Frankel v. Cedars-Sinai Foundation

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Ariella Frankel (Ariella)[1] appeals a jury verdict in favor of defendant Cedars-Sinai Foundation, dba Cedars-Sinai Medical Center (Cedars-Sinai). Ariella was born prematurely and developed necrotizing enterocolitis (NEC) while being cared for in Cedars-Sinai's neonatal intensive care unit (NICU). She contends the trial court erred in (1) requiring a pretrial independent medical examination; (2) granting defendant's in limine motions; and (3) behaving in a hostile manner to her counsel during trial. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Ariella's Birth

Deanna Frankel (Deanna) gave birth on December 14, 1997, at Cedars-Sinai to twin babies, a girl (Ariella) and her brother Zev. The twins were born prematurely at 25 weeks. While in Cedars-Sinai's NICU unit, Ariella developed NEC and required surgery to her bowel. Ariella was released from the hospital in May 1998, and at age eight months was diagnosed with periventricular leukomalacia (PVL), a form of brain damage.

Currently, Ariella has static encephalopathy, meaning that her PVL condition is not worsening. However, Ariella has cerebral palsy, spastic quadreparesis (paralysis), relative microcephaly (a small head due to her underdeveloped brain), and cortical blindness. She has suffered from seizures, and takes anti-convulsant medication. Her motor and intellectual skills are significantly delayed (she is at the three to six-month level), she will not be able to live independently, and she will require lifetime 24-hour attendant care. Her lifetime medical care in present dollars is estimated to be nearly $8 million.

Ariella contended at trial that her neurological problems were caused by her bout of NEC. Cedars-Sinai contended that her PVL was a result of her prematurity. The evidence at trial disclosed the following:

Ariella weighed 710 grams at birth. Babies born at 24 weeks are on the threshold of viability. Their vascular systems are underdeveloped, and they commonly suffer from respiratory problems. About 40 to 60 percent of babies born at 25 weeks do not survive; of those that do survive, around 50 percent are neurologically impaired.

At birth, Ariella suffered respiratory distress and was put on a ventilator. She had a heart defect (patent ductus arteriosus), which is an open connection between the pulmonary artery and the aorta that results in low oxygen in the baby's blood. She had low blood pressure, and suffered from apnea (gaps in breathing) and bradycardia (slow heartbeat). Premature babies are at risk of developing intracranial hemorrhage caused by fragile blood vessels; Ariella suffered from one. Ariella had episodes of low blood pressure, and like most premature infants, was unable to autoregulate her blood pressure. Infants with these problems are predisposed to complications, including cerebral palsy, blindness and deafness.

PVL,[2] damage to the white matter surrounding the ventricles of the brain, occurs in seven percent of infants weighing under 750 grams at birth. PVL is the result of the premature infant's underdeveloped vascular system, and causes damage either because nutrients do not reach developing brain cells, or because the infant's brain cannot properly regulate blood pressure to insure adequate blood supply to the brain. As a result, portions of the brain are starved for nutrients and do not properly develop. PVL does not always manifest itself immediately.

NEC[3] is a very common problem in premature infants. NEC occurs because the infant's digestive system is not properly fed by its immature vascular system. As a result of vascular immaturity, the bowel becomes dilated with gas, blood flow is further compromised, and the bowel becomes gangrenous; a hole can form in the intestine. Portions of the bowel die because they do not receive enough oxygen, and surgery is necessary to excise dead tissue. NEC can develop slowly or arise very quickly.

NEC is not necessarily an infectious process. While antibiotics are used in the event an infection occurs, if a baby is developing NEC, the symptoms will occur even if antibiotics are given. The symptoms of NEC are a hard, distended abdomen, which is often reddish in color, blood in the stool, and green "residuals."[4] In addition, an x-ray ("K.U.B.") of the kidney, ureter, and bladder and a sideways x-ray can assist in diagnosing NEC.

NEC by itself does not cause PVL or brain damage. The salient concern with NEC post-operatively is the amount of remaining healthy intestine. The bowel can be partially dead, with a healthy muscular outer layer but a dead, inner mucosal layer. This results in poor absorption of nutrients, which are absorbed through the mucosal layer. Internal scarring can also result.

2. Ariella's Development of NEC

On January 11, Ariella's girth was normal and her abdomen was soft. There was no discoloration, although there was one heme-positive stool. Antibiotics were prescribed and given, but were discontinued on January 14. Feedings by mouth were discontinued. An x-ray was normal. NEC was ruled out.

On January 12, Ariella's girth was unchanged. Her abdomen was soft and there was no discoloration. These findings were inconsistent with NEC. Three stools were tested, and all were negative for blood.

On January 13, Ariella's girth remained within normal limits. Her abdomen was soft and there was no discoloration, and her residuals were normal. NEC was not suspected at this time.

