

***Staub v. Kiley*, 2014 Cal. App. LEXIS 520 (Cal. App. 3d Dist. May 20, 2014)**

Plaintiffs' late disclosure of expert witness information was not so unreasonable so as justify exclusion of their expert testimony at trial.

FACTS AND PROCEDURAL POSTURE

Plaintiffs George and Julianne Staub filed an action for medical malpractice and loss of consortium against defendants Dr. James Kiley and Regents of the University of California. In May 2008, George was treated by Kiley for pain and swelling in his left leg and severe pain in his left groin. Although he was diagnosed with deep vein thrombosis, and despite Kiley being informed by a specialist that George's pain was likely caused by May-Thurner Syndrome, no ultrasound or other procedure was performed to determine the cause of the pain. Had an ultrasound been ordered it would have revealed George's condition, which requires treatment to begin within a week or two of the first symptoms to be effective. Kiley never informed George of any of these facts before discharging him. In June 2008, George saw another physician at Regents' UC Davis Medical Center and an ultrasound was performed. Although doctors there observed additional clotting extending in the left groin, they did not test for May-Thurner Syndrome. In January 2009, George saw doctors at Stanford Hospital who tested and discovered he suffered from May-Thurner Syndrome. At this point it was too late for treatment. In February 2011, plaintiffs filed a first amended complaint, adding claims for fraudulent concealment and lack of informed consent. Trial was set for February 14, 2012.

On December 6, 2011, defendants served by mail a demand for exchange of expert witness information and set the disclosure date for December 27. Defendants exchanged their expert witness information on that date, but plaintiffs did not until January 12, 2012 by fax and on January 14 by mail. Plaintiffs then informed defendants that their attorney would be unavailable until January 27. On February 2, plaintiff's attorney faxed a letter to defense counsel stating that plaintiffs' experts would be available the following week for deposition. Defendants immediately declined the offer. On the day set for trial, defendants moved in limine to preclude plaintiffs' expert testimonies due to late disclosure and their failure to seek leave from the court. Defendants also argued given plaintiffs' attorney's limited availability, the depositions could not be taken prior to the 15-day discovery cutoff, or in sufficient time to allow transcripts to be evaluated by defense experts. Plaintiffs opposed the motion, arguing that their late disclosure was not unreasonable and had not prejudiced defendants. The time to disclose experts had been extended by five days from the stated exchange date by operation of *CCP § 1013*. Plaintiffs' attorney also denied he acted willfully to obstruct discovery and submitted a declaration explaining his unusual difficult and unavoidable delay locating and retaining his experts.

The trial court granted defendants' motion in limine to preclude plaintiffs' expert testimony. Defendants then filed a motion for nonsuit on the grounds that plaintiffs' lack of expert witness testimony prevented them from establishing a prima facie case on any cause of action. The trial court granted the motion and entered judgment for defendants. Plaintiffs appealed and the court of appeal reversed and reinstated the action.

DISCUSSION

In determining that the trial court erred in granting defendants' motion to exclude plaintiffs' expert testimony, the court of appeal first decided that defendants lacked standing because defendants themselves failed to make a complete and timely exchange. Pursuant to *§ 1013*, when an expert witness