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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BRANDON FOSS et al.,

Plaintiffs and Appellants,

v.

SAN ANTONIO COMMUNITY  
HOSPITAL et al.,

Defendants and Respondents.

E057236

(Super.Ct.No. RCVRS073136)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,  
Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis Professional Law Corporations, Suzanne E.  
Rand-Lewis and Timothy D. Rand-Lewis, for Plaintiffs and Appellants.

Davis, Grass, Goldstein, Finlay & Brigham, Stacy K. Brigham and Jeffrey W.  
Grass, for Defendant and Respondent San Antonio Community Hospital.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody, Mark V. Franzen, and Christy Lee Thomasson for Defendant and Respondent Michael J. Mammone, M.D., a Medical Corporation.

Plaintiffs and appellants Brandon Foss, Ronald Foss and Lisa Foss (plaintiffs) appeal after the trial court granted nonsuit to defendants and respondents San Antonio Community Hospital (SACH) and Michael J. Mammone, M.D., a Medical Corporation (collectively referred to as defendants) in plaintiffs' action concerning Brandon's misdiagnosis of a spinal tumor.<sup>1</sup> Plaintiffs contend the trial court abused its discretion in excluding their expert's testimony and erred in granting nonsuit. They further challenge the trial court's award of costs and attorney fees. Rejecting plaintiffs' contentions, we affirm the judgment.

## I. FACTS AND PROCEDURAL HISTORY

On June 23, 2002, Brandon, a minor at the time, was taken to SACH by his father, Ronald, with complaints of extreme pain in the groin and genital area and numbness in his legs, along with weakness and giving way of his legs.<sup>2</sup> SACH's emergency room doctor, Dr. Mammone, ordered an x-ray of Brandon's sacral (tailbone) area, diagnosed Brandon as having a fractured coccyx, and released him that same day. Three days later, on June 26, 2002, Brandon returned to SACH because he could not feel anything from

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<sup>1</sup> Other parties were sued; however, they are not parties to this appeal.

<sup>2</sup> Because of the family relationship of the parties, we refer to them by their first names. No disrespect is intended.

his waist down. An MRI revealed Brandon was “acutely paralyzed” from the waist down due to a tumor in the L1-L2 area of his spine that was compressing on his spinal cord. He had surgery to remove the tumor and then was treated with chemotherapy, proton radiation, and daily physical therapy at Loma Linda University Medical Center. Eventually he was able to walk again; however, he now suffers from “foot drop” in both feet, and his legs are small and atrophied.

On June 18, 2003, plaintiffs initiated this action against defendants. Pursuant to their third amended complaint filed on February 10, 2004, plaintiffs alleged general negligence, concealment, negligent infliction of emotional distress, and violations of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). Trial was initially set for March 13, 2006, but was continued to June 23, 2006. On or about May 3, 2006, plaintiffs served their designation of expert witnesses, including Marshall T. Morgan, M.D. (Emergency Medicine). Dr. Morgan was expected to testify concerning Brandon’s emergency medical care and treatment on June 22, 2003, along with the standard of care for emergency medicine. Defendants made several attempts to depose Dr. Morgan; however, the actions of plaintiffs’ counsel prevented Dr. Morgan’s deposition from proceeding. The trial date was vacated and rescheduled for August 6, 2007. Unable to depose Dr. Morgan in a timely manner, defendants filed motions in limine to preclude his testimony.

On August 3, 2007, the trial court again vacated the trial date and ordered the parties to submit a joint written statement on or before August 17, 2007, addressing the issue of expert witness discovery. Unable to resolve the expert discovery issue, on

February 15, 2008, at a further case management conference, the trial court ordered the expert witness deposition schedule recited into the record, which included Dr. Morgan's deposition for March 10, 2008. Once again, Dr. Morgan's deposition failed to take place due to plaintiffs' counsel's actions, and defendants moved to exclude the expert's testimony on that basis. On April 3, 2008, over plaintiffs' opposition, the trial court granted the defense motion.

In June 2008, one of the defendants filed bankruptcy, which resulted in the action being automatically stayed. On March 27, 2012, after the stay was lifted, the parties stipulated to extend the five-year statute up to and including the date of June 1, 2012, to continue the trial, to attend a settlement conference, and to dismiss the concealment cause of action against Dr. Mammone.

Trial commenced on May 9, 2012. Plaintiffs presented the testimony of Brandon; his parents; Dr. Mammone; Dr. Scott Lederhaus, the consulting doctor on June 26, 2002; Carol Hull, the director of risk management for SACH; and Dr. Kent Shoji, the designated expert witness for Dr. Mammone. Following the close of plaintiffs' case, defendants moved for nonsuit on the ground that plaintiffs failed to offer any evidence that Dr. Mammone's or the nursing staff's treatment of Brandon fell below the standard of care for emergency room doctors and nurses. Furthermore, Dr. Mammone argued that plaintiffs failed to prove causation, i.e., that Dr. Mammone's negligence, if any, caused Brandon's injury. Regarding the CLRA cause of action, SACH argued that plaintiffs failed to offer any evidence of any false or misleading information, and medical negligence alone, even if proven, is insufficient to sustain such a cause of action.