On January 14, Ariella's morning examination for NEC was normal. However, in the evening, Ariella's abdomen became firm and she had a large residual. NEC was diagnosed in the evening of January 14.

On January 15, Ariella's symptoms had worsened somewhat. Dilated bowel loops were seen, although no sideways x-ray had been taken. Her abdomen was distended and firm.

On January 16, Ariella's bowel wall thickened. Her platelet count dropped.

On January 17, early in the morning, Ariella was taken to surgery. Bowel contents which should have been inside the intestine were outside in the abdominal cavity, indicating a burst intestine (although this was not apparent from x-rays). Portions of Ariella's small intestine were removed. Ariella's surgeon opined that she had a very good result from her surgery.

During this time period, Ariella's blood tests came back negative for bacterial infection.

Ariella's expert testified that her treatment in the NICU during the period January 11 through January 17 fell below the standard of care. This conclusion was based upon the following facts: Ariella's feeding was restarted after January 11, and did not give the vascular system of her intestines sufficient time to rest. Ariella did not have follow up K.U.B. x-rays after January 11. Although the blood cultures did not show infection on January 13 when the antibiotics were stopped, pathogens do not always show up immediately in the tests. Thus, when the antibiotics were stopped, the alleged infection manifested itself very quickly.

Defendant's experts opined that Ariella's current condition was the result of her prematurity and associated problems, and was not caused by her episode of NEC. Ariella had all of the risk factors for PVL: extreme prematurity, periods of low blood pressure, and variations in her heart rate. While one of defendant's experts had never seen a case of PVL caused by NEC, that expert acknowledged NEC can lead to PVL if the NEC causes low blood pressure or shock. However, at the time Ariella developed NEC, her blood pressure and oxygen levels were normal.

The jury unanimously found in favor of defendant.

DISCUSSION

Plaintiff contends that the trial court erred in (1) compelling Ariella to submit to a medical examination by two physicians; (2) granting defendant's in limine motions and in excluding exhibit 34 on hearsay grounds; and (3) acting in a hostile manner towards plaintiff's counsel.

I. THE TRIAL COURT DID NOT ERR IN ORDERING ARIELLA'S EXAMINATION BY TWO PHYSICIANS

Plaintiff contends that the trial court erred in granting defendant's motion to compel Ariella's examination by two physicians (Dr. Kimberly Bedell and Dr. Jean Lake) because the motion was not accompanied by any medical evidence. Furthermore, plaintiff contends a vocational rehabilitation expert cannot be allowed to examine a medical malpractice plaintiff. (Browne v. Superior Court (1979) 98 Cal.App.3d 610, 615.)

Plaintiff's argument is not well taken. Code of Civil Procedure section 2032, subdivision (c) provides a party is entitled to one physical examination. Section 2032, subdivision (d) provides that additional examination may be had with leave of court upon a showing of good cause. "Nowhere does the Legislature specifically limit the number of available examinations, either mental or physical." Thus, multiple examinations may be ordered upon the requisite showing. (Shapira v. Superior Court (1990) 224 Cal.App.3d 1249, 1255.)

Here, reams of medical evidence were not necessary to establish good cause. Plaintiff claimed she suffered from debilitating illness, requiring 24-hour life-long care. In order to defend Ariella's claims, Cedars-Sinai needed evidence to evaluate its potential exposure to damages. Its request for examination by a physician, Dr. Bedell, who was certified by the American Board of Physical Medicine and Rehabilitation, was therefore reasonable.[5]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT'S IN LIMINE MOTIONS OR IN ADMITTING EXHIBIT 34

We review for abuse of discretion trial court orders excluding evidence pursuant to motions in limine. (Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal.App.4th 1422, 1431-1432.) A trial court has broad discretion in ruling on the admissibility of evidence. (Evid. Code, § 352; Tudor Ranches, supra, 65 Cal.App.4th at p. 1431.) An abuse of discretion is established only where there is a clear showing the ruling exceeded the bounds of reason under all the circumstances. (People ex rel. Lockyer v. Sun Pacific Farming Co. (2000) 77 Cal.App.4th 619, 639-640.) We find no abuse of discretion in the granting of the motions.

A. Motion in Limine No. 5, Exclusion of Mention of MICRA Damages Cap

Motion in limine number 5[6] requested the trial court to prohibit the mention of the $250,000 damages cap in medical malpractice actions for pain and suffering to avoid jury confusion and because the applicability of rules that would increase or decrease the verdict was an issue for the court to determine. (Civ. Code, § 3333.2; Marshall v. Brown (1983) 141 Cal.App.3d 408, 418.) Plaintiff argued at trial that this was an improper motion in limine because it merely requested a ruling on pure issues of law. (See, e.g., Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659, 670.)

