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## Summary of Williams v. Dist. Ct., 127 Nev. Adv. Op. No. 45

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## EVIDENCE – EXPERT TESTIMONY

### **SUMMARY**

Two consolidated petitions for writs of mandamus dealing with the admission of evidence regarding the qualification of a nurse to testify as an expert in medical causation and whether defense expert testimony offering alternative causation theories must meet the *Morsicato*<sup>2</sup> Standard.

### **DISPOSITION/OUTCOME**

The Supreme Court of Nevada granted the writs in part and denied in part. It held that a nurse may testify as an expert in his or her field of expertise, but not as to medical causation unless he or she had obtained the requisite knowledge and experience to identify cause.

The Court also held that allowance of a defense expert's alternative theory of causation depends on how the defendant utilizes the expert's testimony. It held that a defense expert's testimony need not be stated to a reasonable degree of medical probability if the testimony is to controvert an element of the plaintiff's prima facie case. However, if the testimony traverses the plaintiff's causation theory and establishes an independent causation theory, the testimony must qualify under the *Morsicato* standard.

### **FACTUAL AND PROCEDURAL HISTORY**

Both writ petitions arose from separate actions involving the Endoscopy Clinic of Southern Nevada and an outbreak of Hepatitis C in its patients. In each case, plaintiffs sued pharmaceutical companies for strict products liability and alleged that defective vials produced by the companies caused the patients to contract Hepatitis C.

To contradict these allegations, defendants offered the expert testimony of a registered nurse specializing in endoscopy procedures and a doctor who is a professor of medicine. Plaintiffs in both cases moved to exclude these experts' testimonies.

In Docket No. 56928 the plaintiffs argued that neither expert could testify because they "did not have an opinion to a reasonable degree of medical probability," and also argued that nurses cannot give testimony regarding causation. The district court denied the motion and allowed both experts to testify.

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<sup>1</sup> By Ryan Johnson

<sup>2</sup> *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 111 P.3d 1112 (2005).

In Docket no. 57079 the plaintiffs similarly moved to prohibit the nurse from testifying, and the district court granted the motion because it felt the nurse could not testify at a greater than the 50 percent probability that is required under *Morsicato*.

After the district courts issued their orders, the losing parties petitioned for writs of mandamus. Both cases were stayed and the petitions for writs were consolidated.

## **DISCUSSION**

*When a writ of mandamus is appropriate.*

In *Walton v. District Court*<sup>3</sup>, the Supreme Court of Nevada held the admissibility of expert testimony if not typically subject to review on a petition for writ of mandamus because the chance to appeal a final judgment usually provides an adequate and more appropriate remedy.

Despite this general rule, the Court felt that this situation was appropriate for a narrow exception. This issue was one of first impression, and a speedy resolution would promote judicial economy because the issues brought before the court in these petitions “have the potential of being repeated in the many endoscopy cases pending before the district court.”

Despite this exception, the Court emphasized that unless there are extraordinary circumstances, the Court will not consider writ petitions challenging evidentiary rulings.

*Standard of Review.*

With writ petitions, the Court reviews questions of law de novo while giving deference to the district court’s findings of fact.<sup>4</sup> All the issues in these petitions are questions of law; therefore the Court reviewed them de novo.

*Admissibility of the nurse’s and doctor’s testimonies.*

To testify as an expert in Nevada, the district court must first determine the witness’s qualification, including whether

- (1) he or she [is] 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).<sup>5</sup>

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<sup>3</sup> *Walton v. Dist. Ct.*, 94 Nev. 690, 586 P.2d 309 (1978).

<sup>4</sup> *Gonski v. Dist. Ct.*, 126 Nev. \_\_, \_\_, 245 P.3d 1164, 1168 (2010).

<sup>5</sup> *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275).

*Nurse in this case not qualified to testify as to medical causation.*

In *Hallmark*, the Court listed formal schooling and academic degrees, licensure, employment experience and practical experience and specialized training as a non-exhaustive list of factors when assessing whether an expert witness is appropriately qualified.<sup>6</sup>

The Court held that a nurse may be allowed to testify as to causation if, after proper examination of the nurse's knowledge and experience, the court finds the nurse to be qualified as an expert in that area.

In this case, however, the Court found that the nurse in question could not testify as to causation. This nurse had extensive experience in cleaning and disinfecting endoscopy equipment, but he did not have experience in diagnosing the cause of Hepatitis C, which was the crux of the disputed testimony in this case. The nurse was a leading expert in endoscopic reprocessing but that alone does not qualify him to testify as to medical causation.

*The doctor will assist the trier of fact.*

The *Morsicato* standard says that "medical expert testimony regarding causation must be made to a reasonable degree of medical probability."<sup>7</sup> Here, the Court held that if the defense testimony is offered as an alternative to the plaintiff's prima facie case, then "it will assist the trier of fact if it is relevant and support by competent medical research." The level that it must reach is a greater-than-50-percent probability.

The Court held that the *Morsicato* standard is applied to a defense expert's testimony once the testimony's purpose is determined. A defense expert may offer testimony not rising to the level of medical probability if it is in rebuttal of the plaintiff's prima facie argument for the causation. Regardless of whether an expert testifies for the plaintiff or the defense, if the testimony is introduced for the purpose of establishing causation, it must reach the degree of medical probability required in *Morsicato*.

Once a plaintiff presents a prima facie case, the defendant has three options to attack the case. The defendant may cross-examine the plaintiff's expert, contradict the testimony with his own expert, or propose an independent theory of causation. If the defense expert simply contradicts the plaintiff's expert, then the testimony is not subject to the *Morsicato* standard. The purpose of the standard is not to prevent a medically competent expert's testimony from being used to controvert the plaintiff's prima facie case. However, if the defense offers its own independent theory of causation, that testimony is subject to *Morsicato*.

Despite this lower standard, the defense expert's testimony must still be relevant and supported by competent medical authority. Consequently, the Court held that if the doctor's

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<sup>6</sup> *Id.* at 499, 650-51.

<sup>7</sup> *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005).

testimony is used to controvert the plaintiff's prima facie theory, and if the doctor's theory of causation is relevant and supported by competent medical research, then the testimony is admissible and not subject to the *Moriscato* standard.

Along with the instructions regarding the testimony of the doctor, the Court ordered that the district courts allow the nurse to testify as to the proper cleaning and sterilization procedures for endoscopic equipment, but ordered the courts to not allow the nurse to testify as to causation.

## **CONCLUSION**

A nurse may testify as an expert in his or her area of expertise, including testimony as to medical causation, provided that this knowledge is part of the nurse's experience. An expert's testimony need not live up to the *Moriscato* standard if the testimony simply controverts the plaintiff's theory of causation and is not an independent theory of causation.