JACK L. SEGAL, M.D., Plaintiff and Appellant, v. DUNCAN Q. McBRIDE, et al., Defendants and Respondents.

B193092

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

2008 Cal. App. Unpub. LEXIS 1181

February 11, 2008, Filed

PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of Los Angeles County, No. SC082862. Lisa Hart Cole, Judge.

DISPOSITION: Affirmed.

COUNSEL: The Law Office of Alan Goldberg and Alan M. Goldberg for Plaintiff and Appellant.

Patterson, Ritner, Lockwood, Gardner & Jurich, Clyde Lockwood, Rose L. Carter; Greines, Martin, Stein & Richland, Martin Stein and Barbara S. Perry for Defendants and Respondents.

JUDGES: MOSK, J.; TURNER, P.J., ARMSTRONG, J. concurred.

OPINION BY: MOSK

INTRODUCTION

Plaintiff and appellant Dr. Jack L. Segal brought a medical malpractice action against defendants and respondents Dr. Duncan Q. McBride and the Regents of the University of California [1] (defendants) arising from back surgery Dr. McBride performed on Dr. Segal at the UCLA medical facility in Santa Monica. [2] At trial, Dr. Segal proceeded under the theories that Dr. McBride was negligent in using a morphine paste at the surgical site to reduce Dr. Segal's postsurgical pain, and that Dr. McBride failed to obtain Dr. Segal's informed consent to the surgery because Dr. McBride did not inform Dr. Segal that he would use the morphine paste. The trial court granted defendants' motion for a directed verdict. On the issue of informed consent, the trial court held **[*2]** that the duty to inform a patient of the use of morphine paste to establish a lack of informed consent must be proved through expert witness testimony, which Dr. Segal failed to present at trial. On appeal, Dr.

Segal contends that the trial court erred in holding that informed consent must be proved through expert witness testimony. Alternatively, Dr. Segal contends that even if the trial court correctly ruled on the issue of informed consent, it erred when it ruled that he could not testify as an expert witness on that issue. Dr. Segal does not contest the trial court's directed verdict on the issue of the alleged negligent use of the morphine paste. We affirm.

FOOTNOTES

[1] The Regents were erroneously sued as Santa Monica UCLA Medical Center.

[2] A third named defendant, Thomas L. Viskanta, was dismissed with prejudice prior to trial.

BACKGROUND

Dr. Segal and Dr. McBride are colleagues. Dr. Segal is a medical doctor and professor of medicine at UCLA, based at Harbor UCLA Medical Center in Torrance and Dr. McBride is chief of the neurosurgery division at Harbor UCLA and an associate professor of clinical surgery in the division of neurosurgery at UCLA. Dr. Segal's work is based on the medical - as **[*3]** opposed to surgical - treatment of spinal cord injuries.

Dr. Segal suffers from long-term severe back pain and lumbosacral - but primarily lumbar (lower back) - degenerative joint disease. In the spring of 2003, Dr. Segal began experiencing numbness and tingling in his legs, uncertainty in placing his feet, and "very excruciating" back pain. Dr. Segal was beginning to lose certain motor, strength, and sensory functions and believed that his condition would not respond to pharmacological intervention. Dr. Segal contacted Dr. McBride for a surgical referral. Dr. Segal would never have considered surgery just to relieve his pain. He contacted Dr. McBride because he was losing his ability to participate in activities that he considered to be normal parts of his personal and professional lives. Dr. McBride offered to perform the surgery, and Dr. Segal accepted.

The surgery was scheduled for June 18, 2003. Dr. Segal met with Dr. McBride in the weeks prior to the surgery. Dr. Segal testified that he and Dr. McBride came to a "joint agreement" that if Dr. Segal did not have surgery, he would probably be in a wheelchair within one and a half to two years. As with all of his patients, Dr. McBride **[*4]** personally explained to Dr. Segal the surgery and the benefits and risks of, and alternatives to, the surgery. Dr. Segal had to sign a consent to surgery form and Dr. McBride wanted to make sure that Dr. Segal knew what he was signing. Of his explanation to Dr. Segal, Dr. McBride's notes state, "He's very conversant in these matters. The risks discussed include bleeding, infection, failure of the surgery to relieve his pain to his satisfaction, spinal fluid leakage requiring repair in the operating room, perhaps drainage and prolonged hospitalization in the flat position, and even reoperation, nerve root injury with numbness, weakness, pain, and bowel and bladder disturbance and the need for future surgery at these or other spinal levels." [3] Dr. Segal testified that he understood the risks as set forth in Dr. McBride's notes. Dr. Segal decided to undergo the surgery because he felt the potential benefits of surgery outweighed the potential risks.

