

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

SAMUEL LEE, a minor, by and)
through his guardian ad litem,)
ESTHER LEE, ESTHER LEE and YOUNG)
SUK LEE,)
)
Plaintiffs and Appellants,)
)
vs.)
)
THE HOSPITAL OF THE GOOD)
SAMARITAN CORPORATION,)
)
Defendant and Respondent.)
)
)
_____)

APPELLANTS' REPLY BRIEF

Appeal from Los Angeles Superior Court

Hon. Elizabeth A. Grimes

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I. HOSPITAL'S ARGUMENT THAT IT FULLY COMPLIED WITH THE EXPERT WITNESS DISCLOSURE REQUIREMENTS OF CCP § 2034, AND THEREFORE HAD STANDING TO REQUEST EXCLUSION OF THE CAUSATION TESTIMONY BY SAMUEL'S EXPERT WITNESSES, IS WITHOUT MERIT.

On page 28, et seq. of Respondent's Brief, Hospital contends that Samuel's argument on this issue is frivolous, because it was expressly rejected by two published opinions, neither of which was cited by Samuel: Sprague v. Equifax, Inc. (1985) 166 C.A.3d 1012, 213 C.R. 69, and Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 C.A.3d 1244, 226 C.R. 306. Respectfully, these two cases are not competent authority for Hospital's point.

It is well-established that an opinion does not constitute authority for a point not raised, considered or resolved therein. Styne v. Stevens (2001) 26 C.A.4th 42, 57, 109 C.R.2d 14. Of Hospital's two cases, only Sprague addresses the issue of whether the objecting party had standing to object to the opposing party's expert witness testimony by complying with the expert witness disclosure requirement of CCP § 2037.3 (the predecessor to CCP § 2034). Sprague, however, is distinguishable from the instant case.

In Sprague, defendants appealed from an adverse judgment, arguing, amongst other things, that the trial court erred in excluding defendants' expert medical witness testimony, contending that plaintiff did not have standing to interpose an objection to such testimony because plaintiff was not in compliance with the expert witness disclosure requirement. In rejecting defendants' contention, the Court of Appeal reasoned at 1040-1041, in summary, as follows:

Compliance with the expert witness disclosure statute requires inclusion of a statement of the general substance of the expert's testimony. The statute "requires the party to disclose, either in his witness exchange list, or in response to a request at the witness' deposition, the substance of the facts and opinions to which the witness will testify at trial (Kennemur v. State of California (1982) 133 C.A.3d 907, 184 C.R. 393)."

"Plaintiff informed appellants that Dr. Nelson would testify `to the medical care and treatment rendered to plaintiff as well as [his] diagnoses and prognoses of plaintiff's physical condition.' Dr. Nelson testified that he had examined plaintiff at the request of the worker's compensation insurer and gave his findings and interpretations of the various tests and diagnostic procedures he had used. He testified on the general diagnosis of disc disease; explained medical terminology relevant to plaintiff's treatment; testified to his interpretation of other doctor's reports which he had seen in making his diagnosis; testified to symptoms of disc disease; answered hypothetical questions about what his diagnosis would be, given certain symptoms; and gave his evaluation of Dr. Ramey's X-rays, and X-ray reports; his evaluation of X-rays and the medical tests taken by other doctors after the disability; and his disagreement with Dr. Ramey's diagnosis. Nothing in his testimony went beyond plaintiff's statement of the `general substance of the testimony.'"

Sprague held that plaintiff's disclosure that his expert would testify "to the medical care and treatment rendered to plaintiff as well as [his] diagnoses and prognoses of plaintiff's physical condition" constituted a disclosure of "the substance of the facts and opinions to which the witness will testify at trial" as required by the expert witness disclosure statute per the holding in Kennemur, and adequately covered the witness's trial testimony to that effect. The breadth of the disclosure in Sprague was substantially more comprehensive than the cursory statement by Hospital in the instant case: "Standard of care, causation, and damages." Therefore, Sprague is readily distinguishable from the instant case.

