S230899

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

BARRY S. JAMESON,
Plaintiff and Appellant

vs.

TADDESE DESTA, M.D.,
Defendant and Respondent

SUPREME COURT
FILED

MAY 12 2016

Frank A. McGuire Clerk

Deputy

California Court of Appeal, Fourth Appellate Dist., Div. One, Case No. D066793
San Diego County Superior Court Case No. GIS 9465
Hon. Joel M. Pressman, Judge

ANSWER BRIEF ON THE MERITS

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I.

INTRODUCTION

In this action, the plaintiff, who was incarcerated, alleges that the defendant, Taddese Desta, M.D., negligently treated his hepatitis with a one-year regimen of a drug known as "alpha-interferon," from which he suffered adverse side effects. He claims that rather than a one-year regimen of alpha-interferon, Dr. Desta should have treated him with a six-month regimen of a two-drug combination.

After several reversals on appeal, the action proceeded to trial in April 2014. Because of the onerous budget cuts faced by the courts at the time, the San Diego Superior Court did not provide official court reporters for civil proceedings, and the trial proceedings were not reported. Following opening statements, the trial court granted the defendant's motion for nonsuit on the grounds that based on plaintiff's opening statement, the plaintiff was unable to establish his case.[1] The Court of Appeal affirmed, holding that the plaintiff was precluded from obtaining a reversal of the nonsuit on appeal in the absence of a reporter's transcript. (Typed Opn., p. 17.)

The plaintiff contends that the trial court abused its discretion and violated

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[1]A nonsuit following opening statements is authorized by Code of Civil Procedure section 581c(a). "A defendant is entitled to nonsuit after the plaintiff's opening statement only if the trial court determines that, as a matter of law, the evidence to be presented is insufficient to permit a jury to find in the plaintiff's favor." Ewing v. Northridge Hospital Medical Center (2004) 120 Cal. App.4th 1289, 1296.

his constitutional rights in establishing a policy that did not provide for free court reporters to indigent plaintiffs in civil cases. He claims that the San Diego Superior Court's policy precluded him and other indigent plaintiffs in civil actions from obtaining meaningful access to appeal.

The plaintiff was not entitled to a free reporter at trial for the following reasons:

- In their long history of considering the issue, neither the United States Supreme Court nor the courts of this State have held that a plaintiff in a civil action is entitled to a free reporter or a free reporter's transcript on appeal.
- The San Diego Superior Court acted within its discretion in not providing reporters in civil cases in light of the onerous budget cuts it faced.
- Constitutional equal protection and due process requirements do not mandate that an indigent plaintiff in a civil action be provided with a free reporter or a free reporter's transcript on appeal.
- Providing an indigent plaintiff with a free reporter at trial is an illusory right unless the courts also provide the plaintiff with a free transcript, which they have no obligation to do.
- Mandating the provision of official court reporters to indigents in

civil actions would be contrary to the Legislative scheme set forth in Government Code sections 68086 and 68086.1, which provides the courts with discretion in determining whether to provide official court reporters.

Even if this Court determines that the San Diego Superior Court abused its discretion or violated the plaintiff's constitutional rights in not providing him with a court reporter, the judgment should nevertheless be affirmed for the following reasons:

- The plaintiff had a viable method for obtaining meaningful appellate court review by means of a settled statement (California Rules of Court, Rule 8.137), which he chose not to use.
- Any error was harmless, because the plaintiff could not have purchased a transcript even if a reporter had been made available at trial.
- The record is clear, even without a reporter's transcript or a settled statement, that nonsuit was properly granted.

II.

PROCEDURAL HISTORY AND RELEVANT FACTS

In this action, filed in 2002, the plaintiff proceeded on causes of action

against Dr. Desta for medical negligence and breach of fiduciary duty. As stated by the Court of Appeal, "In his complaint, Jameson alleged that he had been suffering from hepatitis and that Desta negligently prescribed interferon for Jameson while Jameson was incarcerated at Donovan [Richard J. Donovan Correctional Facility] and Desta was performing services as a physician for the Department [of Corrections and Rehabilitation]. Jameson further alleged that the interferon caused him to suffer serious physical injuries, including irreversible damage to his eyesight." (Typed Opn., p. 4.)

