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***Hallmark v. Eldridge*, 124 Nev. Adv. Op. 48 (Jul. 24, 2008)¹**

EVIDENCE – ADMISSIBILITY OF EXPERT TESTIMONY

Summary

Appeal from a district court judgment on a jury verdict in a personal injury action and an order denying a motion for a new trial. Plaintiff seeks a more favorable damage award alleging that the district court abused its discretion in allowing prejudicial expert testimony under NRS 50.275.²

Disposition/Outcome

The Nevada Supreme Court reversed the district court's judgment as to the damage award and remanded the case to the district court for a new trial limited to the issue of the plaintiff's damages. Further, at the new trial proceedings, the district court is to exclude the biomechanical expert's evidence from consideration by the jury.

Factual and Procedural History

During the course and scope of his employment, respondent Eldridge backed a company truck into the driver's side of Hallmark's vehicle, rocking the vehicle three feet off the ground. Although the collision severely damaged Hallmark's car, responding paramedics did not transport Hallmark to the hospital. However, Two months later, doctors diagnosed Hallmark with a contusion and strain in her left hip. Through MRI studies and later examination by a spine specialist, the doctors eventually concluded that Hallmark had developed two ruptured lumbar disc herniations. Further, Hallmark's treating physicians opined that the collision that had caused her lower back disc injuries.

Hallmark sued Eldridge and his employer, Tradewinds (collectively Tradewinds), to recover damages for the personal injuries she suffered. To refute the contention made by Hallmark's doctor regarding the cause for her lower back disc injuries, Tradewinds presented its own expert testimony. Over Hallmark's objection, the district court allowed a physician, Alfred Bowles II, M.D., who was credentialed as a "biomechanical engineer," to testify that the forces involved in the collision could not have caused Hallmark's back injuries. Another Tradewinds expert concluded that Hallmark's preexisting diabetic neuropathy caused her lower back pain.

The jury found Tradewinds 100 percent at fault and awarded Hallmark \$200,000 for past damages and \$20,000 for future damages. Hallmark moved for additur or, in the alternative, a new trial limited to the issue of damages. The district court denied the motion and this appeal followed.

¹ By Barbra E. Zess

² See NEV. REV. STAT. 50.275.

Discussion

Hallmark made two contentions in her appeal, namely that the district court:

- (1) erred in allowing the biomechanical expert to testify that the forces involved in the collision could not have caused Hallmark's herniated disc and lumbar spinal injuries, and
- (2) abused its discretion then it denied her motion for additur, or, in the alternative, a new trial limited to the issue of damages.

The Biomechanical Expert and His Testimony

Before the trial, Hallmark had moved to prevent the biomechanical expert, Dr. Bowles, from reconstructing the accident, rendering a biomechanical opinion, and testifying about the reasonableness of Hallmark's medical treatment. Tradewinds, having designated Dr. Bowles as a biomechanical expert that would testify about whether the physical forces involved in the collision could have caused Hallmark's alleged spinal injuries, relied upon Dr. Bowles professional training and experience³ to oppose the motion. As a result, the district court prohibited Dr. Bowles from testifying about accident reconstruction and reasonableness of Hallmark's medical treatment, but, over Hallmark's renewed objection at trial, concluded that Tradewinds presented an adequate foundation for him to testify as a biomechanical expert.⁴

Interpretation and Application of the Applicable Rule of Evidence

NRS 50.275⁵ governs the admissibility of expert testimony in Nevada district courts, which, as has been construed by the Nevada Supreme Court, tracks Federal Rule of Evidence (FRE) 702.⁶ Although the court has not adopted the United States Supreme Court's interpretation of FRE 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁷ *Daubert* and other federal courts discussion of it are persuasive authority in determining admissibility of expert testimony in Nevada courts.

³ The opinion goes into significant detail regarding Dr. Bowles training and experience.

⁴ The opinion relates exactly what Dr. Bowles testified to during the trial, including his opinion that the forces involved in the collision could not have caused the herniation in Hallmark's lumbar spine; that his opinion was founded upon his examination of Tradewinds' truck, Hallmark's complaint and Tradewinds' answer, the depositions of Hallmark and Eldridge, Hallmark's medical records, and photographs of Hallmark's vehicles. Dr. Bowles conceded that he formed his opinion without knowing the starting positions of the vehicles, the speeds at impact, the length of time that the vehicles were in contact during impact, the distances traveled, or the angle at which the vehicles collided.

