Appellate Reports

Court looks at Medi-Cal liens and the published-compilation exception to the hearsay rule for evidence

By Jeffrey I. Ehrlich

Medi-Cal liens

L.Q. v. California Hospital Medical Center (2021) 69 Cal.App.5th 1026 (Second Dist., Div. 3)

Plaintiff L.Q. is a severely disabled child who suffered catastrophic injuries during her birth in 2015. She sued various medical providers for professional negligence, settling those actions in 2019 for $3,000,000. The California Department of Health Care Services (DHCS) asserted a lien on the settlement to recover what DHCS paid for L.Q.'s medical care through the state's Medi-Cal program. The trial court denied the lien, concluding that it was prohibited by the "anti-lien" provision of the federal Medicaid Act, 42 U.S.C. section 1396 et seq. (the Medicaid Act or the Act).

In a case of first impression, the Court of Appeal concluded that the trial court erred by denying DHCS's lien. While the anti-lien provision of the Medicaid Act generally prohibits liens against the property of Medicaid beneficiaries, other provisions of the Act carve out exceptions for settlements or judgments recovered from third-party tortfeasors, to the extent such settlements or judgments are attributable to payments made by the state for the beneficiaries' medical care. The Court therefore reversed and remanded the matter to the trial court to determine what portion of the settlement was properly subject to DHCS's lien.

Evidence; published-compilation exception to the hearsay rule

People v. Jenkins (2021) 70 Cal.App.5th 175 (Fourth Dist., Div. 3)

Jenkins was convicted of burglary of a residence and other crimes, including felony attempted unlawful taking of a vehicle. That crime required the prosecutor to prove that the vehicle was worth more than $950. The prosecution's evidence concerning the car's value came from a detective who testified he used the Kelley Blue Book's website to determine that trade-in value of the car at issue was $1,800 to $2,240. On appeal, Jenkins contended that his conviction must be reversed because the testimony concerning the Kelley Blue Book's valuation of the car was inadmissible hearsay that did not qualify for admission under the published compilation exception in Evidence Code section 1340, and absent this inadmissible evidence, there was no other evidence the car's value exceeded $950. The Court disagreed.

Section 1340 provides: "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270." Five elements must be satisfied when a party seeks to admit evidence under the published compilation exception: (1) the proffered statement must be contained in a 'compilation'; (2) the compilation must be 'published'; (3) the compilation must be 'generally used ... in the course of a business'; (4) it must be 'generally ... relied upon as accurate' in the course of such business; and (5) the statement must be one of fact rather than opinion.

Substantial evidence supports the trial court's finding these elements were satisfied. Det. Johnson described the Kelley Blue Book as a "nationwide database" used by consumers and retail personnel to determine the values of vehicles. He explained a person can enter certain information about a car on the Kelley Blue Book's website and the website provides a "calculation" of the vehicle's worth based on the information provided, with ranges in value for private party sales or trade-ins. Thus, the Kelley Blue Book compiles or puts together information concerning vehicle values, which vary depending on certain criteria like the type of car, its condition, amenities, location, and type of sale.

Johnson also testified he regularly used the Kelley Blue Book in determining the value of vehicles as part of his job as a law enforcement officer and specifically as a detective in the auto theft and burglary unit. He testified he had spoken to many car dealers who also used it to determine the trade-in values of cars. He explained consumers can also use it to determine a car's value. Johnson's testimony was sufficient to prove the Kelley Blue Book is a compilation of vehicle values used by consumers, retailers, and police officers.

Jenkins argued that the evidence presented below was insufficient to establish the Kelley Blue Book's reliability. He contended that the Kelley Blue Book's website "[a]s described by Johnson ... is nothing more than a query-based site where the user inputs certain information about the make, model and year of some car and the site 'spits out' a purported value range without anything establishing the source or reliability of the information from which this value was derived." Jenkins asserted that the prosecution did not prove reliability because it did not present evidence as to how the Kelley Blue Book calculates the vehicular values it provides or how frequently it updates the information on its website. Jenkins's argument was not persuasive. A party seeking to admit evidence under section 1340 does not have to show *how* the compilation was made, only that once made, the compilation is "generally used

and relied upon as accurate ....” (§ 1340.) This the prosecution did.

Civil Rights; 42 U.S.C. § 1983; Excessive-force claims; effect of guilty pleas

Sanders v. City of Pittsburg (9th Cir. 2021) 14 F.4th 968

Sanders fled from the police after being spotted in a stolen car. He continued to struggle after being caught, and a police officer commanded a police dog to bite Sanders’s leg. Sanders was subdued, arrested, and charged with resisting arrest. As his criminal case proceeded, Sanders filed a civil-rights action alleging that the use of the police dog was excessive force. Sanders ultimately pled no contest to all the criminal charges against him, including resisting arrest. At the plea hearing, he stipulated that there was a factual basis for his plea.

