

***Ochoa v. Dorado*, 2014 Cal. App. LEXIS 653 (Cal. App. 2d Dist. July 22, 2014).**

**Defendants' new trial and JNOV motions were premature, and therefore rulings on the motions were void and of no effect.**

### **FACTS AND PROCEDURAL POSTURE**

Plaintiffs husband and wife filed a complaint in July 2010 against defendants for negligence and loss of consortium after they were struck from the rear by defendants' vehicle while they were driving. They named multiple treating physicians as expert witnesses, but designated no retained expert to testify specifically on the reasonableness of their medical expenses.

Defendants filed a motion in limine to exclude testimony by plaintiffs' nonretained treating physicians on any expert opinions that were not formed at the time of and for purposes of treatment, but instead were formed for purposes of litigation. Defendants also filed a motion to exclude any evidence of the reasonable amount of plaintiffs' medical expense, arguing that plaintiffs' failure to produce such evidence in response to discovery and failure to designate an expert witness to testify on the reasonableness of their medical expenses precluded the presentation of such evidence at trial. The trial court granted those two motions in part. It ruled that plaintiffs' nonretained experts could testify only on their medical services provided and the fees charged, but not whether their fees represented the reasonable value of the services. Defendants also filed a motion to exclude any evidence of or claim for noneconomic damages since plaintiffs were uninsured at the time of the collision, pursuant to CCP § 3333.4. Plaintiffs opposed the motion and claimed they had a commercial lines insurance policy issued by the trucking company for which plaintiff husband was an independent contractor. The trial court deferred the ruling. The issue came back up as a post-trial motion when defendants moved to strike the award of noneconomic damages, and the trial court granted the motion. After the jury rendered a verdict for plaintiffs, defendants filed a motion for JNOV and moved for a new trial. The trial court denied the motion for JNOV, but granted the new trial motion. It stated that plaintiffs' medical bills were not evidence of the reasonableness of the amounts charged, and evidence of earnings of the average worker were an improper basis for an award of damages for future lost earnings since such damages must be based on plaintiffs' own work history.

Plaintiffs appealed the order granting a new trial and the order striking their award of noneconomic damages. Defendants appealed the denial of their motion for JNOV and the judgment. The court of appeal reversed the order for both post-trial motions, dismissed defendants' appeal of the judgment, and remanded for further proceedings on any post-judgment motions.

### **DISCUSSION**

With respect to the motion for a new trial and JNOV motion, the court of appeal concluded the notice of intention was premature and therefore void for all purposes. CCP § 659 requires a party to file a notice of intention to move for a new trial. A notice of intention filed before the time permitted by statute is premature, void, and of no effect. The trial court had deferred its ruling on defendants' motion to exclude a claim for noneconomic damages until after the jury trial. The court heard testimony without a jury after the trial for the purpose of deciding whether plaintiffs were insured at the time of the collision. The court of appeal concluded that the legal effect of that was to order and conduct a separate trial. When issues are tried separately, there is no trial and decision until all issues have been decided.

Thus, there was no decision at the time the notice of intention to move for a new trial was filed, and the order granting the post-trial motions were void.

As to the issue regarding the award of noneconomic damages, the court of appeal concluded the order striking the award was interlocutory and there was not appealable. The court then address other legal questions that are likely to arise on remand such as whether unpaid medical bills are evidence of the reasonable value of the services provided. Relying on *Howell* and *Corenbaum*, the court of appeal found that the full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided. This rule applies equally in circumstances whether or not there was a prior agreement where the medical providers agreed to accept a lesser amount as full payment for the services provided. Since unpaid medical bills are not an accurate measure of the reasonable value of the services provided, evidence of unpaid bills cannot support an award of damages for past medical expenses.

The court also addressed whether a treating physician as a nonretained expert for whom no expert witness declaration is provided may testify on the reasonable value of the medical services provided. The identity of a treating physician is not privileged, and is subject to ordinary discovery with no special restrictions. No expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired by his training, skill and experience. This includes an opinion as to the reasonable value of services that the physician either provided to the plaintiff or became familiar with independently of the litigation.