S230899
4th Civ. No. D066793

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

BARRY S. JAMESON,
Plaintiff and Appellant,

v.

TADDESE DESTA, M.D.,
Defendant and Respondent.

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case No. D066793

RESPONDENT'S COMBINED ANSWER TO THE AMICUS BRIEFS OF THE FAMILY VIOLENCE APPELLATE PROJECT, AMERICAN BAR ASSOCIATION, AND CALIFORNIA ACADEMY OF APPELLATE LAWYERS, ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION TO COMBINED ANSWER TO AMICUS BRIEFS

Plaintiff in this action is an incarcerated civil litigant who sued defendant Taddese Desta, M.D. for personal injury damages arising from his allegation of medical negligence. Plaintiff did not procure a court reporter to transcribe his opening statement, which was the only oral proceeding relevant to this appeal. The trial court entered nonsuit for plaintiff's failure to offer an expert witness on the issue of the standard of care and causation. The absence of a court reporter was immaterial, however, because regardless of what plaintiff raised in his opening statement, nonsuit was inevitable. Plaintiff did not have an expert witness to support his case.

The Court should affirm judgment in favor of Dr. Desta and hold that civil litigants who sue for personal injury damages are not entitled to official court reporter services at public expense. The absence of a court reporter during plaintiff's opening statement was harmless for a number of reasons, not the least of which was plaintiff's failure to designate and therefore his inability to call at trial an expert witness to offer opinions on the standard of care and causation.

The briefs of *amici curiae* attempt to expand the scope of this case for the purpose of proposing a rule that California Superior Courts must provide official court reporter services to indigent civil litigants at public expense. Even if the Court adopted such a rule, it would be immaterial for the resolution of this matter because even if the Court of Appeal Opinion is reversed, this case would be remanded

to the Court of Appeal for consideration of the remaining, dispositive and unaddressed issues.

Stated differently, even if the Court is persuaded by plaintiff and *amici* that the Superior Court erred in failing to provide plaintiff a free court reporter at trial, that error was harmless. There were many reasons the trial court ruled against plaintiff below. The Court of Appeal did not consider all of those grounds for affirmance, including the trial court's dismissal based on plaintiff's delay in prosecuting his case pursuant to Code of Civil Procedure section 583.310. Should this case be remanded for further proceedings, this Court should direct the Court of Appeal to consider whether the absence of a court reporter during plaintiff's opening statement resulted in prejudice.

COMBINED ANSWER TO AMICUS BRIEFS

Dr. Desta responds as follows to the *amicus* briefs filed by the Family Violence Appellate Project and 30 organizations and individuals representing survivors of family violence; the American Bar Association; and the California Academy of Appellate Lawyers, Beverly Hills Bar Association, Inner City Law Center, Legal Aid Association of California, Legal Aid Foundation of Los Angeles, Los Angeles Center for Law and Justice, Los Angeles County Bar Association, Public Counsel, Neighborhood Legal Services of Los Angeles County, Professor Erwin Chemerinsky, Professor David Marcus, Professor Judith Resnik, Professor Louis S. Rulli, and Western Center on Law and Poverty.

I. *AMICI'S* POLICY CONCERNS ARE NOT IMPLICATED HERE

Amici raise public policy concerns to support their proposed rule. For example, the Family Violence Appellate Project and related *amici* argue such a rule is necessary because in family violence cases, the survivors' "lives and safety, and the lives and safety of their children, are at stake." (Family Violence Appellate Project *Amicus* Brief ("FVAP Brief"), p. 1.)[1] The American Bar Association emphasizes standards designed to assist litigants who "lack[] the

[1] FVAP incorrectly assumes that the Superior Court does not provide reporter services for domestic violence restraining order hearings. (See FVAP Brief, p. 5.) The San Diego Superior Court policy provides court reporters for Family Support Division matters (actions filed by the Department of Child Support Services) and Domestic Violence Restraining Order hearings. (Petition for Review, Exh. A.)

knowledge necessary to navigate the court systems." (American Bar Association *Amicus* Brief ("ABA Brief"), p. 32.) The *amicus* brief of the California Academy of Appellate Lawyers, *et al.,* cites a report concluding that low income individuals do not have resources available to obtain legal representation in cases involving "divorce, child support, child custody, domestic violence, loss of housing and employment, and discrimination." (California Academy of Appellate Lawyers, *et al. Amicus* Brief ("CAAL Brief"), p. 9.)

