Appellate Reports

Okafor v. United States of America – *Holds that a lawyer's reliance on FedEx to timely deliver a document constitutes "routine negligence"*

Okafor v. United States of America

(9th Cir. 2017) 846 F.3d 337

Who needs to know about this case?
All lawyers who litigate cases.
Why it's important:

Holds that a lawyer's reliance on FedEx to deliver a document on the day it is due constitutes "routine negligence" if FedEx fails to deliver the document timely, and therefore provides no basis to toll the missed deadline.
Synopsis:

Okafor was carrying almost $100,000 in cash in his carry-on bag, which DEA agents seized. On May 1, 2013, the DEA sent Okafor a notice informing him that the money was subject to civil forfeiture. The notice stated that the deadline for Okafor to file a claim to contest the seizure was June 5, 2013.

On June 4, 2013, Okafor's lawyer tendered Okafor's claim to FedEx for overnight delivery to the DEA. But FedEx did not deliver the package until June 6, 2013, the day after the deadline. The DEA deemed the claim untimely, and declined to reconsider that finding. The agency then forfeited the property.

Okafor filed a motion in federal court seeking a return of the property, arguing that the DEA had wrongfully deemed his claim untimely and that the district court had equitable jurisdiction to toll filing deadline. The district court denied the motion, finding that although it had equitable jurisdiction to consider the claim, Okafor failed to show any extraordinary circumstances that warranted application of equitable tolling. Affirmed.

The Ninth Circuit held that the district court did have jurisdiction to consider the motion, but that Okafor failed to establish any extraordinary circumstances sufficient to trigger the doctrine of equitable tolling. In seeking to invoke equitable tolling Okafor was required to establish two elements: (1) he had diligently pursued his rights; and (2) some extraordinary circumstance stood in his way. The Court held:

> FedEx's purported delivery delay does not constitute the kind of extraordinary circumstance that we have found to justify equitable tolling. We have noted that an attorney's filing by mail shortly before a deadline expires constitutes routine negligence. *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015). We "do not recognize run-of-the mill mistakes as grounds for equitable tolling because doing so 'would essentially equitably toll limitations periods for every person whose attorney missed a deadline.'

(*Id.* at 647 (quoting *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S.Ct. 1079, (2007)).

Sanchez v. Kern Emergency Medical Transportation Corporation

(2017) __ Cal.App.5th __ (Fifth Dist.)

Who needs to know about this case:

Lawyers drafting expert declarations opposing summary judgment, particularly in medical-negligence cases.
Why it's important:

Holds that trial court properly excluded critical statements in declaration by plaintiff's neurosurgery expert, resulting in plaintiff demonstrating any disputed issue of material fact that precluded summary judgment. The court distinguished cases that allow a conclusory declaration in opposition to a summary judgment to create triable issues, finding that these cases did not involve a declaration that was contrary to the factual record.
Synopsis:

Plaintiff Sanchez sustained a head injury while playing in a high-school football game. He was evaluated on the sideline by a standby ambulance crew consisting of paramedic Moses and EMT Armstrong at approximately 9:25 p.m. At 9:30 p.m. Moses radioed for a transport ambulance to transport Sanchez to the hospital "Code 2" – without lights and siren. The standby crew appropriately applied spinal precautions, loaded Sanchez into the standby ambulance, and drove to the corner of the field to meet the transport ambulance, which arrived at 9:38 p.m. The transport ambulance left the field by 9:42 p.m. and headed to the hospital. Several minutes later Sanchez's condition deteriorated and the transport crew upgraded the call to Code 3, a lights-and-siren emergency. The ambulance arrived at the hospital in 30 minutes, and the hospital's emergency-room personnel took over Sanchez's care at 10:13 p.m. A CT scan diagnosed Sanchez as suffering from a subdural hematoma. At 11 p.m. mannitol was administered to reduce brain swelling. Sanchez was taken into surgery at 11:42 p.m., and underwent a craniotomy. At some point he suffered a posterior-artery stroke.