The action was dismissed and reversed on appeal on three separate occasions: First was a reversal from a dismissal for delay in prosecution.[2] Second was a reversal from a dismissal for plaintiff's failure to appear at a case management conference and subsequent order to show cause.[3] Third was a reversal from a summary judgment.[4]

Following the third reversal, the matter proceeding to trial. On April 18,

---

[2]The trial court dismissed the action based on the plaintiff's delay in serving Dr. Desta with process, but the Court of Appeal reversed, having determined that service had been effective and that the trial erred in dismissing the action for lack of diligent service. (Court of Appeal case no. D047824; R.A. 16-36.)

[3]The appellate court held that the plaintiff's failure to appear telephonically at the case management conference and subsequent order to show cause hearing was not willful. Jameson v. Desta (2009) 179 Cal. App.4th 672.

[4]The appellate court determined that expert evidence submitted by the plaintiff raised a triable issue of fact regarding breach of the standard of care and causation. Jameson v. Desta (2013) 215 Cal. App.4th 1144, 1149.

2014, ten days prior to the commencement of trial on April 28, 2014, "the trial court informed the parties that 'the Court no longer provides court reporters for civil trials, and that parties have to provide their own reporters for trial.'" (R.A. 231; 254; Typed Opn., p. 11.) The plaintiff filed no document in which he either objected to proceeding without a court reporter or requested that the court provide him with a reporter, and there is nothing in the record to indicate that he requested a reporter.

On April 21, 2014, the defendant filed a motion in limine to preclude the plaintiff from introducing expert deposition testimony in lieu of live testimony at trial. (R.A. 233-247.) The defendant asserted that the plaintiff failed to designate his expert, Allen Cooper, M.D., in either of the two expert witness designations he served, and therefore, the plaintiff should be precluded from introducing expert witness testimony, whether live or via deposition, at trial. (R.A. 234.) In addition, the plaintiff did not establish that Dr. Cooper was "unavailable," and therefore, it would be improper to allow him to use Dr. Cooper's deposition testimony in lieu of live testimony. (R.A. 234.) Furthermore, the deposition was unsigned, which precluded its use. (R.A. 234.) Finally, defense counsel maintained that if Dr. Cooper's testimony was going to be permitted, he should be permitted to cross-examine Dr. Cooper live at trial. (R.A. 234-235.)

The motion was argued on April 23, 2014, although the Court did not rule

on it at that time. (R.A. 252.) On the day of trial, April 28, 2014, the Court issued an order precluding Dr. Cooper's testimony: "The Court states that it is clear that Mr. Jameson has not designated an expert, and that there will be no expert to testify live at trial." (R.A. 254.) "The Court states that the plaintiff had not established Dr. Cooper was unavailable..." (R.A. 258.)

On April 22, 2014, the defendant filed a motion to dismiss pursuant to Code of Civil Procedure section 583.310 for failure to bring the matter to trial within the statutorily required time. The defendant submitted a table setting forth the dates that the five-year time limit ran and the dates it was stayed during the course of the twelve years that the action had been pending. The defendant maintained that the time within which the plaintiff had to bring the case to trial expired. (7A.A. 1194-1197.) In opposition to the motion, the plaintiff stated that he "is not disagreeing with the calculations in the motion." (7A.A. 1199:2-3.) The motion was heard following opening statements on April 28, 2014, at which time it was granted. (R.A. 257.)

In addition to the motion to dismiss for failure to bring the matter to trial within the required time, after opening statements Dr. Desta also moved for nonsuit on the grounds that based on the plaintiff's opening statement, the plaintiff could not establish causation or a breach of the standard of care. The court granted the motion, explaining, "Mr. Jameson did not establish causation in his opening

statement. The Court allowed all of the plaintiff's exhibits into evidence as requested. The court finds that Mr. Jameson did not have an expert available. The Court finds that it's clear that the plaintiff cannot establish causal connection between treatment [by] Dr. Desta and alleged damages. The Court states that the plaintiff had not established Dr. Cooper was unavailable and even in the deposition Dr. Cooper gave no opinion on causation or damages. It is clear, that no matter how far the Court allowed the plaintiff to go in trial he could not overcome these issues. The Court GRANTS the non-suit on all causes of action...." (R.A. 257-258.) The court determined that the plaintiff did not have evidence by which a jury could find that Dr. Desta "did not meet the standard of care and causal damage to plaintiff; nor breached any fiduciary duty." (R.A. 258.)

