

ANGELA MARY ZARTUCHE
v.
JACK DAVID AQUINO

Trial Binder

Tab A: Trial Briefs
Defendant's Trial Briefs

Tab B: Motions in Limine

Plaintiff's MIL's:

1. Plaintiff's MIL #1 to Exclude any Argument Plaintiff failed to mitigate
Defendant's Non- Opposition

2. Plaintiff's MIL #2 to Exclude Evidence of Health Ins./Reimbursement Rates

- a. Defendants may offer testimony regarding what insurance may pay for Plaintiff's future treatment in an effort to dispute evidence of reasonable and customary value.
- b. Speculative at best that the bills may be written off sometime in the future
- c. Insurance or reduced rates have zero tendency to prove or disprove the reasonableness of charges for future treatment
- d. Under Bermudez – the admissibility of billed amount is consistent with the full range of fees being relevant in determining the reasonable value of services in the health care marketplace.

Defendant's Opposition

- They cite to Stokes v. Muschinske where the court of appeal approved of the defense expert's use of the Medicare "allowable amount" and 130 percent of the Medicare allowable amount as methods to calculate reasonable value of past services"

Plaintiff's Reply

3. Plaintiff's MIL #3 to Exclude Evidence / Attorney Referred Treatment

- a. She would have a difficult time defending herself by stating the reason she had to go through an attorney to see a doctor without violating the collateral source rule.
- b. Any communication with her attorneys is privileged

- c. Any mention of insurance – liability, health or workers comp is strictly prohibited
- d. RELEVANCE
 - i. No implication that anything was below the standard of care or attorney and doctor in a scam
 - ii. Any mention of this would be to slander Plaintiff and or his counsel

Defendant’s Opposition

- IT’s not prejudicial because it undermines our position
- Property damage!!!
- They say because the fact that the attorney referred client to a doctor COULD hurt plaintiff’s case is not something that we should be able to hide.
- In this case the bias of the physicians is relevant
- They can cross examine plaintiff’s doctor as to who requested him to treat plaintiff in determining physician’s credibility. – Different than questioning plaintiff as to why she went with one doctor vs. another
 - Cite to Coursault v. Schwebel 118 Cal.App. 259

4. Plaintiff’s MIL #4 to Prevent Defendants and their Experts from Publishing Medical Records into Evidence (SANCHEZ)

- a. Anticipated they will attempt to admit/reference portions of plaintiff’s medical records without properly authenticating the documents, laying the proper foundation or satisfying critical hearsay exceptions
- b. A medical opinion is not a record of an act, condition or event but instead is a conclusion which could not be presented except through expert testimony subject to cross examination.

Defendant’s Opposition

- They want it to apply to plaintiff’s experts – DUH
- Not saying they can’t go into their background
- They say we say defense experts not testify at all
- Not disputing experts can get into their BTE
- They are saying experts can testify to: trial and deposition testimony, diagnostic medical records and general background information. NO!!!

- 5. Plaintiff’s MIL#5 to Exclude Evidence Regarding the Civil Rico Case/Dr. Alexander

Defendant’s Non- Opposition

6. Plaintiff’s MIL#6 to Exclude Hearsay Statements made by Plaintiff

- a. The comments that she was not hurt at the scene
- b. Note: defense response in discovery admits she’s hurt –LOOK UP
- c. Rosenberg agrees that the accident caused her back pain

- d. Defendant and his wife say that Plaintiff said she was ok at the scene and that she did not appear to be hurt.
 - i. In **defendant's cross** include she was shaky right, adrenaline you and your wife were hurt but were walking around, went to car rental place after right?
 - ii. Also she said she's not a medical professional doesn't know if she's hurt

Defendant's Opposition

- Her statements are an admission

7. Plaintiff's MIL#7 to Exclude Reference to Unidentified Witness

- a. Suzanne said she saw the whole thing
- b. No one spoke to her after, it will infer that defendant was not at fault

Defendant's Non- Opposition

8. Plaintiff's MIL#8 to Exclude Improper Opinion Testimony by Defendant

- a. He's unhappy with the officer's opinion that D was solely at fault but to translate that into a quasi-expert opinion is not proper, nor is it probative.
 - i. Discuss with IBI re: Suzanne comment
 - ii. How do we bring up that the officer put him at fault?