Williams did not involve the issue of whether the party seeking exclusion of the other party's expert witness testimony did not have standing to do so for failure to properly disclose the substance of the testimony of the objecting party's expert witnesses. Rather, Williams involved the issue of whether the trial court committed prejudicial error in admitting the testimony of expert witnesses which was contradictory to or nonexistent at the expert's depositions. In affirming the judgment, the Court of Appeal reasoned at 1257-1259, in summary, as follows:

Pursuant to the predecessor to CCP § 2034, as interpreted by the California courts, including Kennemur, on proper request, a party is required to "disclose the substance of the facts and the opinions to which the expert will testify, either in his witness exchange list, or in his deposition, or both." The fact that plaintiff's expert witnesses either gave

no opinions or contradictory opinions during their depositions to the opinions they testified to at trial was adequately explained under the circumstances of that case, including that the experts did not have adequate information available at the time of their depositions.

In relying on Kennemur as California judicial authority interpreting the predecessor to CCP § 2034, Williams stated that the statute required disclosure of "the substance of the facts and the opinions to which the expert will testify." Williams observed that Kennemur did not require disclosure of specific facts and opinions as suggested by the defendant in Williams; and that such a requirement would defy the clear language of the section (i.e., "substance") and the practical dynamics of intelligent trial preparation. Nonetheless, consistent with Kennemur, Williams held that the "substance" of the facts and opinions to which the expert will testify at trial, as differentiated from the "specific" facts and opinions, must be disclosed to the opposing party either in the expert witness designation or at the expert witness deposition, or both.

In Williams, the subject experts' depositions were taken. In the instant case, the depositions of Hospital's experts were not taken. Therefore, whether Hospital complied with the testimony disclosure requirements of CCP § 2034 must be judged strictly on the content of its CCP § 2034 expert witness declaration. Hospital's perfunctorily stating only the elements of a cause of action for medical malpractice on which its experts would testify cannot properly be deemed to comply with the requirement of

disclosure of the "substance of the facts and opinions" the expert will testify to at trial.¹ The full elaboration of this principle is enunciated in Kennemur at 919:

"In our view, this means the party must disclose either in his witness exchange list or his expert's deposition, if the expert is asked, the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for a cross-examination and rebuttal of the expert's testimony."

II. HOSPITAL'S CONTENTION THAT THE STANDARD OF APPELLATE REVIEW OF THE TRIAL COURT'S EXCLUSION OF THE CAUSATION TESTIMONY OF SAMUEL'S EXPERT WITNESSES IS ABUSE OF DISCRETION, RATHER THAN DE NOVO REVIEW, IS WITHOUT MERIT.

On page 21 of Respondent's Brief, Hospital argues that the trial court's evidentiary rulings excluding the causation testimony of Samuel's expert witnesses is to be reviewed on appeal by the abuse of discretion standard. Respectfully, this contention is incorrect in the context of the instant case.

Samuel concedes that generally appellate court's apply the abuse of discretion standard in reviewing a trial court's rulings on the admissibility of evidence. See Ripon v. Sweetin (2002) 100 C.A.4th 887, 900, 122 C.R.2d 802, 812. For instance, this standard

¹ The aforesaid statutory interpretation in Kennemur was restated with approval in both Sprague and Williams, the two cases relied upon by Hospital on this point.

applies to decisions which turn on the relevance of proffered evidence (Ripon, supra at 900), whether a proper foundation of expertise is presented to permit expert opinion testimony (Jackson v. Deft, Inc. (1990) 223 C.A.3d 1305, 1319, 1320, 273 C.R. 214, 223), whether to receive lay witness opinion testimony (Osborn v. Mission Ready Mix (1990) 224 C.A.3d 104, 112, 273 C.R. 457, 461), or whether evidence was properly excluded under Evidence Code 352 (Akers v. Miller (1998) 68 C.A.4th 1143, 1147, 80 C.R.2d 857, 859).

In contradistinction, questions of statutory interpretation are purely legal issues to which the de novo standard of review applies. Associated Builders & Contractors, Inc. v. San Francisco Airports Commission (1999) 21 C.4th 352, 361, 87 C.R.2d 654, 659. Unlike the general evidentiary rulings which are subject to the abuse of discretion standard of review, the evidentiary ruling in the instant case pivots on the interpretation of the requirement in CCP § 2034(f)(2)(B) that the expert witness declaration contain: "A brief narrative statement of the general substance of the testimony that the expert is expected to give." As such, the evidentiary ruling in this case is a matter of statutory interpretation subject to the de novo standard of review regarding questions of law.

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III. HOSPITAL'S CONTENTION THAT THE TRIAL COURT PROPERLY EXCLUDED THE CAUSATION TESTIMONY OF NURSE PRACTITIONER CAMARA IS WITHOUT MERIT.