In light of these policy concerns, *amici* argue it is the duty of California courts to safeguard the rights of these indigent and in propria persona litigants to meaningful access to the courts by providing official court report services. But the policies cited by *amici* are not implicated here.

Plaintiff Jameson is not an unsophisticated pro se litigant with little to no knowledge of the court system. He has filed many lawsuits as a self-represented litigant since being incarcerated and he has gained extensive knowledge of the court system. In fact, his persistent and obsessive tactics resulted in the United States Supreme Court declaring him a vexatious litigant. (See *Barry Jameson v. Jeffrey Beard, Secretary, Cal. Dept. of Corr. And Rehab.* (October 19, 2012, Case No. 11-80162) Mar. 18, 2013 Order, accessible at <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/11-8278.htm> ["As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with

Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (per curiam)"], last accessed October 6, 2016.)

Plaintiff has navigated the instant action from its inception in 2002 and through three appeals. He is not the "helpless" litigant about which *amici* are concerned. (See ABA Brief, p. 22.) Plaintiff is a savvy litigant who has been deemed an abuser of the court system. In fact, it is his tactics that have had the effect of limiting access to justice for many other litigants with legitimate claims. (See *Taliaferro v. Hoogs* (1965) 237 Cal.App.2d 73, 74 ["The constant suer for himself becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts"].)

Moreover, plaintiff's fundamental rights are not at stake in this action. Plaintiff does not face a determination that will impact his basic human needs or safety. This case does not address the problem of family violence victims, probate, or parental custody litigants and their access to civil justice. Rather, plaintiff has sued Dr. Desta for civil damages arising from his allegations that Dr. Desta prescribed him the wrong medication while he was in jail. Plaintiff's right to seek monetary compensation for his alleged injury is not a fundamental right. Jameson's position as a civil tort plaintiff is separate and distinct from other classes of self-represented and/or indigent litigants. While access to justice should be protected, abuse of the system should not.

Where, as here, a personal injury plaintiff sues his physician but fails to establish the elements of his claim during opening remarks, an

official court reporter transcript is unlikely to change the result of the action. Each of the participants in this matter understood plaintiff did not designate an expert witness to prove breach of the standard of care and causation, and it was clear to all that there would be no expert to testify live in court on plaintiff's behalf. (Respondent's Appendix, p. 254 [4/28/14 Minute Order].) The presence of an official court reporter was irrelevant as nonsuit was inevitable after plaintiff's opening statement.

In short, *amici* identify no public policy justifying a departure from the Superior Court's policy in this case where a civil litigant is suing to recover personal injury damages.

II. *AMICI* DISREGARD THE BUDGETARY REALITIES THAT GAVE RISE TO THE CURRENT SUPERIOR COURT POLICY AND THEY IGNORE THE PRACTICAL EFFECTS OF THEIR PROPOSED RULE

The Superior Court's policy is the result of an unprecedented funding crisis due to state budget cuts to the judiciary. These cuts had a severe impact on the Superior Court's ability to provide even the most basic of services. Courthouses and courtrooms shuttered, staff members were laid off, and furlough days and reduced hours of service were imposed. The elimination of official court reporter services in civil matters was necessary to ensure the court's continued operation.

The only *amicus* to acknowledge the circumstances giving rise to the Superior Court policy is the ABA, which noted the "budgetary challenges facing state courts, and the difficult decisions in

determining where and how to save money." (ABA Brief, p. 27.) The ABA argues generally that the cost of court reporter services should not be shifted to litigants because "the financial conditions that forced the courts to cut their budgets are the same ones facing the people of California." (*Id.* at pp. 27-28.)

Despite the onerous budget cuts facing California courts, *amici* propose that already scarce funds be allocated to official court reporter services. These fees can be significant, with the Government Code prescribing a *minimum* $55 per day fee for reporting testimony. (Govt. Code, § 69948.) That amount is more than double in many counties. (*Ibid.*) And in cases involving complex issues, like medical negligence actions, trials can span several weeks. The cost to the courts of simply having a court reporter present during those types of lengthy trials can be in the thousands of dollars. That does not even account for the cost of preparing the transcripts of the proceedings.

Amici do not suggest how the courts are to achieve this feat in light of their severe budgetary constraints. They leave even the most basic practical questions about their proposal unanswered. For example, when would court reporter services be provided? Must the courts provide reporters for routine matters, such as ex parte applications and case management conferences? Or would the services be guaranteed only for hearings that could result in the disposition of a case? Who makes that determination?