Sanchez sued the company operating the standby ambulance and crew ("KEMT"), alleging that its employees were grossly negligent in assessing him

and failing to recognize that he had suffered a traumatic brain injury that required immediate urgent transport to a trauma center. He conceded that the crew of the transport ambulance had not been grossly negligent, nor had the hospital or its staff been negligent.

KEMT moved for summary judgment asserting there was no evidence to support plaintiff's allegations of gross negligence or causation of any damages. It argued that Moses properly evaluated plaintiff's condition and could not have immediately transported plaintiff to the hospital in the standby ambulance Code 3 because plaintiff did not meet Kern County's criteria for activating the trauma system (i.e., transporting plaintiff Code 3) until he was placed in the transport ambulance and his condition deteriorated. Using a timeline, KEMT also argued that the delay caused by using two ambulances was only two and-one-half minutes, which did not harm plaintiff or increase his injuries. Additionally, it argued that, even if the delay was as much as 30 minutes, plaintiff could not demonstrate the delay caused him any injury, or increased the injury he suffered, because the medical literature indicates there is no evidence such a brief delay in treatment correlates with a worse outcome for the patient.

In opposition to the motion the plaintiff submitted a declaration from a neurosurgery expert, Dr. Mobin. Without addressing any of the medical literature presented by defendant, Mobin opined, among other things, that had plaintiff "been transported immediately upon Moses's initial contact at 9:25 p.m., there would have been a decrease in brain swelling, and thereby pressure, because the administration of mannitol would have occurred much sooner." KEMT objected to portions of Mobin's declaration. The trial court sustained the objection and granted the motion, finding that Sanchez had failed to raise triable issues of fact sufficient to defeat the motion. Affirmed.

The court held that KEMT's motion was supported by medical expert testimony that presented detailed analysis of medical literature showing that delays of less than four hours before surgical treatment of a subdural hematoma, and more specifically delays less than 30 minutes, do not affect patient outcomes. It also referred to federal case law that rejected the notion that quicker is necessarily better in neural injury cases. Dr. Mobin's declaration did not acknowledge or refute this evidence.

His declaration also referred generically to the defendant's "delay" in transporting Sanchez, without differentiating between delay caused by the transfer from the standby ambulance to the transport ambulance and delays caused by (a) applying spinal precautions before transport; (b) travel time to the hospital; and (3) delays after Sanchez reached the hospital.

The court concluded that Dr. Mobin's opinion that Sanchez should have been transported immediately at 9:25 p.m. was conclusory and was supported by the undisputed facts of this case, including the other sources of delay and the medical literature showing that delays of 30 minutes or less do not affect clinical outcomes in patients with subdural hematomas.

The court distinguished cases holding that opposition declarations are subject to a liberal rule of construction so that even conclusory expert declarations can raise a triable issue of fact. The court held that in those cases the moving papers did not include expert declarations making a prima facie showing that the medical literature refuted the assumptions on which the opponent's expert opinions were based, leaving those opinions without a foundation upon which reasonable experts in the same field would rely. "When the moving papers undermine the assumptions on which the opposing expert's opinion is based, the opposing expert must do more than simply assert those discredited assumptions in order to meet the admissibility requirements of Evidence Code section 801, subdivision (b)."

The court explained, "the defense experts challenged the bases of Mobin's opinions and showed the assumptions on which the opinions were founded were not valid, according to the medical literature. Mobin made no contrary showing. Plaintiff did not refute defendant's showing that Mobin's opinions were based on assumptions of fact without evidentiary support or on speculative or conjectural factors. Such expert opinions have no evidentiary value and may be excluded from evidence."

Short(er) takes:

Employment discrimination; evidence of pretext; summary judgment. *Mayes v. WinCo Holdings, Inc.* (9th Cir. 2017) __ F.3d __.