A. The Principle Relied Upon by Samuel in Kennemur Constitutes a Legal Holding That Has Been Accepted and Relied Upon as Controlling Law by Subsequent Cases.

On page 27 of Respondent's Brief, Hospital argued that the statement in Kennemur at 918, fn. 5, that the appellant in that case could have cured the failure to designate his expert on a particular subject area by disclosing the expert's opinion on that subject during his deposition, constitutes dicta rather than an authoritative holding. Hospital so argued on the ground that in Kennemur, the appellant did not in fact disclose the expert's opinion during his deposition.

Hospital's dicta contention is without merit. First, it fails to take into consideration the rationale of the holding in Kennemur, in which the Court stated in relevant part at 918:

"The decisive fact in the present case is appellant's failure to disclose Mitchell's expected testimony concerning the tire tracks either at Mitchell's deposition or as required by section 2037.3 [predecessor to CCP § 2034]. This failure deprived respondent of the opportunity to prepare for Mitchell's cross-examination and for possible rebuttal (surrebuttal) of his testimony. [In footnote 5:] If appellant had disclosed Mitchell's opinion concerning the tire tracks in his deposition, the statutory noncompliance would have been harmless since respondent would have been afforded

the opportunity to prepare a cross-examination and rebuttal of Mitchell's opinion. For example, respondent also failed to comply with section 2037.3 with respect to Mr. O'Shea's testimony because the general substance of O'Shea's proposed testimony was not included in the witness exchange list. Nevertheless, during O'Shea's deposition he opined that the tire tracks belonged to the VW and stated his reasons in support of that opinion; and thus, appellant was afforded the opportunity of preparing for O'Shea's cross-examination, thereby rendering harmless respondent's noncompliance with section 2037.3." (Emphasis added).

Kennemur held that the reason why expert testimony is subject to exclusion when the substance of the testimony is not properly disclosed is because it deprives the opposing party of the opportunity to prepare for cross-examination and possible rebuttal or surrebuttal of such testimony. When such disclosure is not made in the expert witness designation, but is made in the expert's deposition testimony, the other party is afforded the opportunity of preparing to confront the expert's opinion at trial, and therefore the reason for excluding the opinion is obviated. Upon this analysis, the footnoted portion of the Kennemur opinion should be considered to be a legal holding, not mere dicta.

Furthermore, as noted above in footnote 1 of this Reply Brief, both Sprague and Williams, relied upon as persuasive authority in Respondent's Brief, affirm that the analysis in the Kennemur footnote constitutes a binding holding, rather than mere dicta: Sprague at 1040 ("Section 2037.3 requires the party to disclose,

either in his witness exchange list, or, in response to a request at the witness' deposition, the substance of the facts and opinions to which the witness will testify at trial . . .); and Williams at 1257 ("As interpreted by the California courts, this requires a party to `disclose the substance of the facts and the opinions to which the expert will testify, either in his witness exchange list, or in his deposition, or both.").

B. The Holding in Bonds v. Roy Does Not Address the Subject Principle in Kennemur, and Hence Cannot be Deemed to Overrule or Disapprove It.

As noted above, it is well-established that an opinion does not constitute authority for a point not raised, considered or resolved therein. Styne v. Stevens, supra at 57. Bonds v. Roy (1999) 20 C.4th 140, 83 C.R. 289, was a medical malpractice action against a physician. In that case, the parties exchanged designations of experts, including expert witness declarations. Defendant designated Dr. Duncan, stating in the expert witness declaration that Duncan was expected to testify as to damages. At his expert witness deposition, Duncan testified that he had been retained to testify to two things: (1) to evaluate the disability of the plaintiff at the time Duncan saw him; and (2) to evaluate how much disability he was having prior to the subject surgery based on the records. Duncan specifically confirmed that he did not expect to give any testimony or opinion concerning the standard of care issues that might be involved in the case. During trial, defendant's counsel sought to expand the scope of Duncan's testimony to include two new areas which his appellate counsel

characterized as relating to "the standard of care." The trial court declined to permit this additional testimony, stating that Duncan had been expected to testify only as to damages, specifically noting that because he was the last witness, there was not enough time to adjourn and take his deposition; and therefore, any expansion of the scope of his testimony at that point would be unfair, prejudicial, and a surprise to the plaintiff.² In affirming the judgment, Bonds at 146-149 stated that the rationale for excluding the testimony of an expert witness on a subject not disclosed in the CCP § 2034 expert witness declaration was as follows:

"Indeed, the very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area. `The opportunity to depose an expert during trial, particularly when it relates to a central issue, often provides a wholly inadequate opportunity to understand the expert's opinion and to prepare to meet it. [Citations].' . . .

