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Keeping expert testimony real and reasonable

CAOC-sponsored bill addressing *Kline v. Zimmer* headed to Gov. Newsom

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Consumer Attorneys of California's sponsorship of Senate Bill 652 (Umberg) arose from a recent errant court decision that threatens the credibility of expert witness testimony. One isolated court in *Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123, 131-32, review denied (Aug. 31, 2022) upends current law by allowing only defense experts to testify to any "possible" cause of injury rather than what "more likely than not" caused an injury.

This bill idea was proposed by several members at CAOC's annual legislative meeting and received the most votes by our board. You voted, CAOC listened, and now our bill overturning *Kline* is pending before the governor's desk. Our members' ideas for new laws can become reality: please submit all ideas using our online form at www.CAOC.org.

What SB 652 will do

SB 652 will codify long-standing law regarding the standard for expert witness testimony. The bill will ensure that, when testifying to a jury, all experts provide their opinion to a reasonable degree of probability. "A reasonable degree of probability" means that the expert is testifying that the cause *was more likely than not* the cause of the person's injuries.

Not all witnesses can offer opinions. Most witnesses can testify only on facts: the who, what, when, where, and how. (Evid. Code, § 702.) Experts, however, are the exception. They can offer opinions outside the areas of knowledge of the average juror to help them understand the issues and reach an informed decision. This includes opinions on the ultimate issue of fact in a case, such as what caused the plaintiff's injury. Is the defendant responsible?

Since expert testimony often carries greater weight than testimony by other witnesses, experts must be qualified, and there is an entire body of law governing qualifications of experts and their testimony. (See Evid. Code, § 801.) Before an expert is permitted to testify, the lawyer offering an expert goes through the process of qualifying the witness as an expert, including establishing their background, education, training, and experience. (Evid. Code, § 720.) Therefore, the expert's testimony should be held up to appropriate scrutiny commensurate with the legal standards regarding foundation, reliability, and admissibility.

California law, prior to *Kline*, held that all experts, both plaintiff and defense, must testify to a reasonable medical probability. (See *Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1572 [holding that "the law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony,"] quoting *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336, citing, *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118; *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.) There are cases going back as far as 1962 stating that medical causation can be determined only by expert medical testimony. (*Gin Non Louie v. Chinese Hospital Assn.* (1967) 249 Cal.App.2d 774, 784; *Stephenson v. Kaiser Foundation Hospitals* (1962) 203 Cal.App.2d 631, 635.)

The one-sided *Kline* decision

The one-sided lowering of the standard in *Kline* allows defense experts to offer any alternative cause, regardless of whether they have data, science, or any rationale to support that cause. Anything may arguably be possible; if the action is a "possible" cause for the injury, and not purely speculative, *Kline* now permits this weaker, unreliable testimony to be provided to juries by a defense expert with credibility that is now illusory. This case has opened the floodgates for junk science and simply absurd expert testimony.

In an elder neglect case, a woman was left unsupervised at an assisted living facility and fell on the concrete floor in the courtyard with blood on her head and on the concrete. All experts agreed the cause of death was from severe traumatic brain injuries, including a fractured skull. One defense expert in the case testified that the woman could have suffered a stroke or aneurysm. However, there was no evidence for the defense expert to rely upon to allege that opinion. To the contrary, the coroner confirmed traumatic brain injuries, including a skull fracture which led to an epidural bleed. Another defense expert opined that it was "possible" a bird flew into her face, causing her to fall. Neither opinion was based on a reasonable degree of medical probability. However, although this testimony ordinarily would have been thrown out, the defense can now argue the expert testimony is admissible under *Kline v. Zimmer*.

SB 652 will clarify Evidence Code section 801 to ensure *all* experts must testify to a reasonable degree of probability based on their field of expertise. This would codify the standard that had been consistently relied upon for decades and will ensure only reliable testimony is presented to juries.

How it got done

In the Senate Judiciary Committee, CAOC worked with the California Defense Counsel to ensure defense experts can provide testimony that a matter cannot possibly meet a reasonable degree of probability and provide a basis for that testimony. In the Assembly Judiciary Committee, CAOC worked with the Judicial Council and the California Employment Lawyers Association to ensure the bill is narrow enough to impact only those experts who are currently required to testify to a reasonable degree of probability. Because of these efforts, the final version of SB 652 represents a balanced approach to ensure expert testimony meets the standards our juries expect of experts.

SB 652 has been approved by the Legislature and sent to Gov. Newsom for his signature. CAOC continues to work on our other sponsored legislation: SB 278 (Dodd) – financial elder abuse prevention and accountability, SB 365 (Wiener) – appeals of denied motions to compel arbitration, and SB 21 (Umberg) – remote appearances in the courts. Please feel free to contact me or any of our Sacramento advocates for more information. We thank you for your support of CAOC.

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