

Appellate Reports and Cases in Brief

Bermudez v. Ciolek

Logical discussion of Howell *issues concerning proof of medical expenses for an uninsured client*

By Jeffrey I. Ehrlich

Bermudez v. Ciolek

(2015) __ Cal.App.4th __ (4th Dist., Div. 3)

Who needs to know about this case? All lawyers litigating cases with medical expenses.

Why it's important: Contains what is, by far, the clearest, most logical discussion of *Howell* issues concerning proof of medical expenses for an uninsured client, including the method of proof to show reasonable value of medical services; also contains a helpful discussion of inconsistent verdicts.

Synopsis: Faith Ciolek was heading westbound on Talbert Avenue in Fountain Valley. She began a left turn at the intersection with Bushard Street, and struck the eastbound car of Nathan Heacox, who was proceeding straight through the intersection. After striking Ciolek's car, Heacox's car veered into the southeast corner of the intersection, striking Omar Bermudez, who was standing on the sidewalk. Bermudez sued both Ciolek and Heacox. The jury found that both defendants were negligent, but found that only Ciolek's negligence was a substantial factor in causing harm to Bermudez. Ciolek was assigned 100 percent of the fault for the collision, and was held liable for $3.7 million in damages.

On appeal, Ciolek argued that the jury's verdict was inconsistent in finding that Heacox was negligent but in not assigning him any fault for the accident. In the alternative, Ciolek argued that she was entitled to a new trial on damages because there was insufficient evidence of the reasonable value of Bermudez's medical damages. The Court rejected these arguments, and affirmed the verdict except for a $46,175 portion that it concluded was not supported by substantial evidence.

In finding that the jury's verdict was not inconsistent, the court noted that this is not a case in which the jury made inconsistent findings when answering two essentially identical factual questions pertaining to different theories of liability. Ciolek's argument was that, if Heacox had been traveling slower and had paid closer attention, and therefore braked or taken evasive action sooner, the speed and/or path of his deflected vehicle would have been different, resulting in a potentially different outcome. The court held that Ciolek waived this argument by failing to raise it at trial, and that the verdict was not inconsistent. It simply implied that Heacox was minimally negligent, and that Ciolek's negligence overwhelmed anything Heacox did or reasonably could have done.

With respect to the proof of medical expenses, the record showed that Bermudez had no medical insurance, was hospitalized at UC Irvine Medical Center and suffered a fractured patella, fractured pelvis, severe shoulder injuries, lacerations, and deep bruising to his left leg and testicles. Debilitating pain after his initial convalescence led to two separate back surgeries – a microdiscectomy to repair a herniated disc and a separate surgery to remove and replace the injured disc.

Bermudez testified that the amount of his outstanding medical bills was approximately $450,000. He had not paid any of the bills, and believed his medical providers would be paid out of any recovery he received in this case. But he testified that he would be responsible for the bills regardless of the outcome of the trial.

The parties stipulated to the admissibility (not the reasonableness) of Bermudez's exhibit 239, a summary of past medical bills. The total of the past bills was $445,430.64. The parties also stipulated to the reasonableness (not just the admissibility) of $15,000 in recent medical charges not reflected in exhibit 239.

The parties called local physicians who testified as experts for the parties regarding both the necessity of various procedures and the reasonableness of the charges for those procedures. All the doctors agreed that the charges from UC Irvine were reasonable.

The Court noted that *Howell* did not address the measure of damages for a plaintiff who did not have medical insurance. "*Howell* certainly did not suggest uninsured plaintiffs are limited in their measure of recovery to the typical amount incurred by an insured plaintiff, or, for that matter, the typical amount incurred by any other category of plaintiff. *Howell* noted "pricing of medical services is highly complex and depends, to a significant extent, on the identity of the payer. In effect, there appears to be not one market for medical

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services but several, with the price of services depending on the category of payer...."

The court explained that, "*Howell* offered no bright line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. Ciolek is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests: (1) Bermudez is necessarily in the same market as insured health-care recipients or wealthy health-care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services.

The court noted that, "Bermudez's uninsured status meant that billed amounts were relevant to the amount he incurred (unlike insured plaintiffs, who really only incur the lower amount negotiated by their insurer). The billed amounts are also relevant and admissible with regard to the reasonable value of Bermudez's medical expenses."

The court further explained that, two points about the sufficiency of the evidence to support a judgment can be fairly taken by *Howell*: (1) the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided; and (2) consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. (The court was, in particular, critical of the way that the earlier decision in *Ochoa v. Dorado Trucking* had conflated questions about the sufficiency of evidence to prove medical expenses with the *admissibility* of evidence to prove the amounts paid or incurred.)

Bermudez's expert medical witnesses testified (without objection) to the fairness and reasonableness of the medical expenses incurred by Bermudez, up to $414,255.59, and also estimated the costs of future care (without reference to the current medical bills). Defense experts took issue with the necessity of the back surgeries and the reasonableness of the fees charged for the back surgeries and related expenses. The jury awarded $460,431 in past medical damages. There is a logical basis for the award ($445,430.64 + $15,000 = $460,431). But the jury's verdict is nonetheless legally incorrect and not supported by substantial evidence because it awarded the full amount incurred by Bermudez, not the reasonable value of his past medical services (i.e., up to $414,255.59). The court therefore reduced the award to this amount.

Though not framed in this fashion, Ciolek's real complaint is that expert opinion testimony about the reasonable cost of Bermudez's medical procedures should have been inadmissible because the experts did not sufficiently establish that their method of forming an opinion was linked to a market or exchange value of medical services. For instance, in her opening brief, Ciolek states "there was no foundational testimony as to what actual market rates were." But Ciolek was unable to pursue this argument on appeal because appropriate objections were not made below. No motion in limine was filed. No objections or motions to strike were made, whether on grounds of relevance or lack of foundation. The court would not speculate on what Bermudez's witnesses would have said if there had been objections made to their methodology.