". . . When an expert is permitted to testify at trial on

² The trial court appeared to affirm the principle in Kennemur that disclosure of the expert witness's opinions at his deposition would cure any defect in the expert's formal designation, when the court observed that there was insufficient time at that juncture of the trial to adjourn to take the expert's deposition on the area in question. This implied that if there had been enough time to do so, that would have cured the noncompliance in the expert designation.

a wholly undisclosed subject area, opposing parties similarly lack a fair opportunity to prepare for cross-examination or rebuttal.

"In short the statutory scheme as a whole envisions timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial. . . . We therefore conclude that the exclusion sanction of [CCP 2034] subdivision (j) applies when a party unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of subdivision (f)(2), including the requirement that the declaration contain '[a] brief narrative statement of the general substance of the testimony that the expert is expected to give.'"

The rationale of the holding in Bonds is the same as the rationale of the holding in Kennemur, wherein the Court stated that disclosure of the substance of the facts and opinions of an expert witness in his expert deposition affords the opposing party the opportunity to prepare for cross-examination and rebuttal of the expert's opinions at trial, and therefore obviates statutory noncompliance in the expert witness designation disclosure. Nothing stated in Bonds is inconsistent with the aforesaid holding in Kennemur. Bonds did not refer to Kennemur whatsoever. If it was the intention of Bonds to overrule or disapprove the subject holding in Kennemur, Bonds would have expressly so stated. Bonds confined itself to the issue of excluding an expert witness's testimony when the expert witness declaration did not disclose the

substance of his testimony regarding a particular subject matter area. It did not consider the issue of whether such noncompliance was cured by disclosure of the substance of said testimony in the deposition of the expert witness. Significantly, in Bonds, the subject expert's deposition was taken, and the expert did not give testimony beyond the subject matter disclosed in his expert witness declaration. What Bonds would have held had the expert given such testimony in his deposition is pure speculation. Since Bonds did not raise, consider or resolve that issue, it does not constitute authority in contravention of Kennemur. See Styne v. Stevens, supra at 57.

C. In an Attempt to Avoid the Conclusion That Camara's Causation Testimony in Her Expert Witness Deposition Cured Samuel's Noncompliance in Camara's Expert Witness Declaration, Hospital Misrepresented the Content of Camara's Causation Testimony During her Deposition.

At page 15-16 of Respondent's Brief, Hospital contends, in summary, as follows:

Camara's deposition focused on Hospital's compliance with the standard of care. After testifying as to this topic, Camara stated she had covered all of the opinions she intended to provide at trial. RA 171 (Deposition of Camara, page 102:20-22.) After Hospital's counsel had concluded questioning Camara, Samuel's counsel sought to question her on the medical causation of Samuel's injuries, but only with respect to the medical cause of Samuel's injuries, not with respect to whether those injuries were the result of

Hospital's conduct. RA 252-253 (Deposition of Camara, pages 183-184).

Respectfully, Hospital's representation as to the content of Camara's deposition testimony on the issue of causation is incorrect.

First, Camara's testimony at RA 171 that she had provided Hospital's counsel with all the opinions she intended to provide at trial, related only to her opinions regarding the types of training options given to parents of infants similarly situated to Samuel. RA 171:13-22. Thereafter, counsel for Hospital (Holmes) and counsel for Dr. Sardesai (Trotter) continued to examine Camara during her deposition through RA 245 (Deposition of Camara, page 176), eliciting various opinions and reasons therefor on sundry topics.

Second, during examination of Camara at her deposition by Hospital's counsel, said counsel elicited opinions from Camara on the issue of causation RA 188-189 (Deposition of Camara, pages 119:4-120:25). These causation opinions elicited on examination by Hospital's counsel are summarized at pages 24-25 of Appellants' Opening Brief, to which the Court's attention is respectfully invited. Furthermore, because of the importance of this causation testimony, those pages of Camara's deposition transcript are attached to the instant Reply Brief as Exhibit 1, to which the Court's attention is respectfully invited.

The Exhibit 1 testimony is Camara's primary opinion on the causation issue:

Had the episode on December 27 that resulted in Samuel's

brain damage occurred in the Hospital, it could have been easily dealt with by intervention of a trained nurse, such that the infant would not have come to the point of needing CPR, because such adverse medical consequence would have been avoided. The fact that Samuel's mother was unable to competently deal with the situation was evidence that she had not received adequate training.

