no other reference to

the theory the trial court s ruling defendants had not informed plaintiff of the theory is correct.

Failure to disclose the theory was not the breach of an obligation but rather had operative effects, one of which was that Dr. London should have been allowed to testify on rebuttal. Plaintiff did not forfeit the right to call Dr. London by failing to object to the defense expert s testimony. The trial court may exclude expert testimony if the expert is called at trial to give an opinion that has not previously been disclosed either in deposition or in the expert witness declaration. (*Bonds v Roy* (1999) 20 Cal.4th 140)

As the Supreme Court noted in *Bonds*, CCP 2034 envisions timely disclosure of the general substance of an expert s testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial is inconsistent with this purpose. Failure to submit an accurate expert witness declaration may lead to the exclusion of expert opinion under CCP 2034.300(b).

The policy is to preclude surprises in the expert s testimony for which the opposing party is not prepared. (*Jones v Moore* (2000) 80 Cal.App.4th 557) Expert testimony poses a special problem because counsel must acquire specialized knowledge to examine or cross-examine an expert. Counsel who is not knowledgeable enough to question an expert simply cannot represent the client adequately, and the statute is designed to eliminate surprises in expert testimony.

Here, the defendants maintain plaintiff should have objected when the expert offered testimony on the new theory. Counsel who is not knowledgeable enough to question an expert simply cannot represent the client adequately; thus, the statute is designed to eliminate surprises in expert testimony. And the DCA noted, there cannot be a worse time for a surprise than at the end of a medical malpractice trial.

Instead of objecting, plaintiff s counsel announced to the court his intention to call a rebuttal expert, thereby bringing the matter to the court s attention the same day it occurred. As a general matter, the purpose of an objection is to give the trial judge an opportunity to correct the matter. Counsel could not have been faulted for not being able to determine that this was a new theory. Some reflection and review of materials, if not a consultation with one s own expert, would be required before counsel knew enough to make an objection that he could support. It could also be said that it was more productive to produce an expert on the issue than to attempt to make inadequately researched objections. Thus counsel acted in a timely manner to address the issue.

Although plaintiff moved for monetary sanctions, the penalty for attempting to present an expert opinion at trial that was not contained in the expert witness declaration is the exclusion of that expert opinion. CCP section 2034.300(b) provides for exclusion of testimony as a sanction. The denial of monetary sanctions is affirmed.

The order granting the new trial and denying the motion for sanctions is affirmed.