FOOTNOTES

[3] Dr. McBride included the observation in his notes that Dr. Segal was "very conversant in these matters" as a reminder that Dr. Segal did not want to listen to the list of risks associated with the surgery and appeared to be "dismissive" of **[*5]** the potential risks.

After Dr. Segal awoke following the surgery, he noticed that there seemed to be a great deal of pain relief and that he was comfortable. Dr. Segal discussed his pain relief with Dr. McBride. Dr. McBride advised Dr. Segal that he had placed a morphine paste right above the spinal cord prior to closing the wound.

At trial, Dr. McBride testified about the components that make up morphine paste. Dr. McBride testified that the use of morphine paste was "an accepted school of thought among neurosurgeons as of June 2003." Dr. McBride further testified that it was his custom and practice to use the particular morphine paste he used in Dr. Segal's surgery, and that he had used the paste "hundreds of times" without any significant side effects. Prior to using the morphine paste in Dr. Segal's surgery, Dr. McBride had read research papers on the efficacy of morphine paste as an epidural analgesic. According to Dr. McBride, the papers demonstrated that the risks of using morphine paste were "mighty low." According to the literature, there were no reported cases of infection at a "higher rate than the standard," no reported cases of "hyper-allergic response," and no reported **[*6]** cases of any significant or severe reaction. Dr. McBride testified that the standard of care did not require him to discuss with Dr. Segal the use of the paste, but that he had told Dr. Segal that he was going to use the paste, just as he told all of his patients.

Dr. Segal testified that Dr. McBride had not discussed with him the use of morphine paste prior to the surgery and that he was unaware that Dr. McBride planned to use it. Dr. Segal first learned that Dr. McBride had used the morphine paste during his conversation with Dr. McBride after the surgery. Dr. Segal testified that he later learned of two components of the morphine paste that concerned him. Dr. Segal testified that he would not have consented to the use of the paste.

Dr. Segal's pain relief after his surgery lasted about six hours. After that, Dr. Segal experienced a fast onset of excruciating pain. About a week to 10 days after the surgery, Dr. Segal became "alarmed" at the way his back was healing. There was a "persistent drainage" from **[*7]** the wound that continued beyond what Dr. Segal considered a reasonable healing period. Also, Dr. Segal experienced unrelenting back pain that could only be controlled by pain medication.

In July 2003, Dr. Segal went to see Dr. McBride because he was not getting better. Dr. Segal testified that he had an MRI that showed a "collection of fluid," a "mass affect" that was pressing on his spinal cord. Dr. McBride testified that he reviewed the radiographs and believed they showed an infection in the area where the morphine paste had been applied or scar tissue that he believed might have been related to the morphine paste. On July 22, 2003, Dr. McBride performed a second surgery on Dr. Segal's back at the UCLA Medical Center in Westwood. Dr. McBride

determined that scar tissue, and not an infection, had developed at the surgery site. Dr. McBride removed the scar tissue and performed a full laminectomy to provide "adequate and wide decompression" of Dr. Segal's nerves.

Dr. McBride did not use morphine paste in Dr. Segal's second surgery. Dr. Segal testified that his recovery from the second surgery was prolonged and protracted, but that there was "clear-cut improvement in the pain relief to **[*8]** a great extent." Dr. Segal remained in Dr. McBride's care for one or two follow-up visits following his second surgery, but retained a different surgeon for a third surgery when he continued to experience persistent pain, persistent disability, and loss of motor and sensory function. Dr. Segal's third surgery was performed on December 17, 2004. Dr. Segal believed that "[a]ll things considered, compared to what happened before the third surgery," he was "improved and stabilized," but he was "nowhere near" where he was before the first surgery.

At trial, Dr. Segal called three doctors as expert witnesses, Dr. Mayank Pathak, a neurologist, Dr. Lloyd Dayes, a neurosurgeon, and Dr. John Thompson, a clinical pharmacologist and a clinical pharmacist. None of Dr. Segal's expert witnesses testified about what, if any, presurgery disclosures a neurosurgeon is to make concerning the use of morphine paste for purposes of informed consent. Dr. Segal testified on his own and called Dr. McBride as an adverse witness. Dr. Segal was not allowed to testify as an expert on whether he would have consented to the use of the morphine paste. Defendants moved for a directed verdict. The trial court granted **[*9]** the motion for a directed verdict.

