

Cottini v. Enloe Medical Center, 2014 Cal. App. LEXIS 439 (Cal. App. 3d Dist. May 21, 2014)

Third District affirms trial court's exclusion of plaintiff's expert testimony for plaintiff's failure to timely comply with expert witness disclosure requirements.

FACTS AND PROCEDURAL POSTURE

Plaintiff Patrick Cottini is a paralysis patient who was brought to Enloe Medical Center after sustaining a shoulder injury while training for the Paralympics. He sued Enloe for negligence and abuse of a dependent adult. He claimed he suffered a severe pressure sore on his coccyx (tailbone) caused by the failure of hospital employees to regularly reposition him, he did not receive adequate bowel care, and he also suffered a traumatic injury to his scrotum. The trial date was set for August 17, 2009.

On June 3, 2009, the defendant hospital served Cottini with a demand for simultaneous disclosure of expert witness information, specifying June 29, 2009 as the date for the exchange. On the scheduled exchange date, Cottini moved to disqualify the law firm representing the hospital based on a conflict of interest that plaintiff's attorney had given confidential information to another attorney in defendant's law firm. Defendant denied there was a conflict of interest and proposed to delay disclosure until three days from the hearing on plaintiff's motion. Plaintiff did not respond to the proposal. The disqualification motion was later denied.

On July 16, 2009, defendant demanded that expert witness information be disclosed no later than July 20, 2009. Plaintiff failed to disclose by the schedule date again. Defendant unilaterally disclosed its expert witnesses the next day. By August 3, 2009—the discovery cutoff date for expert witnesses—Cottini still had not disclosed his expert witnesses nor had he attempted to depose Enloe's experts. After the trial court again denied Cottini's renewed disqualification motion, it set a new trial date.

On January 6, 2011, Cottini disclosed his expert witnesses and then served notices demanding to depose Enloe's witnesses and to inspect the facility. The discovery period had been closed for some time. Cottini moved to reopen discovery, arguing that pursuant to CCP § 2034, any party that failed to timely serve an expert disclosure lacks standing to object to any other party's incomplete or untimely disclosure. Therefore the trial may commence without the ability to preclude improper expert testimony. The motion was denied. At trial, defendant filed a motion in limine to preclude Cottini's expert testimony. The trial court granted the motion reasoning that plaintiff exercised bad faith in its failure to disclose expert witnesses, and it would be highly prejudicial to Enloe to go through trial with experts that were not disclosed until after discovery cutoff. The court of appeal affirmed the trial court's decision.

DISCUSSION

The first issue the court addressed was whether the trial court abused its discretion in denying Cottini's motions to reopen discovery, continue the trial, and allow late submission of expert witness information. CCP § 2034.710 allows the trial court, on motion of any party who has failed to submit expert witness information on the date specified in the demand for an exchange, to grant leave to submit that information on a later date. If the motion is not made a sufficient time before completion of discovery, the court may permit the motion to be made at a later time *under exceptional circumstances*. Since Cottini moved for leave to submit his expert witness information well after the expert witness

discovery cutoff, he was required to show exceptional circumstances to make the motion at all. He failed to make that showing and therefore the Third District concluded the trial court did not abuse its discretion in its finding that there were no grounds for late disclosure. Because there were no grounds for late disclosure, the trial court was also correct in denying Cottini's motion to reopen discovery and continue the trial. Cottini's decision to forgo expert witness discovery in favor of pursuing a disqualification motion was "strategic" and was considered "gamesmanship", which does not justify reopening discovery.

The main issue in the case concerned CCP § 2034.300 which provides that with certain exceptions, on objection of any party who has made a complete and timely compliance with § 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 submit expert witness information. As a matter of statutory interpretation, the statute does *not* state that where the objecting party's compliance is untimely, the trial court has no power to exclude such testimony. The trial court still possesses inherent equitable powers to promote fairness which extends to the preclusion of evidence. Cottini's late disclosure was made after the close of expert witness discovery, thereby providing no opportunity for Enloe to depose plaintiff's experts. In a case where discovery of experts was vital the court considered this an egregious violation of the expert witness discovery rules. Thus the trial court did not abuse its discretion in exercising its inherent power to exclude Cottini's expert testimonies.