Plaintiff Katie Mayes worked at WinCo, an Idaho Falls grocery store, for twelve years. During her final years at WinCo, Mayes supervised employees on the night-shift freight crew. On July 8, 2011, Mayes was fired for taking a stale cake from the store bakery to the break room to share with fellow employees and telling a loss-prevention investigator that management had given her permission to do so. WinCo deemed these actions theft and dishonesty that rose to the level of "gross misconduct," so it denied her claim for COBRA health coverage and payment for accrued vacation days.

Mayes sued, for gender discrimination and under COBRA, claiming that WinCo fired her in order to put a man in charge of the freight crew. The district court granted summary judgment to WinCo on all claims. Reversed. Mayes presented evidence showing that other employees at her level (a "person in charge" or PIC) believed that WinCo allowed PICs to take cakes from the stale cart into the break room to boost morale, and that her general manager, Steen, had made comments to her and others suggesting that he did not think that a woman should be in charge of the freight crew. She also produced evidence that Steen was critical of her when she left work early to pick up her children from

school, but made no similar comments when male employees did the same thing. Finally, she showed that after her termination WinCo replaced her with a man who had only one month of freight-crew experience and no supervisory experience.

Summary judgment was improper because Mayes offered ample direct evidence of discriminatory animus: (1) Steen's alleged comment that a man "would be better" leading the safety committee; (2) Steen's alleged comment that she did not like "a girl" running the freight crew; and (3) Steen's alleged criticism of Mayes, but not her male counterpart, for leaving work early to care for her children. These remarks directly concerned Mayes and the decisional process for retaining and promoting employees. Mayes's failure to give precise dates for the remarks or show a closer temporal link between the comments and her termination does not defeat her claims.

"If Mayes's testimony is believed, reasonable jurors could decide that Steen's comments, including the alleged comment that a man 'would be better' as chair of the safety committee, demonstrate Steen's overt hostility to having women in leadership roles." Moreover, contrary to WinCo's position, the fact that Steen is also a woman does not preclude a finding of discriminatory animus.

In addition, Mayes also supported her opposition with evidence of pretext. Multiple employees testified that it was a common, accepted practice – rather than an offense punished by termination – for PICs to take cakes to the break room. "That WinCo purportedly fired Mayes for following a practice described by some witnesses as 'common,' and that another PIC thought was authorized, is specific and substantial evidence that WinCo's proffered explanation for her termination is not believable. Mayes could not have stolen a cake that she had permission to take. Nor could management have reasonably thought that Mayes lied about having permission if they knew that PICs were allowed to use stale cakes to motivate employees." Additionally, Mayes presented evidence that WinCo replaced her with a less qualified male employee. Evidence that an employer replaced a plaintiff with a less qualified person outside the protected class can be evidence of pretext.

Five-year statute; when jury is "impaneled" *Stueve v. Nemer* (2017) __ Cal.App.5th __ (Fourth Dist, Div. 3.

Generally, an action must be "brought to trial" within five years of the filing of a civil complaint. (Code Civ. Proc., § 583.310, et seq.) If the time period is not tolled by statute, the case must be dismissed. (§§ 583.340, 583.360.) "In an action tried to a jury, the action is *brought to trial* when the jury is *impaneled and sworn*. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 723.)

Here, three days before the five-year date a panel of 75 prospective jurors assembled in the courtroom for jury selection. The court clerk administered an oath and the panel swore to give truthful answers. Seven days later, while voir dire was still in progress, defendants moved to dismiss under the five-year dismissal statute. The trial court granted the motion, finding that the jury had not yet been "impaneled and sworn." Reversed.

The jury was "impaneled" when the panel of prospective jurors assembled in the courtroom for voir dire. The panel was "sworn" when the prospective jurors took an oath to respond truthfully. Accordingly, the action was, in fact, "brought to trial" within five years of the filing of the civil complaint. Thus, the trial court should not have granted defendants' motion to dismiss.


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