Short(er) takes

Five-year statute; effect of stipulation to postpone trial past five-year deadline: *Munoz v. City of Tracy* (2015) __ Cal.App.4th __ (3d District.)

Code of Civil Procedure section 583.310 requires cases to be brought to trial within five years of being filed, or be dismissed for lack of prosecution. The statute does allow the five-year period to be extended by stipulation, and does not specify any particular formalities for such a stipulation. The parties in this case filed a written stipulation that extended the trial date to a date past the five-year date. The stipulation did not, however, reference the five-year deadline or state that it would be extended. After the deadline expired, the defendant moved to dismiss based on the five-year statute. The trial court granted the motion, finding that because the stipulation did not mention the five-year deadline, it was not effective to extend it. Reversed.

Section 583.130 establishes a general policy favoring the parties' right to make stipulations in their own interests. Here, the parties stipulated to continue the trial date to June 16, 2014, more than six months after the expiration of the five-year period. Although the parties do not appear to have discussed the five-year deadline for bringing the case to trial, their stipulation "reflects a mutual intent to defer the proceedings," and "must be enforced to effectuate the whole of the instrument." Accordingly, a stipulation to a date after the expiration of the five-year deadline will be enforced according to its terms, and necessarily waives the right to dismissal for failure to meet the five-year deadline.

Passenger liability for encouraging unsafe driving; unlawful exhibition of speed; willful interference with a car's driver; conspiracy: *Navarrete v. Meyer* (2015) __ Cal.App.4th __ (4th Dist., Div. 1.)

Hayley Meyer was the front passenger in a car driven by her friend, Brandon Coleman. Their friend Levi Calhoun was in the back seat. While driving to a nearby drugstore, Meyer told Coleman to turn onto Skyview Drive, a residential street with a 25 mph speed limit, as a shortcut. Meyer had been on Skyview Drive before, and she knew it had dips that would cause a car traveling at high speed to become airborne. She told Coleman about the dips, said that it was fun to drive fast on them, and that he should do it. Shortly after he turned on the street,

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she told him to "go faster." Coleman exceeded 80 mph, lost control, and crashed into Miriam Navarette's parked car while her husband, Esteban Soto, was attempting to put one of their children in a car seat. Soto's legs were severed and he was killed by the impact. Navarrete sued Coleman, Riverside County, and later added Meyer as a Doe defendant. Her claims against Meyer included willful interference with a driver in violation of Veh. C. § 21701, and civil conspiracy. Meyer obtained summary judgment on Navarette. Reversed.

The court first held that Navarette could proceed on appeal with a theory that Meyer violated Vehicle Code section 23109, aiding and abetting an exhibition of speed, even though that statute was not alleged in the complaint. The court held that it was proper for it to look beyond labels to the gravamen of the claim. Because her allegations were sufficient to apprise Meyer of the nature of the claim against her, and were broad enough to encompass a violation of section 23109, the court would consider the claim.

Navarette argued that Meyer abetted, urged and encouraged Coleman to engage in the prohibited activity of unlawful exhibition of speed within the meaning of Vehicle Code section 23109 for the purpose of the vehicle's tires losing traction and becoming airborne. She asserted that Meyer, as a passenger, owed a duty under that statute not to aid or abet Coleman in such action and is jointly liable for the consequences of such conduct. The court agreed that the theory was viable and would withstand summary judgment.

Courts have applied the concert of action/aiding and abetting principles in various civil contexts, including "the 'drag race'" and like cases, opinions in which courts held the reciprocal inciting and encouraging one another to drive at a fast and reckless rate of speed furnished the necessary proximate cause to support joint and several liability of both racers, including the defendant whose car did not strike the plaintiff. This theory applies to the facts in this case. Meyer's encouragement to Coleman to speed from within Coleman's car is not materially different from that of a separate driver encouraging and engaging in a race.

The evidence here permits a reasonable jury to infer that Coleman accelerated the vehicle at Meyer's request so Meyer (and possibly Calhoun) could observe and experience the car "gain air," as she had experienced in past trips along that road. This conduct manifestly comes within the ambit of an exhibition of speed under Vehicle Code section 23109 and the cases that have construed it.

The court also concluded that the evidence was sufficient to raise a triable issue of fact on the claim for civil conspiracy. The law imposed on Meyer personally an independent duty not to encourage or assist Coleman in engaging in an unlawful exhibition of speed. To be liable for conspiracy, the parties need only expressly or tacitly agree to commit a tort or "civil wrong," which in this case is met by evidence raising a fact issue whether Coleman and Meyer agreed that Coleman should engage in an exhibition of speed. Meyer's encouragement to Coleman to exceed the speed limit on Skyview Drive, a street with unique dangers, was clearly wrong. The sort of injury that ensued from Coleman's unlawful conduct – the car losing traction or control and striking another vehicle or person on the residential street – was foreseeable, and is the very sort of harm the statute was designed to prevent.

The court also found that the evidence was sufficient to state a claim against Meyer for the violation of Vehicle Code section 21701, which states, "No person shall wilfully interfere with the driver of a vehicle or with the mechanism thereof in such manner as to affect the driver's control of the vehicle." Meyer's exhortation to Coleman to drive fast on Skyline Drive, so that the car would become airborne over the dips, potentially fell within the sort of interference with a driver's control of a vehicle to fall within the statute.


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