

Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC (2013) 221 Cal. App. 4th 102

In a suit against a nursing home and its licensed operator by an elderly resident, the trial court properly denied the defendants' proposed jury instruction, but erred in admitting a DPH citation and in its interpretation of HSC section 1430.

FACTS AND PROCEDURAL POSTURE

Plaintiff is Samuel Nevarrez, who was 79 years old at the time of the incidents that gave rise to this litigation. He was admitted to San Marino nursing home in March 2009. While at San Marino, he fell nine times in just over a month. After each fall, the nursing home took additional precautions to prevent further accidents. For example, after the third fall a bed alarm was added to his room. After the fifth fall a bedside commode was added to Nevarrez's room (which he refused to use). After the seventh fall San Marino determined that Nevarrez needed around-the-clock monitoring – though it is not clear that such monitoring actually took place. The ninth fall resulted in a subdural hematoma, which required brain surgery, and a stroke. Nevarrez was readmitted to San Marino in July, and fell 2 more times before he left the facility in September, 2009.

Nevarrez sued San Marino and its licensed operator, Country Villa. The case went to trial on 3 causes of action: elder abuse, negligence, and violations of the Patients Bill of Rights. A jury returned a special verdict finding 14 separate violations of the Patients Bill of Rights, negligence (80% by defendants, 20% by plaintiff), and reckless neglect resulting in elder abuse. The jury awarded Nevarrez \$1.2 million in past medical expenses, \$200,000 for future medical expenses, and \$3 million in general damages. The court subsequently awarded Nevarrez \$7,000 for the Patients Bill of Rights violations under HSC 1430 (\$500 per violation) and \$950,000 in attorney's fees. The court denied defendants' motion to reduce noneconomic damages to the \$250,000 cap under the Medical Injury Compensation Reform Act. This appeal followed.

DISCUSSION

The court addressed three issues on appeal: (1) the denial of defendants' proposed jury instructions; (2) the admission into evidence of a Department of Public Health citation; and (3) the proper interpretation of the HSC section 1430 \$500 penalty.

Jury Instructions

Defendants contended that the trial court erred in denying their jury instructions. First, defendants wanted a jury instruction modifying the definition of "clear and convincing evidence" to read:
the evidence must be so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind.

The trial court gave the jury the standard CACI 201 instruction that clear and convincing evidence "means that the party must persuade you that it is highly probable that the fact is true." The court of appeal explained that there were no grounds for giving the proposed modified instruction, and that the proposed language was "dangerously close" to describing "beyond a reasonable doubt."

Defendants also requested various instructions concerning the use of restraints in nursing homes. The defendants' proposed jury instructions tracked the language of state regulations. The trial court rejected these instructions on the grounds that the regulations did not "rise to the level of law." The

court of appeal disagreed, but affirmed the trial court's decision on the grounds that the instructions were irrelevant, and were not properly framed as instructions on regulatory compliance.

DPH Citation

San Marino self-reported the fall which resulted in the subdural hematoma to the DPH. After an investigation, the DPH issued a class A citation and statement of deficiencies, based on violations of federal regulations. The citation included the investigator's conclusion that the ninth fall could have been prevented had the staff at San Marino acted properly, a plan of correction, and declarations from San Marino staff. Before trial, Nevarrez moved in limine to have the citation admitted, arguing that it was admissible to establish negligence per se and that it fell under the hearsay exception for official records. Defendants opposed on the grounds that the citation was currently on appeal, the declarations and plan of correction were inadmissible, the investigator's opinion was inadmissible, and Evid Code 352.

The trial court permitted admission of the citation, with the redaction of hearsay statements. At trial, when it became clear that the investigator would not testify, the defense objected to the admissibility of the citation. The court overruled the objection, ruling that the citation was admissible as a record by a public employee under Evidence Code 1280. The staff declarations were redacted, but everything else was admitted. During trial, plaintiff's counsel frequently referred to the citation, and it was the cornerstone of plaintiff's closing argument.

The court of appeal found that the plan of correction should have been excluded as it was not admissible as an admission of a party opponent, and it was inadmissible as a subsequent remedial measure. The court found that the citation itself should have been excluded under Evidence Code 352 as it created a substantial risk of unfair prejudice and of confusing the jury. The court held that the trial court abused its discretion in admitting the citation into evidence. The court found that the citation had no prejudicial effect on the jury with respect to the 14 violations of the Patients Bill of Rights under HSC 1430. However, the record did indicate that the citation tainted the verdict on negligence and on elder abuse. Accordingly, the court reversed the jury's verdict as to those two causes of action.

HSC 1430

The final issue was the proper interpretation of HSC 1430. Section 1430 provides, in part:

A current or former resident or patient of a skilled nursing facility ... may bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights ... or any other right provided for by federal or state law or regulation. ... The licensee **shall be liable for up to five hundred dollars (\$500), and for costs and attorney fees**, and may be enjoined from permitting the violation to continue.

The trial court had awarded \$500 for each of the 14 violations. However, the defendants contended that HSC 1430 permitted only a single \$500 award for all of the violations combined. The court agreed. HSC 1430 does not include the phrase "per violation," present in many other similar statutes. The court also declined to follow legislative analysis of the bill that indicated that legislators believed the fine to be "per violation," explaining that "a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute."

Held: Affirmed as to liability for violations of the Patients Bill of Rights, reversed in all other respects.