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LITIGATION

Unavailability of expert warrants last-minute trial continuance

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A medical service provider recruited two gastroenterologists. They quickly became dissatisfied and departed the following year. The provider sued, and the physicians countersued. Two weeks before trial, the physicians' expert witness fell ill and could not be deposed or testify. The superior court denied the physicians' application for a trial continuance, and the court of appeal reversed.

Medical service provider sues gastroenterologists

In 2013, GI Excellence, Inc., recruited Manmeet Padda and a colleague (collectively, "the petitioners") to work as physicians at its gastroenterology center in Temecula. The petitioners signed physician recruitment and employment agreements, but they became dissatisfied with their conditions of employment and compensation. They resigned in Spring 2014.

GI Excellence sued the petitioners for breach of the agreements and other claims. The petitioners cross-complained for breach of contract, fraud, violations of Labor Code Section 970 (prohibiting the solicitation of employees by misrepresentation), and other claims. In

December 2015, the cases were consolidated and transferred to one courthouse.

During the litigation, each side designated expert witnesses to testify about the intricacies of gastroenterology medical and business practices. The petitioners designated Dr. Richard Corlin. The case progressed slowly, with the court permitting at least four trial continuances. Most recently, trial was scheduled to begin May 21, 2018.

One week before trial—and just before his scheduled deposition—Corlin suffered a ruptured hemorrhagic cyst, affecting his kidney and pancreas. His urologist informed the superior court that he should not participate in trial as an expert witness or be deposed. On May 14, 2018, the petitioners filed an application for a continuance of trial. In its opposition, GI Excellence acknowledged that Corlin would be unavailable for a May 21 trial—and possibly for many weeks thereafter. GI Excellence expressed concerns over the impact a continuance would have on patient scheduling and encouraged the trial court to implement a litigation plan that accounted for the continuance and possible replacement of Corlin.

On May 16, 2018, the superior court denied the application for continuance. The next day, the petitioners filed a petition for writ of mandate and/or prohibition with the court of appeal. The following day, the court of appeal ordered a temporary stay of the trial and any proceeding requiring Corlin's participation. After further consideration, the court issued a preemptory writ of mandate in favor of the petitioners, directing the trial court to continue (i.e., postpone) the trial because of Corlin's unavailability.

Trial continuance was appropriate

California Code of Civil Procedure Section 595.4 dictates that a motion to postpone a trial because of the absence of evidence generally requires an affidavit showing the significance of the evidence expected to be obtained and that due diligence has been used to gather it. If an application for a continuance is made because an important witness is absent, the court may require the requesting party to detail the testimony expected from the witness. If the other side stipulates the testimony as detailed can be read into the record at trial as if it were given by the witness, the trial will not be postponed. Notably, the affidavit requirement is not jurisdictional and may be excused. Generally, it is an abuse of discretion for a trial court to deny a request for a trial continuance due to the absence of a properly called and subpoenaed witness.

In this case, the petitioners formally filed an application for a continuance immediately after learning of Corlin's medical status. Their application was supported by declarations concerning the nature and importance of his testimony to their cases. The petitioners contended that their defense and cross-complaint would be rendered ineffective without Corlin's testimony and that it would be extremely difficult to find a replacement expert. Although GI Excellence filed an opposition to the application, it only did so to ensure Corlin or a replacement would be available to testify after a reasonable amount of time. It did not stipulate that, if called, Corlin would give the testimony as detailed in the declarations.

The superior court recognized that "a continuance is normally appropriate when an unexpected illness renders an expert witness unavailable on the eve of trial," but it expressed concern over the impact on patients being treated by the physician parties and witnesses, the scheduling difficulties attendant to a continuance, and the age of the case and the number of prior continuances.

As an alternative, the superior court proposed that trial begin as planned on May 21, 2018, only to be interrupted virtually immediately by the trial judge allowing time for the petitioners to seek, retain, educate, and present a new expert witness. But that proposed alternative would cause disruption in the trial and to the sitting jurors and would undermine the certainty in patient scheduling and continuity of care. In fact, this option would create the very disruption in patient support that GI Excellence was seeking to avoid. Even GI Excellence acknowledged that starting the trial only to pause it to find a replacement expert witness was not a desirable solution.

The court of appeal recognized the superior court's inherent power to manage its docket, but it observed that the eve-of-trial impact on the petitioners' ability to present their case was "an untenable burden and a distraction during a high-tempo" trial. Accordingly, the court of appeal found that the trial court was incorrect to deny the petitioners' request for a continuance. It granted the petition and directed the Superior Court of Riverside County to vacate (toss out) its May 16, 2018, order denying their application for a continuance of the trial and to enter a new and different order granting the request. *Padda et al. v. The Superior Court of Riverside County* (California Court of Appeal), Fourth Appellate District, 6/11/18.

Bottom Line

When litigating in a specialized, highly technical field, expert witnesses can make or break a case. For that reason, parties should strive to retain not just knowledgeable and accomplished experts but also experts who are reliable and available. As illustrated in this case, courts will permit scheduling accommodations for experts but only for good reason supported by reliable evidence.

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