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Justices Overturn Order Allowing Plaintiffs to Depose Convalescent Hospital's Attorney in Malpractice Suit

By a MetNews Staff Writer

Plaintiffs' desire to verify contested calculations regarding the staffing ratio at a hospital sued for malpractice did not amount to "extremely good cause" for deposing opposing counsel, the Fourth District Court of Appeal ruled yesterday.

"Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse" and should take place only under very narrow circumstances, Presiding Justice David Sills wrote for Div. Three.

Granting a writ of mandate sought by the defendant in a wrongful death and elder abuse lawsuit, the panel vacated an order by Orange Superior Court Sheila Fell, who attempted to resolve a discovery dispute by directing plaintiffs to depose defense counsel.

The dispute began in 2003, after the children of decedent Richard Sims filed a complaint against Carehouse Convalescent Hospital alleging that its intentional practice of understaffing caused fatal injury to Sims. The 90-year-old patient had been treated at the Santa Ana-based skilled nursing facility during most of 2002, following a stroke.

In requests for admissions, the plaintiffs initially asked Carehouse to admit or deny whether it had 3.2 nursing hours per patient day during the period of decedent's residency. The hospital admitted it did not meet the 3.2 staffing ratio on every of that period.

The plaintiffs then propounded an interrogatory requesting that Carehouse list the ratio of nursing hours per patient day for each day of Sims' residency. In its response, the hospital indicated that plaintiffs could obtain the requested information by compiling and summarizing the available data on their own.

When the plaintiffs moved to compel further responses, Carehouse asserted the attorney work product doctrine. Its counsel, Irvine attorney Kippy L. Wroten, explained that her client did not maintain a log of its staffing ratios for the calendar year 2002, and she therefore had to compile the information by applying the regulatory statutes to the staffing logs and sign-in sheets—information the plaintiffs also had.

But plaintiffs' attorney Robert John Chavez contended he nonetheless needed Carehouse's later-prepared log in order to "see what their position is."

Fell granted the plaintiffs' motion to compel and directed that the response be provided by Wroten's deposition if necessary, reasoning:

"If Defendant's Counsel has made independent decision regarding the classification of certain employees of Defendant, she has placed herself in the position of being an expert witness, and plaintiff is entitled to depose her as an expert."

The plaintiffs then noticed Wroten's deposition.

But Presiding Justice David G. Sills, writing for the Court of Appeal, concluded that Fell "ran afoul of clear legal principles in requiring the deposition of Carehouse's trial counsel given the compelling policy reasons against such a deposition."

Depositions of opposing counsel are presumptively improper, justified only where the proponent makes a showing of "extremely" good cause, meaning that it lacks other practicable means of obtaining the desired information, that the deposition is crucial to the preparation of its case, and that the information is not subject to a privilege, Sills wrote.

"The adversarial system of justice presumes that the attorneys for each side oppose one another, not depose one another," he wrote.

The plaintiffs failed to make the requisite showing to justify deposing Wroten, Sills concluded, because they had access to the same underlying documentation Wroten used.

Sills further dismissed the argument that Wroten's deposition was necessary to confirm calculations she made as a necessary expert witness.

"The argument is a fallacy, and, if taken to its logical conclusion, would permit the deposition of an attorney who used his or her impressions, conclusions, opinions or legal research or theories to assist the client's responses to requests for admissions. Wroten is an advocate, not an expert witness."

Justices Kathleen O'Leary and Raymond J. Ikola concurred in the opinion.

The case is Carehouse Convalescent Hospital v. Superior Court, G037421.