DISCUSSION

I. Informed Consent And Expert Witness Testimony

Dr. Segal contends that the trial court erred in holding that he had to introduce expert witness testimony to establish Dr. McBride's duty to inform him that morphine paste would be used at the surgical site to treat postsurgical pain because the use of expert witness testimony to establish such a duty is optional and not mandatory. We reject Dr. Segal's contention.

A. Standard of Review

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' [Citations.] Unless it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible **[*10]** from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. [Citation.]" (*Estate of Lances* (1932) 216 Cal. 397, 400; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906-907.) In reviewing an order directing a verdict, "we view the evidence in the light most favorable to plaintiffs. Conflicts in the evidence are resolved, and inferences from the evidence are drawn, in their

favor. If there is substantial evidence to support plaintiffs' claim, *and* if the state of the law also supports that claim, we must reverse the judgment. [Citation.]" (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895.)

B. Application of Relevant Legal Principles

In *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244-245 (*Cobbs*), the California Supreme Court established a two-part test for determining a doctor's duty of disclosure to obtain a patient's informed consent to a medical procedure. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated **[*11]** with a proposed procedure. (*Cobbs, supra,* 8 Cal.3d at p. 244.) Expert testimony on the custom of the medical community is not necessary to establish this duty. (*Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 656 [40 Cal.Rptr.2d 360]; *Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 418 [175 Cal.Rptr. 365].) Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' (*Cobbs, supra,* at pp. 244-245.) Therefore, expert testimony is relevant and admissible to determine the duty to disclose matters other than the risk of death or serious harm and significant potential complications. (*Arato* [*v. Avedon* (1993)] 5 Cal.4th [1172,] 1191; *Spann v. Irwin Memorial Blood Centers, supra,* at p. 657, fn. 13.)" (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301-1302.)

In *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 534-535 (*Morgenroth*), in affirming a grant of nonsuit, the court of appeal agreed with the trial court that expert testimony on the issue of "additional information," was required and **[*12]** stated, "we do not see any other rational interpretation of the above quoted language from *Cobbs* . . . ." (See also *Betterton v. Leichtling* (2002) 101 Cal.App.4th 749, 756 ["Whether to disclose a significant risk is not a matter reserved for expert opinion. Whether a particular risk exists, however, may be a matter beyond the knowledge of lay witnesses, and therefore appropriate for determination based on the testimony of experts. [Citation.]"]; *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 840 [in affirming a grant of summary judgment, we held that to prove his informed consent claim, the plaintiff was required "to present properly qualified medical opinion evidence that his alleged diabetic condition created surgical risks other than those related by defendant prior to the procedure"].) As the court in *Morgenroth* concluded, It stands to reason that expert testimony is necessary to establish that "a skilled practitioner of good standing would provide [information on risks of the use of morphine paste in this operation] under similar circumstances." (*Cobbs, supra,* 8 Cal.3d at pp. 244-246.)

Dr. Segal did not present any expert witness testimony concerning the use of morphine paste at **[*13]** a surgical site to treat postsurgical pain; the risks, if any, associated with such use of morphine paste; or a doctor's duty to disclose such use of morphine paste or associated risks. Dr. Segal argued in the trial court, as he does on appeal, that expert witness testimony is not required in informed consent cases. At trial, defense counsel told the trial court, "No, I don't have any expert on informed consent. It's not necessary." The use of a morphine paste at a surgical site to treat postsurgical pain and any associated risk is "additional information" under the second part of the *Cobbs* test and not a "minimal disclosure" under the first part of that test. Under these circumstances, the trial court was justified in concluding that expert testimony to establish Dr. McBride's duty to disclose his intended use of the paste in Dr. Segal's surgery was required. (*Cobbs, supra,* 8 Cal.4th at pp. 244-245; *Daum v.*

SpineCare Medical Group, Inc., supra, 52 Cal.App.4th at pp. 1301-1302; *Morgenroth, supra,* 54 Cal.App.3d at pp. 534-535.) Accordingly, the trial court properly granted defendants' motion for a directed verdict on the informed consent issue.