Plaintiffs responded by arguing there was “no requirement . . . that [they] present expert testimony as to the standard of care of the emergency room physician, Dr. Mammone,” because there was no dispute that the standard of care required Dr. Mammone to examine Brandon. According to plaintiffs, the question was whether or not the doctor actually examined Brandon. Thus, plaintiffs maintained it was “within the common knowledge of the jurors that a physician has to examine a patient and here the jurors have to determine if he did or did not examine him.” Regarding causation, plaintiffs pointed to the evidence that the tumor compressed on the spinal cord to the point that “Brandon became acute [*sic*] paraplegic.” Regarding the CLRA claim, plaintiffs argued that Brandon did not receive the services that were advertised by SACH. Following argument, the trial court granted nonsuit and entered judgment in favor of defendants.

## II. DISCUSSION

Plaintiffs contend the trial court erred in (1) precluding their expert’s testimony, (2) granting nonsuit, (3) denying their motion to strike and/or tax costs, and (4) granting SACH’s motion for attorney fees. We find no error.

### **A. Plaintiffs’ Expert Testimony Was Properly Excluded**

Plaintiffs claim the trial court abused its discretion and denied them the right to a fair trial by excluding their expert’s testimony.

#### *1. The Relevant Discovery Statutes*

After the initial trial date is set in an action, any party may demand that all parties simultaneously exchange information concerning the expert witnesses the parties intend

to call at trial. (Code Civ. Proc., § 2034.210.) Code of Civil Procedure section 2034.300, in relevant part, provides: “[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court *shall exclude from evidence* the expert opinion of any witness that is offered by any party who has *unreasonably failed* to do any of the following: [¶] . . . [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).” (Italics added.)

““When construing a statutory scheme, our primary guiding principle is to ascertain the intent of the Legislature to effectuate the purpose of the law.’ [Citation.] . . . The statutes governing expert witness discovery are part of the Civil Discovery Act (§ 2016.010 et seq.). The purposes of the discovery statutes are ‘to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise.’ [Citation.]” (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950 (*Boston*).

## 2. *Relevant Background*

Before trial, both parties timely designated expert witnesses. (Code Civ. Proc., § 2034.210.) Plaintiffs designated several “retained” experts, including Dr. Morgan. Dr. Morgan was expected to testify regarding, inter alia, Brandon’s medical care and treatment “pre and post June 22, 2003,” the applicable standards of care, and whether said standards were met. On or about May 8, 2006, Dr. Mammone served notice of the deposition of Dr. Morgan for May 23, 2006. Dr. Morgan’s deposition did not proceed as planned and defendants made several attempts to reschedule, without success. Trial was

set initially for March 13, 2006, but was continued to June 23, 2006. Later, the trial date was vacated and then rescheduled for August 6, 2007. Unable to depose Dr. Morgan, in July and August 2007, defendants filed motions in limine to preclude the expert from testifying.

On August 3, 2007, the trial court vacated the trial date and ordered the parties to submit a joint written statement on or before August 17, 2007, addressing the issue of expert witness discovery, including efforts in scheduling expert witness depositions. The parties attempted to resolve their issue. On February 6, 2008, Dr. Mammone noticed the deposition of Dr. Morgan for February 25. On February 15, 2008, at a further case management conference, the trial court ordered the expert witness deposition schedule recited into the record. Dr. Morgan's deposition was set for March 10, 2008.

On March 7, 2008, plaintiffs' counsel advised defense counsel that she was physically unable to attend the deposition of Dr. Morgan and that counsel should contact her office with available dates. Dr. Morgan's deposition did not take place on March 10, 2008. The next day, on March 11, 2008, plaintiffs' counsel informed defense counsel that the following dates were available: "March 24, 26, 27, and 28, 2008, and April 3 and 4, 2008." Simultaneously, Dr. Mammone moved to exclude Dr. Morgan's expert testimony. On March 14, 2008, counsel for SACH advised plaintiffs' counsel by fax that all defense counsel were available to depose Dr. Morgan on March 26, 2008.

Dr. Mammone's counsel called plaintiffs' counsel's office on March 18, 24, and 25 to confirm the deposition. On March 25, 2008, plaintiffs' counsel informed defense counsel by fax that Dr. Morgan's deposition would not go forward on March 26, 2008. In

response, defense counsel informed plaintiffs' counsel by fax and U.S. Mail that the motion to exclude Dr. Morgan's testimony would proceed with defendants seeking sanctions.

