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Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. Adv. Op. 18 (2005)¹

**TORTS—PHARMACY MALPRACTICE
EVIDENCE—EXPERT TESTIMONY**

Summary

This case is an appeal from a final district court judgment, entered pursuant to a jury verdict, in favor of Defendant/Respondent in a pharmacy malpractice action.

Disposition/Outcome

The Nevada Supreme Court reversed the district court's judgment and remanded the case for a new trial on the issues of causation, contributory negligence, and damages. The Court found that the district court abused its discretion in admitting expert medical testimony on causation because the witness never stated his medical opinion to a reasonable degree of medical probability.

Factual and Procedural History

Plaintiff/Appellant Andrew Morsicato ("Mr. Morsicato") contracted scabies, a highly contagious condition causing rash-like symptoms. His dermatologist prescribed lindane lotion, a neurotoxin, to both Morsicato and his wife, Plaintiff/Appellant Concetta Morsicato ("Mrs. Morsicato"), as scabies is highly contagious among members of the same household. The Morsicatos filled their prescriptions at Sav-On Drugs. The application instructions were correct on Mr. