You win some; you lose some

Recent rulings on recovery of expert witness fees, summary judgment rules and product liability actions are a mixed bag

Bader

By Donna Bader

Last month, the California Supreme Court put a dent in public interest litigation when it denied recovery of expert witness fees in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142. In that case, members of a nonprofit mutual benefit corporation sued the Automobile Club to obtain reforms in the corporation's election of officers. The plaintiffs hired three experts who testified during a trial that lasted 24 days. The plaintiffs prevailed on several of their claims, and the trial court ordered a number of election reforms. The court also found plaintiffs to be the successful parties under Code of Civil Procedure section 1021.5. Attorneys' fees of nearly $1.1 million and expert witness fees of $90,466.85 were awarded to plaintiffs based on the public interest in the litigation. The Court of Appeal held that expert witness fees were not authorized under Code of Civil Procedure section 1021.5, and the Supreme Court granted review.

The Supreme Court held that "neither the language nor the legislative history of Section 1021.5 demonstrates that the statute permits an award of expert witness fees." It noted the statute was silent as to expert witness fees, which are distinct from attorney's fees. The court also noted that Code of Civil Procedure section 1033.5(b)(1) does not authorize an award of expert witness fees as costs unless "expressly authorized by law."

The plaintiffs argued that policy considerations support the inclusion of such an award, but the Supreme Court rejected that argument, concluding it "is insufficient to permit this court to craft such a rule, in direct contravention of the statute's plain meaning."

Obviously such a ruling will hurt public interest litigation. Many public interest firms operate on a tight budget, and an award of attorney's fees is important to assist in funding public interest litigation. While attorneys may volunteer their time (or receive minimal pay for their efforts), paying expert witnesses may be a different matter. Often the clients do not have the funds to cover these costs. The plaintiffs and others expressed concern that such a ruling would limit the ability of public interest firms to take on cases or hire experts needed for litigation because the costs may be unrecoverable. *Olson* represents a loss for the plaintiff's bar, and one hopes that the Legislature will act to level the playing field by allowing successful plaintiffs to recover their expert witness fees.

On the winning side of the slate, the Second Appellate District recently decided *Garibay v. Hemmat,* (April 1,2008, B194919)___Cal.App.4th___ [2008 WL 853630].) In that case, the plaintiffs appealed from a summary judgment in a medical malpractice case. The plaintiffs sued the defendant physician, claiming he performed an unsuccessful bilateral tubal litigation. As is standard in medical malpractice cases, the defendant filed a motion for summary judgment, relying on the opinion of a medical expert whose opinion was derived from a review of the medical records. The records were not properly admitted into evidence and were not attached to either the expert declaration or summary judgment motion.

The court concluded the summary judgment motion was insufficient "because there were no facts before the court on which the expert medical witness

could rely to form his opinion." The expert was not a percipient witness. The court noted, "A proper method for producing these facts would have been, for example, by means of a declaration or deposition testimony from the doctor who performed the surgery, or by properly authenticated medical records placed before the trial court under the business records exception to the hearsay rule." Since defendant failed to present the records, there was no evidence to support the expert's opinion or the motion. The court noted that an expert can only form an opinion and the moving defendant can only meet the burden of production by placing the facts *first* before the court.

The plaintiffs in *Garibay* filed evidentiary objections to the expert declaration on the basis of lack of foundation, personal knowledge and authentication, the declaration was hearsay, best evidence rule, and improper expert opinion.

The reviewing court examined the summary judgment statute, noting that a moving party can support a motion "by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (Code Civ. Proc., § 437c, subd. (b)(1).) It also noted that supporting affidavits or declarations must be made on personal knowledge, "shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations."

The court then cited *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523, a favorite case that every plaintiff's attorney who handles medical malpractice cases should know by heart, which held that an expert opinion, unsupported by reasons or explanations, is insufficient to support a motion for summary judgment. "[T]hat standard is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation." (*Id.* at p. 525.)

The court in *Garibay* acknowledged that expert testimony can be the basis for expert medical opinion. But reciting hearsay evidence, upon which the expert relies, will "not transform inadmissible matter into 'independent proof' of any fact." The expert cannot relate the hearsay statements as an independent proof of the fact. The court further stated:

> Physicians can testify as to the basis of their opinion, but this is not intended to be channel by which testifying physicians can place of the opinion of out-of-state physicians before the trier of fact.

Since the expert's opinion was based on assumptions of fact that lacked evidentiary support, his declaration also lacked evidentiary value. Thus, defendant failed to meet its burden of production, and the court reversed the judgment.

One can only wonder why the Court of Appeal decided to publish the opinion. Perhaps it felt the burden of reviewing motions for summary judgment in medical malpractice cases where the defendant simply waltzes into court with a thin expert declaration. (For those of us who can remember, those "expert" declarations often consisted of two or three paragraphs and were clear demonstrations of conclusory thinking.) Starting with *Kelley,* the courts sent a warning to moving parties that such declarations are insufficient and must provide a reasoned explanation for the expert's opinion. *Garibay* has taken another step in that direction in concluding that a declaration without admissible medical records is not enough.

Responding plaintiffs also need to take heed. If the expert declaration submitted by a defendant without evidentiary support is insufficient, then a responding declaration must also satisfy this burden. Does that mean that every motion will be accompanied by a truckload of medical records? We should not have to go that far but the motion (and opposition) must be supported by evidentiary facts. I would consider *Garibay* a win for plaintiff's attorneys.

Of particular interest to plaintiff's attorneys practicing in the area of product liability actions is the recent Supreme Court decision in *Johnson v. American Standard* (April 3, 2008, S139184) ___ Cal.4th __. In that case, the Supreme Court was faced with a question of first impression in California. The Court framed the issue was to "whether we should adopt the 'sophisticated user' doctrine and defense to negate a manufacturer's duty to warn of a product's potential danger when the plaintiff has (or should have) advance knowledge of the product's inherent hazards." (*Id.* at Slip Op. 1.) This doctrine is considered an exception to the manufacturers' general duty to warn consumers.

The court noted that federal courts have adopted this doctrine as an affirmative defense in diversity cases, citing *In re Air Crash Disaster* (6th Cir. 1996) 86 F.3d 498, 522 and *In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1142, 1151. The Court concluded this doctrine applies to California cases. (Slip Op., 1.)

The plaintiff, William Keith Johnson, was a technician trained and certified in heating, ventilation, and air conditioning. The court noted that "Universally" certified technicians are trained professionals. (Slip Op., 2.) Johnson alleged that when he performed maintenance and repairs on air conditioning units in the normal course of his job, he was exposed to phosgene gas, causing him to develop pulmonary fibrosis. He alleged that defendant failed to warn of the potential hazards of R-22 exposure.

The defendant moved for summary judgment on the grounds it had no duty to warn about the hazards of R-22 exposure because it did not manufacture the refrigerant and, as a trained professional, plaintiff would be aware of the risks.

The Supreme Court analyzed the development of the "sophisticated user"

doctrine. It noted that California law also recognizes the obvious danger rule, "which provides that there is no need to warn of known risks under either a negligence or strict liability theory." (*Id.* at Slip Op. 10.) In a unanimous decision, the Court concluded the doctrine:

> A manufacturer is not liable to a sophisticated user of its product for failure to warn or a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger . . . However, individuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class. If they do not actually possess that knowledge and skill, that fact should not give risk to liability on the part of the manufacturer.

(*Id.* at Slip Op., 14-15.)

The court in *Johnson* also held that this defense applies to both negligence and strict liability causes as action. It noted that some jurisdictions apply the doctrine in negligence cases but not in strict liability. It concluded:

> The focus of the defense, therefore, is whether the danger in question was so generally known within the trade or profession that a manufacturer should not have been expected to provide a warning specific to the group to which plaintiff belonged. Consequently, there is no reason why the sophisticated user defense should not be as available against strict liability causes of action as it is for negligence causes of action. In both instances, the sophisticated user's knowledge eliminates the manufacturer's need for a warning.

(*Id.* at Slip Op. 18.)

This knowledge is measured "when the sophisticated user is injured and knew or should have known of the risk." (*Id.* at Slip Op. 19.)

Donna Bader is a certified specialist in appellate law and and is the editor of Plaintiff *Magazine. She has started a blog, "An Appeal to Reason," to alert trial attorneys to tips and cases that will help them in the appellate process. Join her at www.anappealtoreason.com.*