Third, Samuel's counsel did not commence examining Camara until page 176 of her transcript, more than 50 pages later! RA 245. A summary of Camara's testimony on examination by Samuel's counsel is set forth in Appellants' Opening Brief at pages 25-26, to which the Court's attention is respectfully invited. The primary purpose for this examination by Samuel's counsel was to provide an evidentiary basis for Camara's Exhibit 1 causation opinion testimony at pages 119-120 of her deposition (RA 188-189) in view of the final question and answer during that portion of her testimony:

"Q. We don't really know what happened that morning [sic, afternoon], do we?

"A. No, we don't."

After that question and answer, counsel for Hospital was satisfied to terminate his cross-examination of Camara on the causation issue (which consumed two pages of transcript) and to proceed to examination of Camara on a different topic. See RA 190, et seq. Said counsel seemed satisfied with terminating Camara's Exhibit 1 causation testimony with her concession that: "We don't really know what happened that morning [sic, afternoon]"

The purpose of Camara's examination by Samuel's counsel was to demonstrate that although she did not have first-hand knowledge as to what had happened during the tragic episode in which Samuel became comatose while being fed by his mother at approximately 5 p.m. on December 27, she was able to opine with reasonable medical probability what had happened based upon her knowledge of the mother's deposition testimony and the relevant medical records at RA 246-253:

She opined that since the episode happened during a feeding, the infant either had problems with his suck, swallow coordination, that was not seen right away, or had an emesis (spitup) that blocked the airway. Because the airway was blocked, he would have desaturated, turned blue and would have either stopped breathing ahead of time, or at that time, at which time the mother would have had to intervene and do CPR. The lack of oxygen from the airway obstruction related to the feeding that caused the infant to stop breathing long enough for his heart to be without oxygen and go into cardiac arrest. Therefore, although Camara conceded on examination by Hospital's counsel that she did not really know what had happened during the fateful feeding, with reasonable medical probability, she was able to opine what had occurred.

By virtue of Camara's causation examination by Samuel's counsel (which, as noted above, was merely a follow up to Camara's prior causation testimony on examination by Hospital's counsel) Hospital's counsel was given the benefit of hearing Camara's supplemental causation testimony during her deposition, and had the

opportunity to cross-examine Camara about the same. Rather than avail himself of the opportunity, Hospital's counsel was content to merely object to said supplemental causation testimony. Thereupon, at trial, Hospital moved to exclude all causation testimony by Camara, both the primary causation deposition testimony given on examination by Hospital's counsel, as well as the secondary causation deposition testimony given on examination by Samuel's counsel.

Respectfully, both Hospital and the Court below misrepresented the content of Camara's causation opinion testimony during her deposition. Both ignored her primary causation opinion given during examination by Hospital's counsel and focussed only on her supplemental causation opinion testimony given during examination by Samuel's counsel, improperly contending that said supplemental causation testimony was the only causation testimony given during Camara's deposition. Since Hospital's counsel had opened the issue and elicited Camara's primary causation opinion, Samuel's counsel reasonably sought to illicit the supplemental causation opinion testimony in order to make Camara's testimony on the issue complete, and afford Hospital's counsel the opportunity to cross-examine her on the supplemental opinion. Pursuant to the clear authority of Kennemur, Hospital's counsel made the improper strategic choice of objecting, rather than the proper choice of engaging Camara in cross-examination on her supplemental causation opinion, as he had engaged her in cross-examination on her primary causation opinion.

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D. Hospital's Contention That Samuel Did Not Move the Trial Court to Augment Camara's Expert Witness Declaration to Add Testimony on the Subject Area of Causation is Irrelevant.

Hospital argues that Samuel was deficient in not moving the Court below to augment Camara's expert witness declaration to add testimony on causation similar to Samuel's doing so with respect to Dr. Weinstein. Samuel did not make such motion with respect to Camara for the following reasons:

1. There was no need to make such motion in that pursuant to Kennemur, Samuel had cured the defect in Camara's expert witness designation by virtue of her causation testimony during her deposition.

2. A motion to augment an expert witness declaration is addressed to the Court's discretion. Since Samuel had already cured the designation defect by virtue of Camara's deposition testimony, it would have been unwise strategy for him to risk an adverse exercise of the Court's discretion.

