

Kline v. Zimmer, Inc.
(2022) 79 Cal.App.5th 123

The reasonable medical probability standard for expert testimony applies only to the party bearing the burden of proof on the issue that is the subject of the opinion and the party without the burden of proof can suggest alternative causes, or the uncertainty of causation, to less than a reasonable medical probability.

2 DCA - Judge Hartunian.

FACTS/PROCEDURE

Gary Kline was implanted with an artificial joint, a Durom Cup, during his total right hip replacement surgery in 2007. Defendant Zimmer was the manufacturer of the Durom Cup. In September 2008, Kline underwent a second surgery to replace the Durom Cup after the first was unsuccessful. Kline was still experiencing pain after this second surgery. In September 2010 Kline started to see Dr. Chabra, a rheumatologist, to manage his pain. Thereafter, Kline saw Dr. Chabra for eight years to address stiffness in his repaired hip and lower back pain. Dr. Chabra performed tests and studies to find the cause of the pain and proscribed Kline a steroid, a narcotic, and other drugs. Kline was on-again-off-again with the steroid because of the negative side effects. At some point, Kline sued Zimmer and claimed that the Durom Cup was defective. In 2015, a jury found the Durom Cup was defective and returned a verdict for plaintiff. However, the judge ordered a new trial due to excessive damages being awarded and misconduct on behalf of Kline's counsel.

The second trial proceeded in 2019 and Kline was still experiencing pain and weakness. The jury in the second trial heard testimony from Kline's doctors and an expert (the expert was hired to testify to the cause of his pain). Kline's expert testified to a reasonable medical probability that his pain and weakness were a result of a defect in the Durom Cup. The jury did not hear from an expert for Zimmer. Although Zimmer offered an expert, Dr. Sah, who was prepared to testify about "possible" alternative causes of Kline's pain, the trial court excluded any and all medical opinions that were expressed to less than a reasonable medical probability. Because Dr. Sah was unable to offer an opinion to a reasonable medical *probability*, Zimmer had no expert testimony. The court's basis for exclusion was purely legal: it interpreted California law as barring any expert opinion stated to less than a reasonable probability, rendering one identifying a mere "possible cause ... not a proper opinion ..."

The second trial resulted in a jury verdict against Zimmer: \$80,460.19 in economic damages and \$7.6 million in noneconomic damages. Zimmer moved for another retrial based, most importantly, on the exclusion of testimony on the grounds it was offered to less than a reasonable medical probability. The trial court denied Zimmer's motion. Zimmer appealed the judgment.

HOLDING/DISCUSSION

The California Appellate Court stated that the record established that Zimmer sought to introduce causation opinions and other evidence to challenge the causation opinion of Kline's expert, rather than to prove an actual alternative cause. Considering this, the Court found that the trial court erred in excluding Zimmer's expert testimony. The Appellate Court explained that where causation is "beyond the experience of laymen," as it is in complex medical injury cases, evidence must be in the form of an expert opinion that could be accepted by the fact finder as satisfying the plaintiff's burden of proof. That opinion must be expressed to "a reasonable medical probability," which means more likely than not. Thus, testimony by a plaintiff's expert who cannot provide testimony to a reasonable medical probability is properly excluded because the opinion could not sustain a finding in the plaintiff's favor. The same does not apply to a defendant's efforts to challenge or undermine the plaintiff's prima facie case. Even after the plaintiff has made its prima facie case, the general rule is that the burden to prove causation remains with the plaintiff. The Court stated that Zimmer was entitled to put on a case that Kline failed to satisfy that burden. To accomplish this, Zimmer did not need to show it was more likely than not that a cause identified by Zimmer resulted in Kline's injuries. Zimmer did not need to show that a different cause was more likely than not the cause of Kline's injuries. All that Zimmer needed to show was that Kline's evidence was insufficient to prove Kline's injuries were more likely than not caused by Zimmer. As a result of the trial court excluding Zimmer's expert testimony, Zimmer was unable to offer any expert testimony, which the jury was entitled to hear. This resulted in a one-sided presentation of evidence. The Appellate Court explained that un rebutted expert testimony is susceptible to being accepted at face value and therefore, Zimmer should have been permitted to offer expert opinions offered to less than a reasonable

medical probability that Kline's injuries may have been attributable to other causes. The Appellate Court concluded that its holding joins state and federal courts from across the country that recognize the reasonable medical probability requirement applies only to the party bearing the burden of proof on the issue which is the subject of the opinion. Reversed and remanded.