Furthermore, are the courts required to fund copies of the reporter's transcripts in addition to the court reporter services? The *amicus* briefs do not answer these questions. Nor do they address the likely effects of their proposed rule.

While noble in theory, *amici's* proposal would have widespread negative effects on an already overburdened court system. If court funds are to be redirected to official court reporter services, what other court services will be reduced? The courts may be forced to suspend self-help services for the indigent or mediation and settlement programs. The primary concern underlying *amici's* briefs – access to justice – will be compromised for *all* litigants in California, not just those who receive fee waivers and request court reporter services for their personal injury cases they are prosecuting.

The Court should reject *amici's* proposal and defer to local Superior Courts to allocate their limited resources in the manner they see fit.

III. *AMICI* SIMPLY REJECT THE ALTERNATIVE METHODS OF PRESENTING THE UNDERLYING ORAL PROCEEDINGS TO THE APPELLATE COURTS

Amici assume that a verbatim official reporter's transcript of the oral proceedings is the only way to effectively preserve a litigant's right to appeal. They discount or outright reject the alternative methods for preserving the oral record of proceedings which was created by the Legislature.

California Rules of Court, rule 8.137 provides a viable method for obtaining meaningful appellate court review by way of a settled statement. The statute provides a process by which the parties attempt to agree upon the testimony or arguments, after which any disputes between them are "settled" by the judge. That "settled statement" then becomes the substitute for the reporter's transcript on appeal.

Significantly, here, plaintiff did not attempt to obtain a settled statement.

Rule 8.134 provides yet another method to preserve the oral record by means of an "agreed statement." This method requires cooperation between the parties to memorialize the testimony and/or arguments. Significantly, litigants do not lose favorable appellate presumptions when they proceed by either of these means. The process is valid and effective in preserving the record of oral proceedings for appellate review.

This is particularly true in cases that involve minimal oral proceedings on straightforward issues, such as the trial in this matter. The only oral proceeding at issue in this case was plaintiff's opening statement. The trial court was called to decide the legal sufficiency of the evidence proffered by plaintiff during his opening remarks. (Code Civ. Proc., § 581c.) The court granted Dr. Desta's motion for nonsuit based on plaintiff's failure to meet his burden of proof by way of competent expert opinion testimony on the standard of care and causation. (See *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403.)

There was no witness testimony in this case. Nor did the parties or the court expect there to be in light of plaintiff's failure to designate an expert witness to prove his claim of medical negligence. Both parties made the conscious decision to forego court reporter services to memorialize what was anticipated to be a very brief oral proceeding on plaintiff's opening remarks.

The trial court was not "required by statute to make factual findings[,]" as in family violence matters. (FVAP Brief, p. 1.) Nor

was the Court of Appeal in this case called to decide whether substantial evidence supported a jury verdict or whether the trial court abused its discretion in ruling on a particular evidentiary matter during trial. Had plaintiff availed himself of the alternatives to an official reporter's transcript, he could have easily preserved the record. But he chose not to.

If the court ruled against Dr. Desta, he too could have utilized the agreed or settled statement procedures to preserve the oral record on appeal. That is to say, Dr. Desta faced the same risk as plaintiff in choosing to forego court reporter services.

Amici reject these alternative methods of preserving the oral record on appeal for reasons that are not implicated here. For instance, the Family Violence Appellate Project contends agreed or settled statements not a "tenable option" in family violence matters. (FVAP Brief, p. 4, fn. 7.) This is because a survivor of violence should not be forced to collaborate with his or her abuser. (*Id.* at p. 8.) The ABA argues these alternatives require legal acumen and may be challenging for self-represented litigants. (ABA Brief, p. 10, fn. 5.) For reasons identified above, *amici's* concerns are not relevant here.

Contrary to the position of *amici*, the remedy of a settled or agreed statement is complete, adequate, and effective, such that there is no barrier to, or denial of, access to appellate justice.

IV. THE ABA MODEL RULES AND STANDARDS DO NOT ENCOURAGE COURTS TO PROVIDE COURT REPORTER SERVICES AT PUBLIC EXPENSE

Amici ABA cite the Model Rules, Standards, and Canons as collateral sources for guidance on this issue. Not one of those standards or policies encourages courts to offer free court reporter services to personal injury litigants who have been granted a fee waiver. Rather, the ABA relies on the general principles favoring access to justice, as well as the responsibilities of trial judges to enable litigants the full benefit of the right to review and to make reasonable accommodations to pro per litigants in order to have matters fairly heard.

