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 • http://ernestalongadr.com

Stokes v Muschinske 4/8/19

Trial practice; Collateral source rule; Reference to medical insurance; Kaiser, MediCare

On March 28, 2013, Defendant Martin Muschinske was driving a pickup truck towing a horse trailer loaded with equipment when he rear-ended Plaintiff James Stokes's car. Plaintiffs James Stokes and his wife Patricia Stokes sued Muschinske and the case proceeded to a jury trial. Prior to trial, Muschinske stipulated to liability for the accident but disputed the causation, nature, and extent of Stokes's injuries and damages.

After a lengthy trial consisting largely of testimony on causation and damages from numerous medical and other experts, the parties proposed two vastly different damage awards. Stokes argued his total damages were over $23.5 million, and asked the jury to award an additional $4 million for Patricia's loss of consortium claim. Muschinske argued for damages for Stokes totaling less than $500,000, with an additional $25,000 for Patricia.

After two hours of deliberation with one 15-minute break, the jury awarded Stokes $560,537.51 in damages, which was mostly—though not entirely—in line with the amounts requested by Muschinske. The breakdown and juror count for each portion of that award was as follows: $26,806.51 in past medical expenses (12–0); $255,000 in future medical expenses (10–2); $13,731 in past lost earnings

(12–0); $15,000 in future lost earnings (11–1); $100,000 in past non-economic damages (12–0); and $150,000 in future non-economic damages (12–0). The jury awarded Patricia $50,000 on her claim (10–2). The jury also found Muschinske did not act with malice, precluding an award of punitive damages. Judgment was entered on the verdict.

Stokes moved for a new trial on several grounds, including the two grounds he raises on appeal. The court denied the motion. Stokes appealed. One of those issues is discussed here.

Stokes contends the trial court allowed Muschinske to violate the collateral source rule multiple times during trial through references to Stokes's past treatment at Kaiser Permanente and Kaiser medical insurance, as well as references to Medicare and Social Security disability benefits in relation to future medical expenses.

The Second District Court of Appeal began by stating that the **collateral source rule** generally provides that " '**if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.**' " (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551) This rule applies to payments from private insurance as well as public benefits. (see *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 505–506)

There is also an evidentiary aspect to the collateral source rule: "**Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose. Even if relevant on another issue (for example, to support a defense claim of malingering), under Evidence Code section 352 the probative value of a collateral payment must be 'carefully**

weighed . . . against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations.' " (*Howell,* at p. 552; see *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1327.)

Stokes does not contend that the trial court erroneously admitted evidence of any *specific* past collateral payments by Kaiser insurance or anticipated future collateral payments from Medicare or Social Security. Nor does he contend that any of Muschinske's experts deducted any past or future collateral payments to calculate damages, or that Muschinske argued that the jury should make any such specific deductions. His argument is more generalized: he claims mere reference to these entities led the jury to infer that he either had received collateral payments in the past or would receive collateral payments in the future, thereby prompting the jury to reduce his damages accordingly.

Stokes's argument is based on the court's alleged erroneous admission of evidence, leading the 2nd DCA to review the court's rulings for abuse of discretion. (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1000; see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 171)

Stokes's argument is based on the following parts of the record. Stokes had health insurance through Kaiser Permanente, and for six months after the accident, he received treatment from healthcare professionals at Kaiser facilities. Before trial, Stokes filed a **motion in limine to preclude any use at trial of the names "Kaiser" and "Kaiser Permanente"** on the theory that the "vast majority of potential jurors throughout Southern California . . . know that the nature of the Kaiser business model is that nobody treats at Kaiser unless they have Kaiser insurance." He feared his treatment at Kaiser facilities would necessarily reveal that he had medical insurance, in derogation of the collateral source rule. In opposition, Muschinske argued that he should be allowed to "discuss where Stokes received his treatment, especially with those instances where he was

examined and no injury was found." **The court tentatively denied the motion and allowed the use of the term "Kaiser" but directed the parties not to refer to "Kaiser insurance."**