In its Opinion affirming the judgment, the Court of Appeal held that the trial court did not err in failing to have the trial proceedings recorded by a court reporter. The appellate court recognized that while Government Code section 68086(b) provides for a waiver of a reporter's fee for indigents where the court provides an official court reporter, "[t]he statute does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case." (Typed Opn., pp. 14-15.)

In regard to the granting of nonsuit in favor of the defendant, the Court of

Appeal concluded that the plaintiff could not obtain a reversal in the absence of a reporter's transcript: "Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (Typed Opn., p. 17.)

In light of the fact that the judgment on the nonsuit was affirmed, the appellate court did not reach the issue of whether the trial court properly granted the defendant's motion to dismiss for failure to timely bring the matter to trial. (Typed Opn., p. 3, fn. 1.)

III.

THE STATUTORY SCHEME

Government Code section 68086 governs payment of the fee for court reporting services in the superior court. The statute distinguishes between two types of reporters, official court reporters and certified shorthand reporters who serve as official pro tempore reporters, and sets forth a separate payment scheme for each. The statute provides that official court reporters are provided "at the expense of the court"[5] and provides for a fee to be paid by the parties to reimburse the court for the expense of providing official court reporters. Section 68086, subdivision (b) provides that the fee "shall be waived for a person who has been

[5]Government Code section 68086(a)(1)

granted a fee waiver under Section 68631."

Section 68086, subdivision (d) authorizes the Judicial Council to adopt rules to ensure that "if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter..." and that if an official pro tempore reporter is used, "no other charge shall be made to the parties." In other words, the court does not charge a fee where a pro tempore reporter is used.

In accordance with section 68086(d), the Judicial Council enacted California Rules of Court, Rule 2.956, which provides at subdivision (c), "If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter. It is that party's responsibility to pay the reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law."

In other words, where the court does not provide an official court reporter, a party can go out and hire a certified shorthand reporter to serve as an official pro tempore reporter, which includes paying the certified shorthand reporter directly for the reporting services rather than paying the court a fee for a reporter's services.

Importantly, whereas subdivision (b) of section 68086 provides that the fee

charged to parties to reimburse the court for the expense of an official court reporter is waived for parties who have obtained a fee waiver, no similar provision waiving the cost for a court reporter applies where a party retains a certified shorthand reporter to serve as an official pro tempore reporter. The statutory scheme does not obligate the court to pay the cost of hiring a reporter to act as an official pro tempore reporter on behalf of a party who has obtained a fee waiver, and it does not require that the court provide an official court reporter to such litigants. To the contrary, the statute expressly recognizes that courts do not have to provide court reporters, and that proceedings can go unreported.

The Legislature's intent can be seen in Government Code section 68086.1, which directs that a portion of court filing fees goes to the Trial Court Trust Fund to be used to pay for the services of official court reporters in civil proceedings. The statute states that "[i]t is the intent of the Legislature ... to continue an incentive to courts to use the services of an official court reporter in civil proceedings." Thus, while expressing a preference that trial courts use official court reporters and providing an incentive to do so, the Legislature clearly left it to the courts in each county to determine whether and to what extent official court reporters would be used in civil proceedings.

The waiver of the court reporter fee for indigents provided for in subdivision (b) of section 68086 was added to the statute by way of a 2013

amendment effective January 1, 2014. Prior to that time, there was no statutory court reporter fee waiver for indigent litigants. The fee waiver provided for in subdivision (b) does not constitute a legislative pronouncement, policy or determination that courts are required to provide reporters to all indigent litigants. There is nothing in the legislative history to indicate that the Legislature intended anything more than a fee waiver.[6]

If the Legislature wanted to mandate that reporters be provided to indigent litigants, it could have easily amended the statute to so provide. "Had the Legislature intended to craft such a rule, it certainly could have done so. But it chose instead to write a narrower rule..." Flores v. Presbyterian Intercommunity Hospital (May 5, 2016, S209836) ___ Cal.4th ___ [2016 DJDAR 4341, 4344]. Here, the Legislature enacted a fee waiver for indigents in cases in which courts provide official court reporters, without enacting any mandate that courts provide