In addition to his informed consent contention, **[*14]** Dr. Segal claims, among other things, that the trial court erred in ruling that he could not testify about the reasons he would have refused the morphine paste if Dr. McBride had advised him that it would be used. Dr. Segal also claims that the trial court erred in applying the "prudent person" standard from *Cobbs, supra,* 8 Cal.3d at page 245 rather than a "physician-of-ordinary-prudence" or a "reasonable person who is a physician" standard in determining whether Dr. Segal would have permitted morphine paste to be used if he had been so informed. Because Dr. Segal failed to present expert witness testimony establishing that Dr. McBride had a duty to disclose his intention to use morphine paste in the surgery and any associated risks in the first instance, these secondary claims - that depend upon the establishment of such a duty - necessarily must fail. Moreover, Dr. Segal's contention that Dr. McBride owed him a more extensive duty of disclosure than would have been owed as a lay patient would be is without merit. *Cobbs* provides that a doctor must provide information a reasonably prudent lay person would need to make an informed decision. (*Cobbs, supra,* 8 Cal.3d at pp. 243-244.) There **[*15]** is no authority that suggests that the duty of disclosure is greater if the patient has superior knowledge of medicine. Logically, less information should have to be imparted to a more knowledgeable person.

II. Dr. Segal's Status As An Expert Witness

Dr. Segal argues that even if the trial court correctly ruled that expert witness testimony was required on the disclosure duty for informed consent, he should have been permitted to testify as an expert witness on the issue because defendants, and the trial court "opened the door" to such testimony by effectively treating him as an expert on other medical issues at trial. Dr. Segal's argument is unavailing.

On October 18, 2005, defendants filed a motion in limine to exclude "any testimony of [Dr. Segal] critical of the care and treatment of [Dr. Segal] by defendants." [4] The motion was made on the grounds that such testimony would be irrelevant, that such testimony would be unduly prejudicial under Evidence Code section 352, that "an opinion on medical standards of care is expert testimony," and that Dr. Segal did not identify himself as an expert witness in his designation of experts. Dr. Segal did not oppose the motion in limine, and the **[*16]** trial court granted the motion.

FOOTNOTES

[4] We grant defendants' motion to augment the record to include only defendants' motion in limine to exclude certain testimony by Dr. Segal based on, among other reasons, his failure to designate himself as an expert witness. Otherwise the motion is denied.

When a party fails to list an expert witness in response to a demand for exchange of expert witness information as provided in Code of Civil Procedure section 2034.260 [5],

the trial court is to exclude the expert witness's opinion from evidence on the objection of the opposing party. (Code Civ. Proc., § 2034.300, subd. (a).) Specifically, Code of Civil Procedure section 2034.300, subdivision (a) states, "Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on 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: [P] (a) List that witness as an expert under Section 2034.260."

FOOTNOTES

5 Code of Civil Procedure section 2034.260 provides, **[*17]**

"(a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

"(b) The exchange of expert witness information shall include either of the following:

"(1) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

"(2) A statement that the party does not presently intend to offer the testimony of any expert witness.

"(c) If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

"(1) A brief narrative statement of the qualifications of each expert.

"(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

"(3) A **[*18]** representation that the expert has agreed to testify at the trial.

"(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

"(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney."

Dr. Segal does not contend that he was excused from his failure to designate himself as an expert witness under one of the exceptions identified in Code of Civil Procedure section 2034.300. Dr. Segal ignores the procedural posture of the case and the requirements for identifying expert witnesses in the Code of Civil Procedure. Nor does Dr. Segal contend that the trial court erred in granting defendants' motion in limine to exclude his expert witness testimony. Instead, Dr. Segal cites various parts of the record where, he contends, defense counsel asked him questions calling for expert witness testimony or where defense counsel failed to object to his counsel's questions calling such testimony, and the trial court permitted such testimony. **[*19]** Dr. Segal argues that by treating him as an expert witness, defendants and the trial court opened the door to his expert witness testimony on the disclosure duty for informed consent. Dr. Segal cites no authority for the implicit proposition that a party is relieved from its duty to list its expert witnesses as required by the Code of Civil Procedure and may offer expert witness testimony whenever its opponent asks questions of a witness that call for unrelated expert witness testimony or fails to object to improper, unrelated expert witness testimony and the trial court permits such testimony. We reject Dr. Segal's argument. Dr. Segal's failure to designate himself as an expert witness and his failure to oppose defendants' subsequent in limine motion render Dr. Segal's testimony as an expert witness inadmissible under Code of Civil Procedure section 2034.300.

In addition, Dr. Segal did not supply an offer of proof that he would qualify as an expert on the precise subject matter in issue. The trial court did not abuse its discretion in rejecting Dr. Segal as an expert on that basis. (See *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972.)

DISPOSITION

The judgment is affirmed. Defendants **[*20]** are awarded their costs on appeal.

MOSK, J.

We concur:

TURNER, P.J.

ARMSTRONG, J.