One of defendant's stated grounds, however, was not merely a request for a ruling on an issue of law. Rather, defendant sought to avoid the prejudicial result that a confused jury might award higher, unsupported economic damages to compensate for the MICRA cap on non-economic damages. We find no abuse of discretion.

B. Motion in Limine No. 9, Exclusion of Evidence Concerning Zev Frankel's Care and Condition

Motion in limine number 9 excluded evidence that Ariella's twin, Zev, received care and treatment which met the standard of care and did not develop NEC, and that today Zev is healthy and well. Ariella's opposition to the motion provided no substantive basis for presenting this evidence at trial. At the hearing, she argued the evidence was relevant to rebut Cedars-Sinai's contention that NEC routinely occurs in a small percentage of premature children. After the motion was denied, Ariella requested to be heard again and the court asked counsel to file an offer of proof setting forth witnesses and proposed testimony. Ariella's offer of proof stated that once the Frankels learned from Dr. Agosto Sola, the Chief of Cedars-Sinai's neonatology department, that Ariella had NEC, the Frankels continued their round-the-clock vigil to ensure that Zev did not get NEC: they insisted his feedings be stopped; he was put on antibiotics; his abdomen was measured every three hours; and they demanded an x-ray. The court affirmed its ruling on the in limine motion. In her motion for a new trial, Ariella presented further evidence in support of her contention in the form of Zev's discharge papers and his gastroenterologic report.

We find no error. Exclusion of evidence of Zev's treatment and condition was not an abuse of discretion because the evidence was marginally relevant and its admission would have caused undue jury confusion. The issue at trial was whether Ariella's treatment fell below the standard of care, and if so, whether her treatment caused her damage. The appropriate standard of care should be adduced by expert testimony; in any event such expert testimony would be made without reference to Zev's treatment. The fact that Zev did not get NEC does nothing to establish that Ariella's treatment was below the standard of care. Furthermore, introduction of Zev's condition and treatment posed the potential for substantial jury confusion. Finally, Ariella's offer of proof was deficient because it did not contain the names of competent witnesses or the substance of their testimony. (See Semsch v. Henry Mayo Newhall Memorial Hospital (1985) 171 Cal.App.3d 162, 167 [offer of proof must contain admissible evidence, specify the purpose of the testimony, and give the name of the witness and the

content of the witness's testimony].)

C. Motion in Limine Nos. 10 and 11 Concerning Genevieve Clavreul, R.N.'s Testimony About Complaints and the Conditions in the NICU

Defendants moved to exclude reference to Plaintiff's expert Genevieve Clavreul, R.N., as a "whistle blower," and her work at Cedars-Sinai as a registry nurse in 1997 and 1998 under a contract, when she was not asked to come back due to complaints she made about conditions in the NICU (motion No. 10). Defendants argued that Nurse Clavreul was not a whistle blower because she had not been wrongfully discharged from Cedars-Sinai, nor was there any evidence of retaliation for reporting alleged hospital wrongdoing.

The trial court conducted a hearing on the motion pursuant to Evidence Code section 402, at which Nurse Clavreul testified that during late 1997 and early 1998, she worked as a registry nurse at Cedars-Sinai; she was not an employee of Cedars-Sinai. She believed she was blacklisted by Cedars-Sinai because she reported numerous nursing malpractice issues. She observed that nurses came into the NICU without changing their scrubs, in violation of Title 22. On one night shift, a nurse came on duty after having taken Vicodin, and Nurse Clavreul refused to work with that nurse. She spoke to Dr. Sola, head of the NICU, who told her that the quality of care at Cedars-Sinai was worse than what he had seen in Argentina. She testified that the term "whistle-blower" is utilized in the Code of Ethics of the California Nursing Association, and a nurse has a duty to report inappropriate care. One time she observed a nurse come into the NICU and put his hand with a long-sleeved wool sweater into an isolette containing one of the Frankel twins, contaminating it. Nurse Clavreul could not say, apart from the medical records, which nurse cared for the Frankel twins from January 11 through January 14, 1998.

The court found that the evidence concerning another nurse taking Vicodin would be excluded because there was no evidence the particular nurse cared for the Frankel children. The evidence concerning Nurse Clavreul's conversation with Dr. Sola was excluded on the grounds its prejudicial nature far exceeded its probative value because Nurse Clavreul could not identify the particular nurses in question. With respect to the male nurse who came in with his sweater on, the court found that the prejudicial nature of that evidence far exceeded its probative value because Nurse Clavreul did not know which twin was affected and she did not know whether the event occurred before January 14, 1998. Finally, the court found Nurse Clavreul could not be called a "whistle-blower" because all of the evidence she was blowing the whistle about was being excluded.