Defendant's Opposition

- We didn't include that he prepared over 100o TCR
- He can testify as to his personal knowledge but not opinions or conclusions
- He will not testify as an expert witness

9. Plaintiff's MIL#9 to Exclude Evidence of any Alleged Interference During Defense Medical Examination

- a. CCP 2032.510(a) allows for someone to attend the IME with plaintiff
 - i. They can stop it and move for a protective order CCP 2032.510(e) – look up
 - ii. If they open the door then the jury should be entitled to hear about the discovery process
 - iii. Nurse said she couldn't answer questions regarding interference with ADLS
 - iv. Check to see what her depo says re: past neck/back problems

Defendant's Opposition

- The fact that Irvine was there will explain why Dr. Rosenberg might not be able to testify regarding some matters
 - We say they should have stopped IME and filed motions, they say we can't have our cake and eat it too
- The doctor should not be allowed to make inquiries into matters not reasonably related to the legitimate scope of the examination. Should interference occur , appropriate steps may be taken by the

court to provide the doctor with a reasonable opportunity to complete his investigate of the nature and extent of any injuries the plaintiff may have sustained

- They didn't avail themselves of those opportunities or options

10. Plaintiff's MIL#10 to Exclude Certain Testimony by Defense Expert Dr. Rosenberg Concerning MRI Reports

- a. All of his opinions are based on reading the reports authored by other doctors
- b. Never personally saw any imaging and based his opinions solely on his medical record review and radiologist reports
- c. If they want to discuss Plaintiff's medical records or her status prior to the incident, they must call Plaintiff's treating doctors – ie radiologist who read the imaging as witnesses to lay the proper foundation.
- d. His depo
 - i. The quality of the MRI was not good, so he relied on the radiologist report he did not read the images themselves because they were too dark to interpret
 - ii. He has no reason to doubt the radiologist that the L5/S1 disc was contacting the bilateral S1 Nerve Roots
- e. **Note:** I think they sent a subsequent report on Rosenberg might be a violation of Kennemur – review

11. Plaintiff's MIL#11 to Exclude Testimony of Defense Expert Henry Lubow

12. Plaintiff's MIL#12 to Preclude Defendants / Affirmative Defenses

- a. Before trial places blame on unidentified driver but 16.0 says no.
 - i. Defendant has the burden of proof on affirmative defenses and Plaintiff is entitled to discover the basis for these affirmative defenses.
- b. Civil discovery is to designed to do away with the sporting theory of litigation, surprise at trial.

13. Plaintiff's MIL#13 to Preclude Defendant's Expert Kenneth Solomon from Providing Medical Opinions at Trial

- a. He said he was a not a medical doctor and was not going to be giving medical diagnoses and would defer to the MDs BUT then he said:
- b. Based on his review of medical records it is likely that her injuries are attributed to cervical and lumbar disc disease which develops when one or more of the cushioning discs in the spine start to break down due to wear and tear.
 - i. Admits that it borders on medical opinion which he is not giving, he defers to Rosenberg

- c. Biomechanical testimony is to determine the forces of the impact involved in a collision and confirm or deny a MD's opinion that there was a mechanism for the claimed injury
 - i. No MD said she suffered from cervical and/or lumbar disc disease
 - ii. This is a theory of alternate causation that must be stated to a reasonable degree of probability – that the disc disease was the cause of plaintiff's injuries – speculative
- d. He is not qualified to give medical causation testimony
- e. Mere possibility of disc disease is not sufficing to establish a prima facia case
 - i. He admits that he cannot state to the proper standard that degenerative disc disease indeed caused Plaintiff's injuries.

Defendant's MIL's:

1. Defendant's MIL #1 to Preclude Evidence or Argument Re. Defendant's Failure to Take Responsibility for Plaintiff being harassed

- a. They don't want us to argue:
 - i. Defendants failure to take responsibility (insinuates he intentionally caused harm)
 - ii. Plaintiff has been harassed
 - iii. Plaintiff is a victim

Plaintiff's Opposition

- Improper MIL doesn't seek to exclude evidence, too broad
- CACI 3925 – arguments of counsel not evidence
- CACI 106 – Evidence
- Banning arguments to a jury is contrary to California Law –wide latitude
- Evidence will show that the defendant is taking no responsibility for the injuries sustained by plaintiff
 - Dr. Rosenberg simply says – strain or sprain
 - Confirms injury but punts on the question of degree
- Asking the jury to hold defendant accountable is not improper
 - Does not implicate punitive damages
- Defense should be barred from saying we're litigious or greedy since they are saying they should not be punished for asserting his legal right to a defense
- IF plaintiff could get an injunction to prevent Defendant from irresponsibly changing lanes before slamming into plaintiff and altering her life, she would.