3. On the final day of trial, the Court stated that it deemed Samuel's Memorandum of Points and Authorities Re Causation Testimony by Neonatal Practitioner Camara as constituting a motion to augment Camara's witness designation pursuant to CCP § 2034, and denied such motion. RT 1531:21-1532:21. Therefore, it would have been futile for Samuel to have intentionally made such a motion.

In colloquy with the Court concerning Camara's proffered testimony on causation on April 14, 2003, the Court stated that Samuel's counsel represented at a pretrial conference on March 18, 2003 that Camara would testify only as to standard of care.

Frankly, Samuel's counsel cannot agree or disagree with the Court's characterization of what was said on this topic at that pretrial conference, since said counsel cannot remember the conversation. The record on appeal does not contain a Reporter's Transcript of the March 18, 2003 pretrial conference proceedings, nor does it contain a minute order as to what occurred there. Whether the Trial Court's stated recollection of what occurred there is correct is open to speculation.

Furthermore, as mentioned on page 7 of Appellants' Opening Brief, prior to the first day of trial on April 7, 2003, the Court had granted Hospital's boiler-plate motion in limine to preclude expert witnesses from testifying to any opinions not expressed during their depositions. AA 14. Although Samuel's counsel do not have a specific recollection of the same, it is quite possible that ruling occurred at the March 18, 2003 pretrial conference. Samuel did not object to that motion because it was a meritorious motion pursuant to CCP § 2034 and Kennemur. However, since Camara had rendered causation opinion testimony at her deposition, Samuel's counsel was of the opinion that pursuant to Kennemur, the granting of said motion would not preclude Camara from rendering causation opinion testimony at trial consistent with her testimony on that subject during her expert deposition. In that context, the Court's opinion that somehow Samuel's counsel should have broached the subject of Camara's causation opinion testimony during the pretrial conference is without merit. Whether or not they broached the subject at that time, pursuant to Kennemur, Samuel was entitled to the admission of Camara's causation testimony at trial.

IV. HOSPITAL'S ATTEMPT TO CONTROVERT SAMUEL'S ARGUMENT REGARDING THE TRIAL COURT'S ERROR IN EXCLUDING THE CAUSATION OPINION TESTIMONY OF DR. WEINSTEIN AMOUNTS TO AN UMERITORIOUS MINCING OF WORDS.

During Dr. Weinstein's trial testimony, the Court posed the following question: If Samuel had remained in the Hospital under the care of a neonatal nurse, did Dr. Weinstein have an expert opinion "based upon reasonable medical probability" that Samuel would have obtained a better result. Dr. Weinstein replied:

"I think the answer is yes. If the baby had been in the hospital unit and had this amount of vomiting [the vomiting occurring at the 1 p.m. feeding on December 27], they probably would have stopped feeding the baby and had reevaluated why this happened." RT 942:16-943:5. See Appellants' Opening Brief, page 14.

Hospital contends on page 25, fn. 6 of Respondents Brief:

Dr. Weinstein's answer was equivocal because he stated: "I think the answer is yes;" and that a nurse "probably" would have stopped feeding Samuel after he vomited during the earlier feeding. This alleged equivocal response prompted the Court to repeat the question, at which point Dr. Weinstein admitted that he could not give an opinion on causation with reasonable medical probability.

Respectfully, when a person says he "thinks" this or that in answer to a question, he is not giving an equivocal answer. He is merely stating what his opinion is, i.e., what he thinks. On no less authority than the Book of Proverbs from the Old Testament, it

is noted that: As a person thinks in his heart, so is he. Proverbs 23:7. Furthermore, when Dr. Weinstein testified that a nurse "probably" would have stopped feeding the baby and reevaluated him because of his vomiting during the earlier 1 p.m. feeding, the use of the word "probably" obviously referred back to the predicate of "based upon reasonable medical probability."

Moreover, as noted on page 16 of Appellants' Opening Brief, Dr. Weinstein's two answers might reasonably be reconciled, rather than being construed as being contradictory. In answer to the Court's second question, Dr. Weinstein may have been stating that once Samuel had the episode at the 5 p.m. feeding, he could not state with reasonable medical probability that a nurse would have been able to obtain a better result than the mother did. However, he had already opined with reasonable medical probability that the 5 p.m. episode would not have occurred because a nurse would have discontinued feeding and reevaluated the baby after the 1 p.m. incident. RT 965:13-966:10; Appellants' Opening Brief, page 16.