The ABA cites Rule 2.41 of the Standards Relating to Trial Courts to suggest that trial courts are responsible for administering court reporting services to make and transcribe the record. (ABA Brief, p. 14.) However, Rule 2.41 merely states that the trial court administrator should provide administrative services in conformance with other ABA guidelines. It lists examples of administrative services, including the "staff service" of "court reporters." (Rule 2.41, subd. (c).) The Rule does not state, let alone suggest, that the courts are responsible for providing court reporter services.

Neither does Rule 2.42 promote official court reporter services to indigent litigants. That rule simply describes the responsibilities of court reporters, including their "professional independence" in regard to the accuracy of their reporting, and the management of those services by court policies. (Cited at ABA Brief, pp. 14-15.)

ABA's conclusion that it "has long encouraged trial courts to provide court reporters" simply does not follow. (ABA Brief, p. 19.) The ABA is unable to cite any policy or standard advocating the rule they ask this Court to adopt.

In any event, this matter was fairly heard and plaintiff could have – but chose not to – preserve the underlying proceeding that consisted of his opening remarks and the subsequent grant of nonsuit.

V. THE SUPERIOR COURT POLICY DID NOT RESULT IN PREJUDICE TO PLAINTIFF

Even if this Court is inclined to find error in the Superior Court's refusal to provide an official court reporter in this matter, that error was harmless, such that the judgment in favor of Dr. Desta should be affirmed.

Plaintiff was notified that an official court reporter would not be provided in his medical negligence action against Dr. Desta, pursuant to the San Diego Superior Court policy of not providing court reporters for civil trials. On the first day of trial, Dr. Desta filed a written motion to dismiss the case based on plaintiff's failure to have brought the case to trial within five years of filing. (Code Civ. Proc., § 583.310.) The trial court deferred ruling until after trial began. The minute orders reflect that plaintiff conceded that the time limit for bringing the case to trial had expired. (Respondent's Appendix, p. 257.)

Plaintiff failed to designate an expert to establish breach of the standard of care and causation. His trial documents indicated that he

intended to rely on the deposition of an expert that he had previously retained and who had supported him in opposing Dr. Desta's motion for summary judgment. Dr. Desta moved *in limine* to preclude plaintiff from relying on the expert's deposition transcript based on (1) the failure to designate and (2) plaintiff's failure to show that the expert was "unavailable" for trial, as required by statute.

After plaintiff gave his opening statement, the defense moved for nonsuit on the ground that plaintiff could not prove breach of the standard of care or causation. The trial court granted the motion. At that time, the trial court also granted Dr. Desta's motion to dismiss for delay in getting the case to trial. Plaintiff's opening statement and arguments on the motion for nonsuit were not reported by a court reporter. Plaintiff did not seek to prepare an agreed or settled statement.

The Court of Appeal rejected plaintiff's contention that he was entitled to a free reporter. Given the absence of an appellate record, the Court of Appeal determined it could not find error in granting nonsuit. The Court of Appeal declined to consider plaintiff's challenge to the dismissal based on failure to get the case to trial, finding the nonsuit ruling to be a sufficient basis to affirm the judgment.

In the event this matter is remanded for further proceedings, the Court should direct the Court of Appeal to consider all of the reasons why the trial court ruled against plaintiff, including the dismissal based on delay in prosecution. Plaintiff's failure to designate an expert and establish his prior expert's unavailability at trial are dispositive of his case.

CONCLUSION

This Court should affirm the judgment. A personal injury plaintiff is not entitled to a court reporter at the court's expense, nor would a reported opening statement have changed the result here.

If this Court is inclined to reverse the judgment for Dr. Desta, it should remand this matter to the Court of Appeal to consider the remaining dispositive issues, including plaintiff's delay in prosecuting his case, which the Court of Appeal did not address in its opinion because it decided there were alternative grounds to affirm the judgment.

DATED: October 17, 2016

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CERTIFICATION

Appellate counsel certifies that this document contains 3,272 words. Counsel relies on the word count of the computer program used to prepare the brief.

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PROOF OF SERVICE

I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2670 Mission Street, Suite 200, San Marino, California 91108.

On the date stated below, I served in the manner indicated below, the foregoing document described as: **RESPONDENT'S COMBINED ANSWER TO THE AMICUS BRIEFS OF THE FAMILY VIOLENCE APPELLATE PROJECT, AMERICAN BAR ASSOCIATION, AND CALIFORNIA ACADEMY OF APPELLATE LAWYERS, ET AL.** on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

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By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of October, 2016.

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