2. Defendant's MIL #2 to Exclude / Reptile and Community Safety

- a. Don't want us mentioning "Personal Safety" and "Community Safety"
- b. Golden Rule is improper (agreed)

- c. You are the conscience of the community – improper because it's telling the jury to “send a message”

Plaintiff's Opposition

- They're asking for a gag order
- We would never insinuate the jurors should place themselves in the Plaintiff's shoes but to argue that jurors set community standards would be contrary to logic and the foundation of our jury system.
- CACI 3925 – Argument of counsel is not evidence
- CACI 106 – Evidence
- Over 140 years ago US Supreme Court said the jury is the conscience of the community.
 - Justice Mosk did say that
- Being held accountable is not akin to being punished

3. Defendant's MIL #3 Limiting Evidence of Plaintiff's Future Medical Bills - RE READ

- a. This seems to be the same as Plaintiff MIL 2

Plaintiff's Opposition

- In all cases damages must be reasonable
- Plaintiff agrees to only present actual amounts that were paid by an insurance company
 - Howell doesn't allow them to present insurance rates, or reimbursement rates as evidence of reasonableness of Plaintiff's damages

4. Defendant's MIL #4 to Modify CACI 3903A

- a. They want us to include Howell language (Howell is a 2011 case) these instructions have been updated as of _____ and don't include these modifications.
- b. They want to include after insurance (for the purposes of determining liability issues)

Plaintiff's Opposition

- The Judicial Council of California Civil Jury Instructions are the official instructions for use in state trial courts and are designed to accurately state the law in a way that is understandable to the average juror. – CRC 2.1050(a)
- Their modification violate the collateral source rule.

5. Defendant's MIL #5 to Exclude Plaintiff's Cumulative and Irrelevant Evidence

- a. They say we have too many damages witnesses
- i. Chris – mom
 - ii. Jacquelyn – sister
 - iii. Primo – brother
 - iv. Primo Sr. – Dad
- b. They say we have too many doctors

- i. Stepan – treating doctor and we both designated portions of this transcript
- ii. Alexander – retained Ortho
- iii. Miller – treating pain specialist

For the record Bob emailed them saying:

Maria The damages witnesses will speak on something different and are short. If it becomes cumulative we will welcome the objection. As for the medical doctors, I am sure you are aware that many of yours overlap as well. Dr. Kasimian the treater and not a retained expert. Under the rules of Sanchez he will be required.

Thanks.

Plaintiff's Opposition

- We don't intend on presenting cumulative evidence, motion is premature
- Treating doctors need to lay foundation

6. Defendant's MIL #6 to Preclude & Exclude Evidence of Mental or Cognitive Injury

Plaintiff's Non-Opposition

- No intention to put on any evidence of mental or cognitive deficits which were explicitly withdrawn pursuant to the stipulation

7. Defendant's MIL #7 to Exclude Plaintiff's Rehab Expert

- a. His testimony is speculative and is based on her having cognitive impairment but she is withdrawing her mental impairment claims
- b. His method has been criticized by multiple researchers in peer-reviewed journals
- c. He has a financial incentive to testify because he's a partner
- d. Attacks methodology

Plaintiff's Opposition

Tab C: Joint Statement

Tab D: Joint Witness List

Tab E: Joint List of Jury Instructions

Tab F: Jury Instructions - *Long Form*

Tab G: Joint Verdict Forms

Tab H: Joint Exhibit List

Tab I: Joint Chart of Page and Line Designation(s) for Deposition and Former Testimony

1. Plaintiff's Notice of Intent to Play Deposition of Stephen Kasimian

Tab J: Copies of Current Operative Pleadings

1. Plaintiff's Complaint
2. Defendant's Answer