Plaintiffs opposed the defense motion to exclude Dr. Morgan's testimony, submitting their counsel's declaration which stated that she had injured herself on March 4, 2008, and was placed off work per doctor's orders from March 5 through March 12, 2008, and part time thereafter. Absent from the response was any documentation from counsel's doctor confirming the injury and off-work order. On April 3, 2008, following oral argument, the trial court granted the defense motion to exclude Dr. Morgan's expert testimony.

### *3. Standard of Review*

A trial court's exclusion of expert opinion evidence is generally reviewed for abuse of discretion. (*Boston, supra*, 170 Cal.App.4th at p. 950.) The scope of a trial court's discretion is always delimited by the statutes governing the issue before it. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1107.) And to the extent a trial court's ruling excluding evidence is based on its interpretation of the governing statutes, we review the ruling de novo, independent of the trial court's reasoning. (*Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114, 126, disapproved on other grounds in *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39-40.) "We review the trial court's reasonableness determination under section 2034.300 for abuse of discretion." (*Boston, supra*, at p. 950.) "The behavior of the party seeking to exclude the expert testimony is relevant to the reasonableness inquiry." (*Id.* at p. 954; see *Stanchfield v. Hamer Toyota, Inc.* (1995)

37 Cal.App.4th 1495, 1503 [finding that when expert was not fully prepared at deposition, but proponent offered to make expert available within one or two days, opponent acted unreasonably by failing to take any action until he moved for exclusion of the expert in the middle of trial]; see also 2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) P 8:1712, p. 8J-31 (rev. #1, 2009) [“There is no statutory requirement that the objecting party give the opposing party opportunity to correct the defects before trial. But failure to do so may be ground for finding that the opposing party’s failure to comply was not ‘unreasonable.’”].) We defer to the underlying factual findings, express and implied, the trial court made in excluding the evidence. (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 [abuse of discretion review entails “considerable deference” to the fact finder].)

#### 4. Analysis

The record reflects that plaintiffs acted unreasonably when they failed to produce their emergency medicine expert for deposition over a two-year period of time, despite repeated efforts from defense counsel, including a court order, to schedule such deposition. An unreasonableness determination is to be made based on all the relevant circumstances, including “[t]he behavior of the party seeking to exclude the expert testimony . . . .” (*Boston, supra*, 170 Cal.App.4th at p. 954.) “[T]he opportunity for meaningful deposition is one of the circumstances the trial court should consider when making the reasonableness determination.” (*Ibid.*) “[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses

[because] . . . . [¶] . . . the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions.’ [Citation.]” (*Bonds v. Roy* (1999) 20 Cal.4th 140, 147.)

Here, defendants sought to exclude Dr. Morgan’s testimony only after plaintiffs repeatedly failed to make him available and also failed to comply with the court’s order. In deciding to exclude Dr. Morgan’s testimony, the trial court was well aware of defendants’ claims of plaintiffs thwarting the discovery process through their refusal to cooperate in setting the doctor’s deposition, their repeated canceling of any dates set for his deposition, and their failure to proceed on a date acceptable to all counsel. Because of plaintiffs’ behavior, defendants were forced to appear in court and request an order setting a date for expert depositions. The schedule of expert depositions was placed on record with Dr. Morgan’s deposition set for March 10, 2008. Nonetheless, plaintiffs again refused to proceed with the doctor’s deposition.

Plaintiffs’ actions after March 10, 2008, further support the trial court’s determination that plaintiffs unreasonably failed to produce their expert, Dr. Morgan, for deposition. After canceling the court-ordered March 10, 2008, date for Dr. Morgan’s deposition due to their counsel’s unanticipated health issues, plaintiffs offered several alternative dates. When defendants chose one of those dates and noticed the doctor’s deposition for March 26, 2008, plaintiffs refused to acknowledge and confirm the notice. Instead, on March 25, the day before the noticed date, plaintiffs’ counsel informed defense counsel, via fax, that the deposition would not go forward. In response, defense

counsel moved to exclude Dr. Morgan's testimony. At the hearing on the motion, plaintiffs' trial counsel failed to appear. Rather, another attorney from counsel's firm appeared and addressed the issue of Dr. Morgan's deposition not proceeding on the first court-ordered date of March 10, 2008. The associate never explained why the deposition had not proceeded on March 26, a date initially offered by plaintiffs as being an available alternative. The trial court had ample ground to find abuse of the discovery process, justifying severe sanctions. (See *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327 ["when a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules, preclusion of that evidence may be appropriate, even if such a sanction proves determinative in terminating the plaintiff's case"].)