⁵ NEV. REV. STAT. 50.275 states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

⁶ FED. R. EVID. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Nevada Supreme Court reviews a district court's decision to allow expert testimony for abuse of discretion. Under NRS 50.275, an expert witness must satisfy the following three requirements in order to testify:

- (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement)
- (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and
- (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Through a fact intensive query and application, the court concluded that the district court did not abuse its discretion when it determined that Dr. Bowles, Tradewinds biomechanical expert, was qualified as an expert under NRS 50.275.⁸ However, when the court then analyzed whether Dr. Bowles expert testimony satisfied the "assistance requirement," it concluded that the district had abused its discretion in allowing Dr. Bowles to testify because Tradewinds offered insufficient foundation for the Supreme Court of Nevada to take judicial notice of the scientific basis for Dr. Bowles' conclusions.⁹

Under the "assistance requirement" of NRS 50.275, the expert's testimony is deemed to assist the trier of fact only when it is relevant and the product of reliable methodology. A district court, in determining whether an expert's opinion is based upon reliable methodology,¹⁰ should consider whether the opinion is

- (1) within a recognized field of expertise;
- (2) testable and has been tested;
- (3) published and subject to peer review;
- (4) generally accepted in the scientific community (not always determinative); and
- (5) based more on particularized facts rather than assumption, conjecture, or generalization.

Further, if the expert formed his or her opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether¹¹

- (1) the technique, experiment, or calculation was controlled by known standards;
- (2) the testing conditions were similar to the conditions at the time of the incident;
- (3) the technique, experiment, or calculation had a known error rate; and
- (4) it was developed by the proffered expert for purposes of the present dispute.

⁸ In determining whether a person is properly qualified, the Nevada Supreme Court stated that the district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training. The court also notes that these factors are not exhaustive and may be accorded varying weights.

⁹ In a footnote within the opinion, the court states that it has not yet judicially noticed the general reliability of biomechanical engineering or its ability to assess the cause of personal injuries in automobile accidents, nor had Tradewinds cited to any other jurisdictions that do so.

¹⁰ The court notes that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case. Further, for each factor in the test, the opinion cites supporting and or explanatory cases in the footnotes.

¹¹ Again, these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case. Further, for each factor in the test, the opinion cites supporting and or explanatory cases in the footnotes.

In reaching its conclusion that Dr. Bowles expert testimony did not assist the jury in understanding the evidence or in determining a fact in issue, the court analyzed the testimony presented by the expert¹² during the trial relative to the factors used in determining whether the expert based his opinion a reliable methodology. The court found that Dr. Bowles had simply affirmed that his opinions were supported by a “reasonable degree of medical and biomechanical certainty.”

Further, the court probed federal district and appellate caselaw to bolster its conclusion that the district court should have excluded Dr. Bowles’ biomechanical testimony. In particular, the court drew analogies between the excluded testimony of biomechanical experts in *O’Neill v. Windshire-Copeland Associates*,¹³ *Clark v. Takata Corp.*,¹⁴ and *Smelser v. Norfolk Southern Railway Co.*,¹⁵ and the expert testimony of Dr. Bowles in this case to support the court’s conclusion that the district court should have excluded Dr. Bowles biomechanical testimony.

Standard of Review Concerning the Erroneous Admission of Evidence

Having concluded that the district court abused its discretion in the admission of Dr. Bowles’ testimony, the court turned to determining whether the error compelled reversal. For errors in the admission of evidence, the court reviews claims of prejudice relative to whether the error substantially affected the rights of the appellant. To prevail, the appellant needs to demonstrate from the record that, but for the error, a different result “might reasonably have been expected.”¹⁶ In applying this standard to the case, the court concluded that the erroneous admission of Dr. Bowles’ biomechanical testimony substantially affected appellant’s rights.¹⁷

Conclusion

The district court abused its discretion when it allowed a biomechanical expert to testify because the respondent failed to demonstrate that the expert had based his opinion upon a reliable methodology, and therefore his testimony did not assist the jury in understanding the source of the plaintiff’s injury. Further, the erroneous admission of this testimony required reversal because the record confirms that, absent the error, the plaintiff would have received a larger damage award.

¹² Or, more significantly, the court noticed the lack of evidence offered by Tradewinds to lay the foundation for the expert’s testimony, *such as* whether:

Dr. Bowles biomechanical opinion was capable of being tested or that it had been tested;

these types of opinions were generally accepted in the scientific community; and

Dr. Bowles opinion was formed and controlled by known standards or had a known error rate.

¹³ *O’Neill v. Windshire-Copeland Associates*, 372 F.3d 281 (4th Cir. 2004).

¹⁴ *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1999).

¹⁵ *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299 (6th Cir. 1997).

¹⁶ *See Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (Nev. 1983); *Peterson v. Silver Peak*, 37 Nev. 117, 140 P. 519 (Nev. 1914).

¹⁷ The opinion notes that although the jury concluded that Tradewinds was 100 percent at fault for any injuries approximately caused by the accident, the award of \$200,000 for accrued damages and \$20,000 for future damages was probably inadequate to compensate the appellant for her medical expenses, pain and suffering, and general damages, and therefore “a different result might reasonably have been reached concerning the accrued and future damages but for the error in admitting Dr. Bowles’ testimony.”