The district court dismissed Sanders’s civil-rights action based on *Heck v. Humphrey* (1994) 512 U.S. 477, 114 S.Ct. 2364. Under *Heck*, a section 1983 claim must be dismissed if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,” unless the conviction or sentence has already been invalidated. Thus, Heck bars a plaintiff ’s action if it would negate an element of the offense or allege facts inconsistent with the plaintiff ’s conviction. The Ninth Circuit affirmed the dismissal of Sanders’s case.

The California statute criminalizing resisting arrest, Penal Code section 148(a)(1), prohibits “resist[ing], delay[ing], or obstruct[ing]” a police officer during the discharge of his duties. Under California law, a conviction under this statute requires that the defendant’s obstructive acts occur while the officer is engaging in the lawful exercise of his duties. The use of excessive force by an officer is not within the performance of the officer’s duty. Thus, the lawfulness of the officer’s conduct is necessarily established as a result of a conviction under section 148(a)(1). In other words, a defendant can’t be convicted under section 148(a)(1) if an officer used excessive force at the time of the acts resulting in the conviction.

Here, as part of his guilty plea, Sanders stipulated that the factual basis for his conviction encompassed the three instances of resistance identified in the preliminary hearing transcript. Under the facts of the case, there was no way to carve out the dog bite from the conviction without necessarily implying that the conviction was invalid.

Summary judgment; expert declarations; inconsistencies between deposition and declaration

Harris v. Thomas Dee Engineering Co., Inc. (2021) 68 Cal.App.5th 594 (First Dist., Div. 5.)

After being diagnosed with mesothelioma, Harris sued several defendants for exposing him to asbestos. After his death, his wife and children amended the complaint to include wrongful-death and survival claims. In his deposition, plaintiffs’ expert industrial hygienist testified that if Harris had not been present when work on boilers on the Navy ship on which he served was done, “there would not be any issue regarding exposure [to asbestos fibers].” Despite this testimony, in opposing the defendant’s motion for summary judgment, the expert submitted a declaration opining that Harris need not have been present when the work was done, because the work could have caused asbestos fibers to remain suspended in the air for up to 80 hours through a process called re-entrainment.

In its reply, the defendant argued that the declaration about the re-entrainment phenomenon should be disregarded because it contradicted the expert’s deposition testimony and because an expert may not testify to opinions not disclosed during his or her deposition. The trial court disregarded the re-entrainment theory on this basis and granted summary judgment. Reversed.

The controlling rule is that, “a party’s expert may not offer testimony at trial that exceeds the scope of his deposition testimony if the opposing party has no notice or expectation that the expert will offer the new testimony, or if notice of the new testimony comes at a time when deposing the expert is unreasonably difficult.” Here, the court deals with summary judgment and an inconsistency between deposition testimony and a declaration.

Here, no statute renders the expert’s testimony inadmissible at trial. And the defendant acknowledged that the trial court had discretion to admit an opinion the expert did not disclose in his or her deposition. If appropriate notice of a new expert opinion is provided, the opinion may be admissible, and “the fact that an expert’s testimony at trial differs from his deposition testimony goes to the expert’s credibility; it does not, without some further evidence of prejudice to the opposing party, serve as ground for exclusion.”

Nor does the decision in *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, support the trial court’s ruling. In *D’Amico*, the California Supreme Court did *not* hold that declarations contradicting discovery responses must be “excluded.” Rather, the court stated only that such declarations may be insufficient to create a triable issue of fact. Properly understood, *D’Amico* does not state a rule regarding the admissibility of evidence; instead, the case provides guidance in determining whether a declaration that contradicts prior discovery responses is sufficient to create a triable issue of fact.

In the present case, the contradiction between the expert’s declaration and his deposition testimony does not eliminate the declaration’s evidentiary value. The stated rationale for the *D’Amico* rule is that “admissions against interest have a very high credibility value.” And this is particularly true where a deponent testifies regarding a factual matter within his or her personal knowledge and arguably contradicts the testimony in a declaration. In contrast, in the present case, the expert’s declaration relates a scientific theory that he apparently did not discuss in his deposition, and his statements in the declaration do not contradict any prior testimony regarding

facts he observed. While it is for the fact finder to ultimately decide what weight to give the expert's testimony, it was error for the trial court to assign it no weight.


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*