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[6]The purpose of the 2013 bill to amend section 68086 (AB 648) was to provide guidance on how to implement the $30 fee charged to litigants for court reporting services in civil proceedings lasting less than one hour. (See Bill Analysis, April 22, 2013.) The bill as originally introduced on February 21, 2013 did not contain the fee waiver provision at issue herein. The fee waiver was added to an amended version of the bill on April 29, 2013. There is no indication in the legislative history that by enacting the fee waiver, the Legislature intended to mandate that indigent litigants be provided with an official court reporter at the expense of the court in all civil proceedings. The Legislature was merely waiving the court reporter fee in those civil proceedings where the courts provided official court reporters. The legislative history, including the Bill Analysis, can be found on the Legislature's website at http://www.legislature.ca.gov/index.html.

reporters to all indigent litigants.

This was not some "oversight" on the part of the Legislature, but indicates that the Legislature did not intend to mandate that courts provide reporters in all cases involving indigents. There is an enormous difference between waiving a fee and mandating the provision of a service. If the Legislature had intended to provide court reporters to all indigent litigants, it would have done so. In construing a statute the court's function is to ascertain what is in terms or in substance contained therein, "not to insert what has been omitted, or to omit what has been inserted." Code of Civil Procedure section 1858.

Contrary to the plaintiff's argument that Code of Civil Procedure section 269 mandates the provision of a reporter upon the request of a party (Opening Brief, pages 21-22), the statute read in conjunction with Government Code section 68086 does not mandate the provision of a reporter in civil litigation where the court does not provide reporters. If Code of Civil Procedure section 269 mandated the provision of a reporter to any party who requested one, it would nullify subdivision (d) of Government Code section 68086, which recognizes that court reporters are not provided by all courts or in all cases.

In addition, section Code of Civil Procedure section 269 predates Government Code section 68086, enacted in 1992, and the provision in section 68086 allowing parties to arrange for pro tempore reporters clearly supercedes any

requirement in Code of Civil Procedure section 269 that reporters be provided by the court upon request of a party.

To the extent that the plaintiff cites California Court Reporters Association, Inc. v. Judicial Council of California (1995) 39 Cal. App.4th 15, 18 as holding that Code of Civil Procedure section 269 mandates the provision of a reporter at the request of a party (Opening Brief, pages 20-21), any such language in that opinion was dicta, as the court merely held that electronic recording was not a permitted method of reporting a case in California. It did not hold that there is a right to have a reporter present in a civil proceeding when one is requested where the court does not provide court reporters.

Citing Elkins v. Superior Court (2007) 41 Cal.4th 1337, the plaintiff argues that the San Diego Superior Court's policy of not providing reporters in civil cases is contrary to statute. (Opening Brief, page 28, citing Elkins at 1353-1354.) However, the Superior Court's policy at issue herein is not contrary to Government Code section 68086. That statute specifically adopted a dual system for providing court reporters, discussed above. Nothing in section 68086 mandates that courts provide reporters for indigent plaintiffs, and the San Diego Superior Court's policy was not in conflict with the statute.

IV.

<u>THE DEVELOPMENT OF RELEVANT LAW</u>

<u>REGARDING INDIGENT LITIGANTS</u>

In the long history of jurisprudence on the issue, neither the United States Supreme Court nor the courts of this State have held that an indigent plaintiff in a personal injury action is entitled to the provision of a free court reporter at trial or a free reporter's transcript on appeal. Equally significant, even in criminal and other cases in which the courts have required the provision of a free transcript, the cases unanimously hold that a party has no such right where there exist alternative methods for providing an adequate record on appeal, such as an agreed or a settled statement.

Almost one hundred years ago, in <u>Martin v. Superior Court</u> (1917) 176 Cal. 289, the California Supreme Court recognized the right of an indigent plaintiff in a civil action to proceed without the payment of court fees. At issue in that wrongful death action was the payment of jury fees. <u>Id</u>. at 290-291. No statute existed at the time that provided for proceeding *in forma pauperis*, and the defendant maintained that only the Legislature could waive court fees for indigents by way of legislation. <u>Id</u>. at 292. The California Supreme Court rejected this argument, noting that the statutes governing the payment of court fees were not "susceptible of the construction that the design of the legislature was to deny to the courts the

exercise of their most just and most necessary inherent power." Id. at 297.

