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McClendon v. Collins, 132 Nev. Adv. Op. 28 (April 21, 2016)

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McClendon v. Collins, 132 Nev. Adv. Op. 28 (April 21, 2016)[1]
CIVIL PROCEDURE: De-designation experts from testifying to non-testifying witness

Opinion

The issue here is whether a witness originally designated as a testifying expert who is then later de-designated may be deposed or called to testify at trial by an opposing party. The Court held that after an expert report has been disclosed, a testifying expert witness cannot regain the confidentiality protections of NRCP 26(b)(4)(B) by being de-designated as a non-testifying expert. The Court reasoned that after an expert witness loses protection under the statute that it is at the discretion of the district court as to whether the expert may be deposed or called to testify at trial by an opposing party.

Factual and Procedural History

The case arises from a motor vehicle accident. Respondent Collins designated an expert witness, Dr. Appel, and filed an expert report and two supplemental reports. Before appellant McClendon could depose Dr. Appel, Collins de-designated Dr. Appel as a testifying expert witness and filed a motion for protective order to prevent McClendon from deposing or calling Dr. Appel at trial. McClendon filed a motion to 1) designate Dr. Appel as her own expert witness, 2) take his deposition, and 3) use his written opinions and deposition at trial. The district court granted Collin's motion for a protective order and denied McClendon's motion. After a trial via the short trial program, the jury entered judgment in favor of Collins. The issue on appeal was whether the district court abused its discretion by refusing to allow McClendon to depose or call Dr. Appel to testify at trial.

Discussion

De-designated expert witnesses can be deposed or called to testify at trial by an opposing party in limited circumstances

NRCP 26(b)(4)(A) states that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial."[2] Additionally, NRCP 26(B)(4)(B) states that a party may not depose or discover facts or opinions from non-testifying experts unless "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions of the same subject by other means."[3] The rules are silent in regards to the issue of whether an originally designated testifying expert who is later de-designated may be deposed or called as a witness by the opposing party. The Court noted that NRCP 26(b)(4)(A) and (B) were nearly identical to their federal counterparts, FRCP 26(B)(4)(A) and (D). Thus, the court looked to other jurisdictions, primarily the Seventh and Eleventh Circuit, for persuasive authority.

The Seventh Circuit held that after an expert has been originally designated as a testifying expert witness and has produced an expert report the expert cannot be de-designated as a non-testifying expert in order to avoid having the expert deposed or called to testify at trial.[4] The Seventh Circuit identified that the key point in time of when "the opportunity to invoke

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[2] NRCP 26(b)(4)(A).
[3] NRCP 26(b)(4)(B).
[4] *See* Sec. & Exch. Comm'n v. Koenig, 557 F.3d 736, 744 (7th Cir. 2009).

confidentiality" ends is upon the disclosure of an expert report; thus, the *Koenig* court suggests that de-designating an expert before any report is disclosed is permissible.[5] The Eleventh Circuit similarly stated that a designated testifying expert witness may not regain the confidentiality protections simply by de-designation.[6] The *Peterson* court qualified this holding by stating that once an expert is de-designated, it is at the discretion of the district court to allow an opposing party to depose or call that expert to testify.[7]

Even though the federal courts have held that the expert witness confidentiality protections fall away, this does not create "an 'entitlement' of the opposing party to depose or use another party's expert at trial."[8] The court in *House* stated that "the proper standard in these circumstances is a 'discretionary' standard, where the trial court's discretion is guided by a balancing of probative value against prejudice under [Federal Rule of Evidence] 403, [the federal counterpart to NRS 48.035]."[9] The *House* court determined that the district court should consider whether testimony is duplicative or cumulative of other testimony and whether opposing parties are attempting to "piggyback[ ] on another party's trial preparation[.]"[10]

The Court, agreeing with the federal courts, held that the pivotal point is when an expert report has been disclosed. It is at this point that a testifying expert witness cannot regain the confidentiality protections of NRCP 26(b)(4)(B) by de-designation of such a witness to the status of non-testifying expert. However, this is not a total bar to any further use of such expert witness, because it is in the district court's discretion to determine whether the expert witness may be deposed or called to testify at trial by an opposing party. The Court stated that the discretion is to be guided by a balancing of probative value against unfair prejudice under NRS 48.035 and reiterated two examples that the federal court referenced for when exclusion would be appropriate: 1) excluding the expert's testimony where it would be duplicative or cumulative; and 2) where the opposing party is attempting to use the testimony to piggyback off of the preparation of the designating party.