V. HOSPITAL'S ARGUMENT REGARDING THE ISSUE OF MISTRIAL BASED UPON DEFENSE COUNSEL'S MISCONDUCT IS UNPERSUASIVE, BECAUSE IT MISCHARACTERIZES THE DECLARATION TESTIMONY OF SAMUEL'S COUNSEL, AND UNMERITORIOUSLY EMPHASIZES THE LACK OF A DECLARATION BY DR. WEINSTEIN.

Respectfully, Hospital's characterization of the Declaration testimony of Samuel's attorneys with respect to the misconduct of attorney Fraser is incorrect. In their Declarations, said counsel did not testify that Fraser threatened to report Dr. Weinstein to the D.A. if he thereafter testified falsely at trial. Rather, said

counsel testified that Fraser accused Dr. Weinstein of having previously falsely testified at his deposition that prior to his deposition he had reviewed the subject hospital records; and concluded by stating to Dr. Weinstein in an agitated voice: "This is perjury; I'm gonna frickin report this to the D.A.!" See Appellants' Opening Brief, pages 11-12. Therefore, the authority relied upon by Hospital, that it is not misconduct for an attorney to warn a prospective witness about the dangers of perjury should he thereafter give false testimony, is not applicable.

Since the Court declined the offer of attorney Fraser to testify under oath to his version of the threatening conduct, the only sworn evidence on the topic was the declarations by Samuel's attorneys, Steinhart and Song. The Court had no basis upon which to reject such sworn testimony in the absence of countervailing sworn testimony. Furthermore, the circumstances strongly militate in favor of the probability of the truth of the version of the threatening conduct given in the declaration testimony by Samuel's counsel.

First, the accusation that Hospital's counsel had engaged in improper intimidation of a witness by accusing Weinstein of having committed perjury in his deposition and threatening to bring it to the attention of the D.A., was brought to the attention of the Court immediately after the incident occurred. Second, attorney Steinhart who addressed the Court, had no way of knowing that the Court would ignore his accusation, rather than questioning Dr. Weinstein and attorney Fraser about the same. Third, Fraser's perjury accusation to Dr. Weinstein and his threat to bring it to

the attention of the D.A. was an obvious intentional ploy to psychologically intimidate the witness immediately prior to his trial testimony. Had Fraser properly sought to use the alleged perjury to impeach Dr. Weinstein's trial testimony, he would have kept the alleged perjury under wraps and sprung it on the witness while he was on the stand. Fourth, on analysis, Fraser's perjury accusation was factually absurd! Fraser "said that Dr. Weinstein claimed to have reviewed Good Samaritan's trial exhibits before his deposition, which was not possible because the exhibits were not prepared until after the deposition." Respondent's Brief, page 31. Weinstein testified at his deposition that he had previously reviewed the hospital records. Copies of those records were available for such review before they were given exhibit numbers and numerical pagination, and placed in trial exhibit books. Therefore, it was nonsensical to contend that it was impossible for Weinstein to have reviewed the hospital records prior to his deposition.

Hospital's attempted distinction of People v. Hill (1998) 17 C.A.4th 800, 72 C.R.2d 756, on the ground that the attorney making the threat in that case was a Deputy D.A. is a distinction without a difference. As a practical matter, a witness who is about to take the stand to testify can find it quite intimidating when any attorney who is an officer of the Court advises him that he has previously committed perjury in his deposition in the case (about which he may be cross-examined while on the witness stand), and that the threatening attorney intends to bring the perjury to the attention of the D.A.

Hospital's contention that Dr. Weinstein not only testified, despite opposing counsel's threat, but did so "without giving any indication that he was intimidated by defense counsel," is incorrect. The Declaration of Steinhart is the only evidence proffered as to Dr. Weinstein's intimidated state of mind. It is true that Samuel did not proffer a Declaration by Dr. Weinstein himself. However, the Declaration of Steinhart explained that was because Dr. Weinstein was so intimidated and frightened of getting himself in more trouble than he already perceived himself to be in by virtue of opposing counsel's threat, as well as a possible lawsuit by Samuel's parents for Weinstein's incompetence as a trial witness, that he declined to sign a Declaration. Nonetheless, Steinhart's Declaration testimony regarding Dr. Weinstein's mental state of intimidation as a result of attorney Fraser's threat was admissible pursuant to Evidence Code § 1251 as a statement of a declarant's previously existing mental state, being an exception to the hearsay rule. Section 1251 requires that the witness be unavailable. Since a motion for mistrial based on conduct outside the Court's presence is to be made in writing based upon declarations, and because Dr. Weinstein declined to cooperate in signing a declaration, for the purposes of the motion, he was effectively unavailable, thereby making applicable the Evidence Code § 1251 exception to the hearsay rule.