Based on the record before this court, the exclusion sanction was properly applied to prohibit Dr. Morgan's expert testimony because plaintiffs unreasonably failed to make the doctor available for deposition.<sup>3</sup>

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<sup>3</sup> In a related argument, plaintiffs contend the court's order excluding Dr. Morgan's expert testimony is reversible per se, because it denied plaintiffs "the opportunity to present any expert testimony in their case in chief." We disagree. To begin with, we note that plaintiffs have failed to offer any evidence to show it was reasonably probable that a more favorable result would have been reached had they presented their expert's testimony. More importantly, at trial, in response to defendants' motion for nonsuit, plaintiffs argued there was "no dispute the standard of care required Dr. Mammone to examine Brandon Foss." Rather, according to plaintiffs, the only dispute is whether or not Dr. Mammone actually examined Brandon.

## **B. Plaintiffs Failed to Produce Evidence Sufficient to Preclude Nonsuit.**

Plaintiffs contend the trial court erroneously granted nonsuit based on a lack of evidence of causation. They argue the use of common knowledge and application of the doctrine of *res ipsa loquitur* establish the standard of care and determine whether defendants met that standard. We conclude nonsuit was proper.

### *1. Standard of Review*

In reviewing a decision granting a nonsuit, we review the record *de novo* to determine whether, as a matter of law, the plaintiff's evidence was insufficient to support the elements of his cause of action. (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [Fourth Dist., Div. Two].) In making this determination, we consider all the evidence in the record and any reasonable inferences drawn from the evidence in the light most favorable to the plaintiff and we resolve all conflicts in the plaintiff's favor. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839; *Mejia, supra*, at p. 1458.) In order to survive a motion for nonsuit, the plaintiff must produce substantial evidence, not merely speculation or conjecture, to support the elements of his case. (See *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402 (*Jones*).)

### *2. Negligence*

#### a. Applicable law

The elements of a medical malpractice claim, like any negligence cause of action, are duty, breach, proximate cause, and damages. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.) In a medical malpractice action, expert testimony generally is

required to establish medical causation. (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1504; *Jones, supra*, 163 Cal.App.3d at p. 402.) “In a medical malpractice action, a plaintiff must prove the defendant’s negligence was a cause-in-fact of injury. [Citation.] ‘The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] . . . A possible cause only becomes “probable” when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action. . . .*’ [Citations.]” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118; see also *Jones, supra*, at p. 403.)

b. Analysis

Here, Dr. Mammone was the on-call emergency medicine physician at SACH for Brandon’s first visit. Plaintiffs’ malpractice claim involving Dr. Mammone’s treatment is governed by Health and Safety Code section 1799.110, which, in relevant part, provides: “(a) In any action for damages involving a claim of negligence against a physician . . . arising out of emergency medical services provided in a general acute care hospital emergency department, *the trier of fact shall consider*, together with all other relevant matters, the circumstances constituting the emergency, as defined herein, and *the degree of care and skill ordinarily exercised by reputable members of the physician[’s] . . . profession in the same or similar locality, in like cases, and under similar emergency circumstances.* [¶] . . . [¶] (c) In any action for damages involving a claim of negligence against a physician . . . providing emergency medical coverage for a general acute care

hospital emergency department, *the court shall admit expert medical testimony only from physicians . . . who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department. . . .*” (Health & Saf. Code, § 1799.110, subs. (a), (c), italics added.)

Plaintiffs assert that “[i]n any malpractice case negligence on the part of the doctor will not be presumed, it must be proved except in those cases where *res ipsa loquitur* is applicable. . . .” (*Lamb v. Moore* (1960) 178 Cal.App.2d 819, 822.) They contend this is such a case. They argue this case presents a situation where the standard of care is not in dispute and the trier of fact can rely on its own common knowledge in determining whether defendants, both the doctor and the hospital, met it. In support of their argument, plaintiffs rely on the analysis presented in *Gannon v. Elliot* (1993) 19 Cal.App.4th 1: “‘Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.’ [Citation.] ‘But to that rule there is an exception that is as well settled as the rule itself, and that is where “negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact.”’ [Citations.] Under the doctrine of *res ipsa loquitur* and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than

not the result of negligence. [Citation.]” (*Id.* at pp. 6-7.) The classic example of a case that falls within this common knowledge application of the *res ipsa loquitur* doctrine is one in which a foreign object has been left in the patient’s body. (See *Ales v. Ryan* (1936) 8 Cal.2d 82, 95-99 [sponge left in abdominal cavity]; *Armstrong v. Wallace* (1935) 8 Cal.App.2d 429, 435-437 [same]; *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 514 [clamp left in abdomen].) “As our high court has succinctly put it: ‘Technical knowledge is not requisite to conclude that complications from . . . a surgical clamp left in the patient’s body . . . indicate negligence. Common sense is enough to make that evaluation.’ [Citation.]” (*Gannon v. Elliot, supra*, at p. 7.)