Throughout trial, both sides used the term "Kaiser" to refer to Stokes's treatment—by Muschinske's estimation, 398 references in 17 volumes of reporter's transcripts. Stokes does not discuss most of these references in his briefs on appeal, and the Appellate Court is not obligated to comb the record for him in order to evaluate his argument. (Cal. Rules of Court, rule 8.204(a)(1)(C); see *Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 46.) Stokes does point out that Muschinske argued in opening statement that Stokes received care for six months through "healthcare professionals at Kaiser." He argued that after he returned to work he did not receive further treatment from "any healthcare professionals, especially from Kaiser, which is what he belonged to." Instead, two-and-a-half years after the accident he went to other doctors who "were not doctors that Mr. Stokes went to from Kaiser."

The issue of future Medicare coverage came up during cross-examination of Stokes's life-care planner who testified as an expert on the costs of his future care. She had prepared a long-term treatment plan for him. She testified at length about the recommended care contained in the plan. On cross-examination, Muschinske asked the following questions about Medicare and Kaiser:

"Q. Mr. Stokes is 65 years old?

"A. That's my understanding, yes.

"Q. He's eligible for Medicare?

Stokes's counsel: "Objection, your honor. Collateral source."

The court: "Overruled."

Stokes's counsel: "Your honor, may we approach?"

The court: "No."

The witness: "That would be typical at age 65."

"Q. Mr. Stokes is a member of Kaiser?

"A. I don't know that to be the case at this juncture. I think he was in the past. I don't know what the current status is."

Stokes argues **the denial of his counsel's request to approach the bench** signaled to the jury that he was trying to hide future government benefit payments. Stokes ignores that the court instructed the jury not to "consider my granting or denying a request for a conference as any indication of my opinion of the case or of my view of the evidence." The Appellate Court will presume the jury heeded this instruction. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598)

The next day of trial, Stokes filed a **motion to strike any reference to future availability of Medicare benefits**, to preclude any further references to Medicare pursuant to the collateral source rule, and to instruct the jury not to consider future Medicare benefits in assessing costs of future care. After discussing the law on collateral sources at length, the court did not see a need to rule on the motion at that time, **effectively denying it.**

Medicare came up again during the cross-examination of Stokes's wife Patricia. She testified on direct examination that she and Stokes did not currently have insurance. Muschinske asked her a series of questions on cross-examination regarding whether Stokes had applied for Medicare benefits. Stokes **repeatedly objected on collateral source and Evidence Code section 352 grounds, among others, <u>which the court overruled</u>.** Patricia testified that they had applied for Medicare but had not received it yet.

Medicare was mentioned again during testimony from Muschinske's expert rehabilitation consultant, who testified to his opinions on Stokes's future care needs. He testified that one item of cost for Stokes's future care would be a case manager to work with Stokes two to four hours a month for the rest of his life

expectancy. Over Stokes's objections based on the collateral source rule and other grounds, the witness explained that "the case manager looks for resources to help the individual, especially if they have some needs that cost money which they don't have. So we look at, for instance, Medicare to see: What does it cover? How do we document the needs? Sometimes Medicare turns something down because we—they don't have the proper documentation. Or, if there's other services someone has, other medical services available to them. The case manager can tap into them. If there's community resources; tap into those. If there's counseling or mental health counseling or services like that adjustment counseling; we want to tap into those." The witness also noted, "Medicare is an example of service that could be provided to an individual. So if someone has Social Security disability, SSDI for 24 months, they'd be eligible for Medicare."

Turning to Stokes's claim of error, most of these references to Kaiser and Medicare, as well as the single reference to Social Security, **merely provided context and background information** on Stokes's past treatment at Kaiser and on some aspects of Muschinske's experts' calculation of past and future reasonable medical expenses. They were helpful and even necessary to the jury's understanding of the issues. Stokes has not shown the court abused its discretion in admitting these references to assist the jury's understanding of the facts.