Furthermore, the very absence of a Declaration by Dr. Weinstein is circumstantial evidence of his intimidated state of mind, unless, of course, there is a substantial reason to find that Steinhart bore false witness in his Declaration concerning his

conversation with Dr. Weinstein following Dr. Weinstein's trial testimony. Since the record contains no basis upon which to make such a finding, Steinhart's Declaration testimony must be accepted as credible.

Moreover, Steinhart's Declaration testimony regarding Dr. Weinstein's attempt to confer with the Judge during a recess in his testimony (which was corroborated by the Judge) is further evidence of Dr. Weinstein's state of intimidation while he was testifying.

The comment by the Trial Court that Dr. Weinstein's demeanor demonstrated that he was able to understand and respond to questions, and that he was otherwise an able, alert, capable, experienced, and competent expert witness, is beside the point. Samuel is not contending that Dr. Weinstein was so emotionally disturbed that he totally lost his poise. Rather, Samuel contends that he was so intimidated by the threat of a criminal prosecution for perjury, he waffled in giving testimony adverse to the Hospital. The Declaration of Steinhart testifies that in Steinhart's witness preparation conversations with Dr. Weinstein prior to his trial testimony, he strongly stated that this was an obvious case of causation, and that had Samuel been under the care of a trained nurse, rather than under the care of his ill-trained mother, he would not have suffered his tragic injuries. In contradistinction, his testimony at trial was a weak reflection of his assertive statements during witness testimony preparation. As noted above, since there is no basis to reject the veracity of Steinhart's Declaration testimony, it should be accepted as credible.

VI. HOSPITAL'S CONTENTION THAT THE TRIAL COURT PROPERLY AWARDED \$16,478.75 IN EXPERT WITNESS FEES PURSUANT TO CCP § 998(c)(1) IS WITHOUT MERIT.

In regard to the issue of costs raised on appeal, it should be noted that at page 33 of Respondent's Brief, Hospital concedes that Samuel's parents are not proper judgment debtors with respect to the costs award.

Furthermore, as to Samuel himself, the costs awarded for Hospital's expert witness fees should be in the amount of \$1,112.50, the costs incurred for said experts after they were formally designated as expert witnesses; not the full \$16,478.75, most of which was incurred as fees to said experts when they were non-designated expert consultants. On this issue, Samuel argues by analogy to the rules regarding the attorney work-product privilege enunciated in CCP § 2018 and the cases decided thereunder.

It is well-established that the opinions of experts who have not been formally designated as expert witnesses are protected by the attorney work-product privilege. Hernandez v. Superior Court (2003) 112 C.A.4th 285, 4 C.R.3d 883. Experts utilized by an attorney as consultants prior to formal designation are subject to the attorney work-product privilege, being deemed to be expert consultants, rather than expert witnesses.

CCP § 998(c)(1) provides that the Court, in its discretion, may require the plaintiff to pay a reasonable sum to recover costs of the services of "expert witnesses" actually incurred and reasonably necessary in either, or both, the preparation for trial or during trial. In using the term "expert witnesses" in CCP §

998, the Legislature is presumed to be aware of the distinction under CCP § 2018 between expert witnesses and expert consultants. Based on this statutory interpretation analysis, only those costs incurred by Hospital subsequent to the designation of its expert witnesses can properly be awarded under CCP § 998(c)(1).

CONCLUSION

For all of the reasons set forth above, the Judgment appealed from should be reversed. Moreover, if the Court does not reverse the Judgment, pursuant to the concession by Hospital, no costs should be awarded against either Esther or Young Lee; and the amount of expert witness fees awarded against Samuel should be reduced from \$16,478.75 to \$1,112.50.

Respectfully submitted,

Terran T. Steinhart
Attorney for Plaintiffs and
Appellants

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c)

Counsel for plaintiffs and appellants hereby certifies that the number of words in **APPELLANTS' REPLY BRIEF** is 6213 words.

Dated: October 1, 2004

Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANTS' REPLY BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and five copies to the California Supreme Court per said Service List; and that envelope was placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed on October 1, 2004.

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