Plaintiffs’ attempt to apply this principle to the facts of this case was correctly rejected by the trial court. This is not a case where “expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact.” (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86 (*Lawless*)). This is not a case where a foreign object was left in a patient’s body or anything similarly, obviously negligent. Rather, the case involved the diagnosis of a rare form of cancer. The physical factors to be noted concerning a tumor at the L1-L2 area of Brandon’s spine, as well as the merits of such a diagnosis, given the information communicated by Brandon and his father, were matters of medical learning, peculiarly within the knowledge of experts. We find this case to be more analogous to that in *Lawless*, where an internal abdominal complaint was erroneously diagnosed and treated as ptomaine poisoning instead of appendicitis. As a result, the patient died of a ruptured appendix. (*Id.* at p. 85.) In commenting upon the sufficiency of the evidence to withstand the granting of a nonsuit in favor of the

defendant doctor, the court stated: “It was not only necessary for plaintiff to prove a mistake in diagnosis, but also that the mistake was due to failure to exercise ordinary care in making the diagnosis [citation], and mere proof that the treatment was unsuccessful is not sufficient to establish negligence. [Citation.]” (*Id.* at p. 89.)

Like the patient in *Lawless*, Brandon was initially misdiagnosed. But according to the only expert evidence on the procedure followed, that of Dr. Mammone, the defendant doctor, the symptoms exhibited by Brandon (coupled with his description of his fall prior to the symptoms) were typical of a coccyx fracture. “Mere error of judgment, in the absence of a want of reasonable care and skill in the application of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient [citations], for a doctor is not a ‘warrantor of cures’ [citation] or ‘required to guarantee results’ [citations].” (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 475.)

In short, to conclude that Dr. Mammone or SACH was negligent in diagnosing Brandon required expert testimony, which would have established the proper practice based on the standard of care used by emergency medicine physicians in the locality. Because the present record is devoid of any evidence from which the trier of fact could reasonably infer that defendants were guilty of any breach of proper practice in the diagnosis and treatment of Brandon, plaintiffs failed to establish negligence against defendants.

Moreover, there is no evidence to show that any act or omission on the part of defendants was the proximate cause of Brandon’s injuries. In other words, there is no

evidence to show that, had the tumor had been detected 72 hours earlier (during Brandon's initial visit to the emergency room), Brandon would not have suffered the same mobility limitations as a result of its presence and removal. The uncontradicted evidence introduced by plaintiffs showed that the location of the tumor, its pressure on the spinal cord, and its surgical removal, affected Brandon's mobility. There is no evidence to show that the tumor would not have affected Brandon's mobility in spite of the most careful and skillful diagnosis and treatment even on his first visit to the emergency room.

### 3. *CLRA Claim*

There now remains for consideration plaintiffs' charge against the hospital for violating the CLRA. The CLRA protects against unfair and deceptive business practices and provides that a consumer who suffers damage as a result of a forbidden practice may bring an action for actual damages, including a class action suit, as well as for "an order enjoining the methods, acts, or practices," and punitive damages. (Civ. Code, § 1780, subd. (a)(2); *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437-438.) Specifically, the CLRA identifies as actionable certain deceptive business practices, including, "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . ." (Civ. Code, § 1770, subd. (a)(7).)

According to plaintiffs, they "presented extensive testimony and exhibits that established SACH made numerous misrepresentations concerning the quality of care provided, and the availability of specialists, at SACH . . . and . . . they relied upon these misrepresentations when selecting SACH as the emergency room they would utilize

when needed.” That evidence included plaintiffs’ testimony that they thought SACH was a quality facility based on website materials and general information in the community. Plaintiffs offered SACH’s advertising brochures and materials, which indicated that SACH provided emergency room services 24 hours a day, had over 500 medical staff members, and that patients in the emergency room received a “focused physical exam” by a triage nurse who would take a thorough history.

Nothing in the record, however, establishes that the above information is false. Rather, the evidence shows that SACH does provide emergency services 24 hours a day, seven days a week. Brandon was seen by the hospital’s emergency staff in the late evening and early morning of June 23-24, 2002. He was triaged and evaluated by nursing personnel. There was a radiologist available to review x-ray films either on site or via teleradiology 24 hours a day, seven days a week. In this case, however, Dr. Mammone read the x-ray without consulting with a radiologist. As the trial court correctly observed, plaintiffs failed to offer any evidence that there was any misrepresentation with regard to what SACH was offering or providing.