We find no abuse of discretion. The evidence was of minimal probative value and would have unduly confused the jury with collateral issues. Nurse Clavreul's testimony would not have tended to establish that a particular nurse on a particular occasion behaved in a fashion which harmed Ariella. At most, any connection was speculative. Furthermore, there was substantial evidence at trial that NEC was not an infectious illness, but rather was a vascular disorder common in premature babies

which had a rapid onset. Evidence concerning the failure to change scrubs, wash hands, or use of an isolette in a wool sweater would have done little to establish conduct below the standard of care in caring for a vascular illness. Therefore, whether or not Nurse Clavreul "blew the whistle" on these issues was of no probative value, and instead would have encouraged the jury to find negligence based upon passion and prejudice because the defendant allegedly ran a sloppy NICU.

D. Admission of Exhibit 34

During the questioning of defendant's expert Dr. Jean Lake, she referred to exhibit 34, a page from a January 1999 report by Dr. Donald Shields, a neurologist at UCLA who had treated Ariella. The report was admitted over Ariella's hearsay objection as a business record. Ariella contends it was error to admit this exhibit because an expert may not testify in detail as to matters contained in hearsay reports.

Ariella's argument, while correct, is inapposite. While we agree an expert may not testify in detail to matters contained in hearsay report, the report at issue here was admitted under the business records exception to the hearsay rule. (Evid. Code, § 1271.) Ariella has not shown that its admission as a business record was error.

III. THE TRIAL COURT DID NOT COMMIT MISCONDUCT

Ariella argues that the trial court's manifest hostility towards her counsel was severely prejudicial and mandates reversal. She contends the court criticized his examination style; became angry with counsel when persons at the back of the courtroom smiled during the examination of a witness; checked State Bar records to determine when counsel was admitted; admonished counsel for commenting on the evidence; improperly interjected itself into the questioning of an expert and instructed the jury to disregard the evidence adduced; and on several occasions chastised counsel for no reason.

A. Factual Background

The record discloses that on numerous instances, of which the following are illustrative, the trial court admonished plaintiff's counsel for the following conduct:

Speaking too loudly at sidebar; commenting on witnesses' testimony; pointing at the trial judge and interrupting her; advising the witness that they have not answered the question; violating an in limine order; failing to keep a "poker face;" and telling the court that it was "off base" on an evidentiary ruling.

In addition, during the examination of Dr. Martin, the court noted that counsel's legal assistant in the back of the court was "sharing a laugh" for the second time during the proceedings. The court

advised counsel that if further laughing occurred, the assistant would be banned from the courtroom.

Further, during trial, the court complained about the exhibit list and provision of copies of exhibits. Later, after the court again admonished counsel concerning provision of copies of exhibits, counsel advised the court he believed it was denying due process to Ariella. The court proceeded to read counsel the Local Rules. Counsel argued that the court was "depriving my brain-damaged little client of due process with your continual recitation of these nitpicking rules that are -- that simply give employment to some $20,000 a year bureaucrat."

We have reviewed the entire record and find that the court's conduct and admonitions, taken as a whole, did not deprive plaintiff of a fair trial. A "trial judge should be judicial, impartial and open-minded with respect to the issues, evidence, parties, witnesses and counsel; the judge's manner should be temperate and courteous." (7 Witkin, California Procedure (4th ed. 1997), § 254, p. 300; see also Hall v. Harker (1999) 69 Cal.App.4th 836, 841-843 [court bias towards attorneys in general as evidenced by running commentary throughout trial denied plaintiff fair trial].) There is nothing in the record demonstrating the trial court had any bias against plaintiff or her counsel or ruled unfairly on issues adverse to plaintiff.

DISPOSITION

The judgment of the superior court is affirmed. Respondent is to recover its costs on appeal.

We concur: PERLUSS, P. J., JOHNSON, J.

1. Because there are family members involved, we refer to the parties by their first names where appropriate to avoid confusion, and not out of disrespect.

2. The term "periventricular leukomalacia" is derived from "peri" (around), "ventricle", "leuko" (white), and "malacia" (tissue destruction).

3. The term "necrotizing enterocolitis" is derived from "necrosis (death), "entero" (intestine), and colitis (inflammation of the colon).

4. Residuals are undigested food remaining in the stomach after feeding.

5. Browne v. Superior Court, supra, 98 Cal.App.3d 610 is inapplicable because Browne held a "vocational rehabilitation counselor" was not a physician and thus not within the scope of Code of Civil Procedure section 2032, which referred to "physicians." (Browne, supra, at p. 615.) Here, Dr. Bedell was a physician.

6. Although she argues error on all 13 motions in limine, plaintiff confines substantive argument in her brief to motion numbers 5, 9, 10 and 11. We do not consider issues raised but not briefed. (Associated Builders & Contractors, Inc. v. San

Francisco Airports Com. (1999) 21 Cal.4th 352, 366; Dills v. Redwoods Associates, Ltd. (1994) 28 Cal.App.4th 888, 890 [court of appeal will not develop parties' arguments for them].)