However, 17 years later, in Rucker v. Superior Court (1930) 104 Cal. App. 683, Court of Appeal held that civil litigants were *not* entitled to a free transcript on appeal. The appellate court explained that there was "no legal mode" of paying the reporter for the reporter's transcript "out of the public treasury." Id. at 685. The court noted that the defendants were not without remedy, because they could pursue their appeal by way of a bill of exceptions, which was permitted by statute as an alternative to a reporter's transcript on appeal. Id. at 686. "It is quite possible to prepare a bill of exceptions without the expense of a reporter's transcript. In times past this has often been done." Id.

In the seminal case of Griffin v. Illinois (1956) 351 U.S. 12, the United States Supreme Court held that the indigent defendants in that criminal action had a right to a free transcript on appeal. It was undisputed that a reporter's transcript was needed in that case in order for the defendants to obtain adequate appellate review of their convictions. Id. at 16. The Court held that the denial of a free reporter's transcript on appeal to the defendants was a violation of the Due Process and Equal Protection provisions of the United States Constitution: "Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." Id. at 18-19.

However, in so holding, the majority expressly noted that an indigent criminal defendant *was not entitled to a free transcript in every case*, and that *alternative methods of presenting the record on appeal could be utilized*: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. [Footnote.]" Id. at 20. Thus, the Court did not mandate that free reporter's transcripts be provided to criminal defendants in all appeals, but only in those appeals where there did not exist other means of presenting an adequate record by which meaningful review could be had.

In Draper v. Washington (1963) 372 U.S. 487, the United States Supreme Court overturned a rule in the State of Washington that required that indigent defendants in criminal actions had to establish that the appeal was not frivolous before being allowed a free transcript. However, in doing so, the Court "reaffirm[ed] the principle, declared by the Court in *Griffin,* that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. [Citation.] Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from

which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript." Id. at 495.

In Ferguson v. Keays (1971) 4 Cal.3d 649, the California Supreme Court held that the appellate court had the inherent power to waive its own filing fees for indigent civil litigants. At the time, California had no statute relieving indigent litigants of various fees and costs at the trial or appellate court level. Id. at 653. The Court explained, "That such power [to waive filing fees] exists, and may be exercised in the absence of statutory provisions to the contrary, seems apparent from our review of the pertinent authorities." Id. at 654. The Court noted that it was "not faced with the question of whether indigents must be given funds by the county or some other source to pay transcript fees, publication costs, or other similar third-party charges." Id. at 654.

In Mayer v. Chicago (1971) 404 U.S. 189, the United States Supreme Court held that the Griffin court's holding regarding indigent defendants convicted of felonies being afforded an adequate record on appeal applied to indigents convicted of nonfelony charges as well, and that the right to an adequate record was not limited to criminal convictions where the defendant faced incarceration.

Id. at 196-197. As in previous Supreme Court decisions, the court in Mayer pointed out that a criminal defendant did not have to be provided with a reporter's transcript of the proceedings where another form of the record permitted proper review of the claims presented. Relying on the holdings of the courts in Griffin and Draper, the court in Mayer stated that "[a] 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript." Mayer at 194.

In March v. Municipal Court (1972) 7 Cal.3d 422, the California Supreme Court held that indigents convicted of misdemeanors were entitled to "a free transcript or adequate substitute" on appeal.

In a set of series of three cases decided on a single day, the Second District Court of Appeal addressed three factual scenarios in determining whether an indigent is entitled to a free reporter's transcript:

a) In Leslie v. Roe (1974) 41 Cal. App.3d 104, the Court affirmed the denial of free clerk's and reporter's transcripts to indigent plaintiffs in a civil action, explaining, "The ordinary civil litigant is not entitled to free transcripts on appeal at public expense." Id. at 107.

b) In Smith v. Superior Court (1974) 41 Cal. App.3d 109, the Court held that in an appeal by a mother denied the opportunity to withdraw her consent to an adoption, the mother was entitled to a free reporter's transcript on appeal because