Moreover, “[u]nder Civil Code section 1780, subdivision (a), CLRA actions may be brought only by a consumer ‘who suffers any damage *as a result of the use or employment*’ of a proscribed method, act, or practice. (Italics added.) ‘This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.’ [Citation.] Accordingly, ‘plaintiffs in a CLRA action [must] show not only that a defendant’s conduct was deceptive but that the

deception caused them harm.’ [Citations.]” (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 809, overruled on other grounds as stated in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337.) Here, in addition to failing to prove that SACH’s conduct was deceptive, plaintiffs were also unable to prove their negligence claim against defendants. Thus, they were unable to prove damages.

We conclude there was no error in granting the nonsuit in favor of defendants Dr. Mammone and SACH.

### **C. Defendants Were Entitled to Their Costs**

Plaintiffs contend Dr. Mammone is not entitled to recover his costs from Ronald and Lisa (the Fosses) because he expressly waived his right to recovery when, on March 27, 2012, the Fosses dismissed what they (incorrectly) characterize as their only claim, i.e., concealment, against the doctor in exchange for a waiver of costs. They further assert that they are not jointly and severally liable for defendants’ costs.

Dr. Mammone concedes that on March 27, 2012, he stipulated to extending the five-year statute to June 1, 2012, in exchange for the dismissal by the Fosses of their concealment claim; however, he asserts that such dismissal did not affect their claim for negligent infliction of emotional distress predicated upon the professional negligence alleged by Brandon. He notes that the Fosses consistently referred to the negligent infliction of emotional distress claim<sup>4</sup> throughout trial. Thus, Dr. Mammone argues that

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<sup>4</sup> The parents of a child may assert a claim for negligent infliction of emotional distress when they observe the defendant’s conduct and the child’s injury and are aware the defendant’s conduct or lack thereof is causing harm to the child. (*Ochoa v. Superior* [footnote continued on next page])

he incurred costs to defend against both Brandon’s professional negligence claim and the Fosses’ negligent infliction of emotional distress claim. We agree. Both Brandon and his parents sued Dr. Mammone alleging different causes of actions. Both lost. Accordingly, Dr. Mammone was entitled to recover costs against both Brandon and the Fosses.

Regarding the determination that plaintiffs are not jointly and severally liable for defendants’ costs, plaintiffs argue that because they were parties to separate causes of action, which could have been the basis for separate actions, the trial court was required to allocate the costs award according to the work performed with respect to the separate claims. We disagree.

As SACH points out, a similar contention was rejected in *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370 (*Acosta*). In *Acosta*, a group of homeowners jointly sued SI Corporation on a single theory—product liability for an allegedly faulty mesh used in the construction of their homes—and lost. (*Id.* at p. 1373.) SI Corporation submitted a single costs bill for all the plaintiffs, and the plaintiffs moved to tax costs on the ground that the company failed to apportion costs among each individual plaintiff. (*Ibid.*) The plaintiffs argued that their claims were separate, not joint, because 101 different homes were involved in the litigation, and each plaintiff had an interest in only the home that he

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[footnote continued from previous page]

*Court* (1985) 39 Cal.3d 159, 170.) In *Ochoa*, the parents sought damages for the emotional distress they suffered as a result of witnessing the defendants’ failure to provide adequate medical care to their child. The California Supreme Court held that the parents could state a claim for the negligent infliction of emotional distress as bystanders, not as direct victims because “the defendant’s negligence . . . was directed primarily at the [child], with [the parent] looking on as a helpless bystander as the tragedy of [the child’s] demise unfolded before [the parent].” (*Id.* at pp. 172-173.)

or she owned. (*Id.* at p. 1374.) Citing the mandatory provision of Code of Civil Procedure section 1032, subdivision (b), which provides that “a prevailing party is entitled as a matter of right to recover costs,” the appellate court held that a prevailing party defendant is not required to apportion costs among plaintiffs “where the plaintiffs were represented by the same law firm and pursued a single cause of action in a joint trial.” (*Acosta, supra*, at p. 1376.) The court explained that “in most cases where a defendant is entitled to costs as of right because plaintiffs took nothing in their joint action, there will be nothing to apportion. The costs are joint and several because the plaintiffs joined together (represented by the same attorney) in a single theory of liability against a defendant who prevailed. It is up to the plaintiffs in a motion to tax costs to point out that some costs are not related to the joint theory of liability, but are specific to a particular plaintiff, and it is therefore not fair to include these in a joint award.” (*Ibid.*) Because the plaintiffs failed to meet this obligation, the *Acosta* court held there was no error in awarding costs jointly and severally against the group of plaintiffs, who, after satisfying the cost award, would be entitled to seek contribution from each other.