Evidence of opposing party's original retention is not admissible

The Court next analyzed whether evidence of the opposing party's original retention of the expert is admissible. The Court was worried that such evidence has the possibility of "destroy[ing] counsel's credibility in the eyes of the jury" because "[j]urors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff's counsel had suppressed evidence which he had an obligation to offer."[11]

Some federal courts have held that there is unfair prejudice against the party who retained the expert, and, thus, the evidence is inadmissible.[12] In accordance with the federal courts, the Supreme Court of Nevada held that evidence of an expert's retention is inadmissible when a de-designated expert is allowed to be further deposed or called to testify by the opposing party.

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[5] *Id.*

[6] *See* Peterson v. Willie, 81 F.3d 1033, 1037-38 (11th Cir. 1996) (internal citation omitted).

[7] *Id.* at 1038 n.4.

[8] House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 246 (N.D. Iowa 1996).

[9] *Id.*

[10] Ferguson v. Michael Foods, Inc. 189 F.R.D. 236, 409 (N.D. Iowa 1996) (internal quotations omitted).

[11] *Peterson*, 81 F.3d at 1037 (internal quotations omitted).

[12] *See id.* at 1038 (holding that trial court's admission of evidence regarding an expert's original retention was an error but harmless); *see also* Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 452–53 (S.D.N.Y. 1997) (holding that a de-designated expert witness may be called to testify as long as evidence of how he became involved in the case is excluded); *House*, 168 F.R.D. at 249 (holding the same).

The district court abused its discretion

The Court "review[s] a district court's decision to [allow] expert testimony for an abuse of discretion."[13] Here, the Court noted that the district court's decision in the interlocutory order was "based significantly on the fact that . . . Appel, prior to [Collins] de-designating him as an expert witness," had not been deposed by McClendon.[14] However, the pivotal point for when protections under NRCP 26(b)(4)(B) are lost is upon disclosure of an expert report and not when a deposition is performed. Thus, the Court held that since the expert disclosed the report, along with two supplements, that the district court abused its discretion by significantly basing its decision on the fact that Appel had not yet been deposed.

The error was harmless

When a moving party shows that an error is prejudicial, the error is not harmless, and, thus, reversal may be appropriate.[15] "To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."[16] Appellant is responsible for making and providing an appellate record, and a failure to do so will create a presumption that the missing record or portion of the record supports the district court's decision.[17]

McClendon failed to provide a trial transcript here, and, therefore, the Court was unable to conclude to what extent there was prejudice, if any, to appellant. Therefore, the Court held that the district court's error was harmless.

Conclusion

After an expert witness report has been disclosed, an expert witness may not regain NRCP 26(b)(4)(B) confidentiality protections. It is in the district court's discretion to determine whether the expert may now be deposed or called to testify by the opposing party. When the de-designated expert is allowed to testify, evidence of the original retention of the expert by the opposing party is inadmissible evidence. The district court abused its discretion, but there was no evidence of prejudice to appellant. The error was thus deemed harmless, and the Court affirmed the district court's order and final judgment.

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[13] Leavitt v. Siems, 130 Nev. Adv. Op. 45, 330 P.3d 1, 5 (2014).
[14] The Court does not cite to any particular page(s) in the interlocutory order. (Emphasis omitted).
[15] Wyeth v. Rowatt, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010).
[16] *Id.*
[17] *See* Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).