A few references arguably did approach the line between permissible background information and reference to collateral sources. For example, the questions posed to Stokes's life-care planner implicated payments by Medicare and Kaiser insurance. The cross-examination of Stokes's wife also referenced Medicare coverage. Yet, even if we assume Stokes has shown the trial court should have excluded some or all of these references, his claim of prejudice is based entirely on speculation.

For the references to Kaiser, the Justices can accept that lay jurors in Southern California might have inferred Stokes had Kaiser insurance that may have covered his past treatment. But Stokes does not suggest there was evidence of any *specific* insurance payments, and there is nothing to suggest the jury reduced his damages award by some unidentified amount simply because he had insurance coverage. The jury unanimously awarded him $26,806.51 in past medical expenses, exactly the amount Muschinske requested based on expert testimony regarding the reasonable cost for Stokes's past medical expenses. Muschinske's expert used the Medicare "allowable amount" and 130 percent of the Medicare allowable amount as methods to calculate reasonable value of past services. Stokes does not suggest the expert deducted any actual Medicare or other collateral payments in that calculation.

Stokes has identified nothing to suggest that Muschinske's expert considered any insurance or other collateral payments in conducting this analysis. In fact, Stokes's wife testified on direct examination that Stokes has to "reimburse every dollar that Kaiser has paid for his care." The court also instructed the jury: "You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence." It is presumed the jury followed this instruction. (*Rufo,* at p. 598.)

Likewise, for the Medicare references, Stokes does not point to any evidence of deductions for specific future Medicare payments, and nothing suggests the jury subtracted unidentified future Medicare coverage in assessing future medical expenses. The jury awarded $255,000 for future medical expenses, which was almost $85,000 *more* than Muschinske's proposed amount of $170,582, suggesting the jury carefully considered the competing expert testimony on the issue of reasonable future costs and arrived at a reasonable award.

Stokes claims it is "reasonably probable" that the jury discounted his requested future medical expenses of $5.77 million in light of future Medicare coverage, but he points to nothing in the record to support that conclusion. He also contends the jury's 10–2 verdict on this award shows prejudice because "only a mere two jurors who voted in the majority needed to have been influenced or confused" by the Medicare references. This is entirely speculative. It is equally possible that two jurors dissented because they believed he should have received *no more than* $170,582, the amount proposed by Muschinske.

Stokes also attempts to link together different aspects of Muschinske's experts' testimony to show the jury *must* have reduced his requested future medical expenses due to future Medicare payments. His argument goes: (1) Muschinske's expert rehabilitation consultant testified that a case manager would help Stokes look for resources like Medicare in the future. (2) Muschinske's expert on the reasonable cost of past care used a "benchmark" of Medicare allowable amounts to calculate reasonable cost because "roughly, 98 percent of physicians and other medical providers accept Medicare as payment in full." (3) Stokes requested $5.77 million in future medical expenses, but the jury awarded $255,000, which was roughly $85,000 more than Muschinske's proposed amount. (4) Because the $85,000 difference is about 2 percent of his requested amount (actually about 1.5 percent), the jury must have reduced his requested amount by 98 percent because that is what the jury believed Medicare would cover.

No one argued this theory to the jury and no rational jury would have accepted it. The 98 percent figure forming the lynchpin of this theory did not relate to the proportion of *costs* covered by Medicare; it related to the proportion of physicians and medical providers who accepted Medicare payments. To argue that the jury would have used it to reduce his future medical costs by 98 percent is a non sequitur.

Finally, with regard to Social Security, the single vague reference by Muschinske's expert rehabilitation consultant could not have affected the jury's verdict. This one reference would not have allowed the jury to infer he would get Social Security payments in the future, and even if it could, there was no basis for the jury to somehow quantify those payments, then reduce his future medical expenses by that amount.

The judgment is affirmed. Respondent Muschinske is awarded costs on appeal.

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