We agree with the reasoning of *Acosta* and hold that the trial court was not required, as a matter of law, to allocate costs between the causes of action asserted by Brandon and those asserted by his parents.<sup>5</sup> As in *Acosta*, plaintiffs elected to join together in a lawsuit, represented by the same attorney, to assert essentially the same

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<sup>5</sup> This is not to say that an allocation of costs is not permitted in suitable circumstances. Such allocation is within the trial court’s discretion. (Code Civ. Proc., § 1032, subd. (a)(4).) We merely conclude that the trial court was not required to do so in this case.

theory of liability—that defendants were responsible for Brandon’s injuries and the resulting damages. While that decision presumably resulted in efficiencies for all parties, the joint prosecution of plaintiffs’ claims and the identical arguments made by their shared counsel necessarily resulted in substantial commingling of the work defense counsel performed for defendants on the various causes of action. Also as in *Acosta*, defendants here secured a total victory, they were the prevailing parties on every claim, and thus entitled to their costs. (Code Civ. Proc., § 1032.) Insofar as the Fosses believed they should not be liable for certain costs because the subject work related entirely to their son’s claims, it was their obligation to identify those costs, and vice versa. Plaintiffs failed to do so in their motion to strike/tax costs, and they have not done so in their brief on appeal. Accordingly, we find no error in the trial court awarding costs jointly and severally against plaintiffs.

#### **D. The Award of Expert Witness Fees Was Proper**

Defendants were entitled to recover their expert witness fees if—and only if—their Code of Civil Procedure section 998 offers were valid. (Compare Code Civ. Proc., § 1033.5, subs. (a)(8) & (b)(1), with § 998, subd. (d).)

Plaintiffs contend defendants’ Code of Civil Procedure section 998 offers were invalid because they failed to include an acceptance provision, i.e., a provision that allowed them to accept by signing a statement of acceptance. Until 2006, section 998 mentioned nothing about acceptance of an offer to compromise. In 2005, section 998, subdivision (b) was amended to provide: “The written offer shall include . . . a provision that allows the accepting party to indicate acceptance of the offer by signing a statement

that the offer is accepted. . . .” (Stats 2005, ch. 706, § 13, effective Jan. 1, 2006.) Thus, inclusion of an acceptance provision was not mandatory until January 1, 2006. (*Ibid.*; see Code Civ. Proc., § 998, subd. (b).) Dr. Mammone and SACH served their section 998 offers on December 1, 2004, and December 2, 2005, respectively, so no acceptance provision was required in the offers to be valid.<sup>6</sup>

Next, plaintiffs contend Dr. Mammone’s second offer to compromise (dismissal of the action in exchange for a waiver of all costs and fees) was not reasonable. The argument is based upon the rule that Code of Civil Procedure section 998 offers not made in good faith will be considered invalid. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263 [“One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees.”].) Generally, when the party asserting the right to costs pursuant to section 998 “shows a prima facie entitlement to costs, the burden is on an objector to prove the costs should be disallowed. [Citations.] Where . . . the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on plaintiff, as offeree, to prove otherwise.” (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 116-117.) As in *Santantonio*, Dr. Mammone obtained a judgment more

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<sup>6</sup> Although SACH served another offer to compromise in 2012, it was invalid because it failed to include the mandatory acceptance provision. To supersede a formal statutory offer, a second offer must be valid. (*Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 576-578.) Because the 2012 offer was invalid, it failed to supersede the prior offer.

favorable than his section 998 offer. The burden is therefore on plaintiffs to prove that the offer was unreasonable. “‘Finally, whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court.’ [Citation.]” (*Santantonio v. Westinghouse Broadcasting Co., supra*, at p. 117.)

Plaintiffs have failed to carry their burden of proving that the trial court abused its discretion in finding Dr. Mammone’s Code of Civil Procedure section 998 offer to be reasonable. Other than a recitation of case law, they have not applied the law to the facts in this case to support their contention. We note that plaintiffs raised this argument below in their motion to strike Dr. Mammone’s memorandum of costs, and Dr. Mammone responded to it in his opposition. In plaintiffs’ motion, they argued that the offer was “a mere tactic,” “illusory, and patently unreasonable.” In defendant’s opposition, he explained that the offer was made after almost nine years since the case had been filed and the costs and fees were substantial. Further, we note the offer was made after years of litigation, providing defense counsel with time to consider the facts of the case, together with the applicable law; to evaluate Dr. Mammone’s potential liability; to question plaintiffs’ consistent thwarting of any attempt to depose their emergency medicine expert; and to anticipate the costs to continue litigation. From the inception of the case, the law has been clear: To prevail on a claim of negligence plaintiffs must show that Dr. Mammone was negligent in his emergency diagnosis of Brandon. (*Huffman v. Lindquist, supra*, 37 Cal.2d at p. 475.) Such showing required expert testimony. At the time of Dr. Mammone’s section 998 offer, almost nine years after plaintiffs filed their complaint, no expert had opined that Dr. Mammone’s treatment of Brandon was

negligent. Absent any evidence to the contrary, plaintiffs' claim that the offer was unreasonable is not persuasive.

Moreover, the only arguments presented by plaintiffs are unconvincing. Plaintiff Brandon challenges Dr. Mammone's offer to compromise contending that he reasonably believed the value of his case exceeded the value of costs because (1) he survived summary judgment in the absence of an expert opinion, arguing the doctrine of *res ipsa loquitur*, and (2) his medical expenses alone exceeded \$150,000. Plaintiffs further argue the trial court failed to determine that defendants' expert witness fees were reasonable. Based on our analysis recited in the prior paragraph, we conclude that plaintiffs' arguments are insufficient to satisfy their burden of proving that the offers were unreasonable or that the court's ruling was an abuse of discretion.

Finally, plaintiffs contend defendants failed to prove the reasonableness and necessity of their claimed expert fees. Plaintiffs claim that defendants merely "submitted copies of invoices showing amounts charged, and simply argued that since the expert witness fees were listed on their memorandum of costs, that was sufficient to establish that same were reasonable and necessary, and Plaintiffs should be required to pay the entire amount claimed." We disagree. In opposition to plaintiffs' motion to tax costs, defendants identified each expert retained, listed his or her specialty and qualifications, and stated the purpose for which he or she was retained.

For the above reasons, the award of expert witness fees was proper.

## **E. The Award of Attorney Fees Was Proper**

Plaintiffs contend the trial court erred by awarding attorney fees against them under the CLRA.

A prevailing plaintiff can recover attorney fees under the CLRA as a matter of right. By contrast, a prevailing defendant can recover attorney fees under the CLRA if, and only if, “the plaintiff’s prosecution of the action was not in good faith.” (Civ. Code, § 1780, subd. (e).) “Courts have uniformly constructed this language as requiring a subjective test.” (*Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 924.) Hence, when any reasonable attorney would agree that the action was totally devoid of merit, the trial court may infer that the action is in bad faith (*id.* at p. 926); however, it is not required to do so (*id.* at pp. 922-924). Moreover, ““there is a distinction between weak cases that assert new theories and frivolous cases that are barred by established law.”” (*Id.* at p. 920 [quoting lower court]; see also *id.* at p. 924 [holding that lower court applied correct standard].) “[T]he defendant moving for attorney fees under Civil Code section 1780, subdivision (d) has the burden of proof.” (*Id.* at p. 926.)

“A trial court’s exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion. [Citation.] . . .

Accordingly, there is no question our review must be highly deferential to the views of the trial court. [Citation.]

“At the same time, discretion must not be exercised whimsically, and reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied ‘the wrong test’ or standard in reaching its result. [Citation.] ““The scope of discretion

always resides in the particular law being applied, i.e., in the ‘legal principles governing the subject of [the] action . . . .’ Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.” [Citation.]” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.)

Having prevailed on plaintiffs’ CLRA claim, SACH requested attorney fees in the amount of \$23,256. The trial court granted SACH’s request, but only in the amount of \$4,320. In addressing the request the trial court stated: “[SACH] argues that the CLRA claim was never prosecuted in good faith and that all of the fees for which they seek recovery are appropriate and reasonable and ought to be granted and awarded to them by the court. I am of a somewhat different mind. I think initially that presenting the court with the CLRA issue was a rather novel, if not outright unique approach and claim. And I certainly am aware of the fact that that claim, as a cause of action, survived both demurrer and summary judgment. So, at least early on as to the conduct of the litigation, discovery which was undertaken with regard to that cause of action, I don’t find that I can view the prosecution of that claim as one which was undertaken in bad faith.

“When we get to trial, it seems to me things change a bit. My recollection is that there was essentially a ruling made by the court, at which time there were not going to be expert witnesses allowed to testify on behalf of Plaintiffs and Plaintiffs were not going to be able to testify with regard to the CLRA action itself as experts. If my recollection is correct, I certainly allowed them to testify as to advertisements, things in the newspapers they may have come across and so forth, but I think it became clear at that point, at least, that the survivability of the CLRA claim was seriously in doubt.”

On appeal, plaintiffs fault the trial court for believing that the success of their CLRA claim was contingent upon their presenting expert witness testimony. Plaintiffs argue that they never intended to use expert testimony, because their testimony alone “regarding SACH’s representations that they relied upon would be sufficient.” However, in order to prevail on their CLRA claim, they had to prove damages. The only way to prove their damages was to prove that defendants were negligent in their emergency treatment of Brandon. As we noted previously, in order to prove negligence, plaintiffs needed to present expert testimony. Once plaintiffs learned they could not offer Dr. Morgan’s testimony at trial, the continued pursuit of their CLRA claim was frivolous. Thus, there is sufficient evidence to support a finding of bad faith.

We therefore conclude that the trial court properly granted SACH’s motion for attorney fees.

III. DISPOSITION

The judgment is affirmed. Defendants and respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

KING

J.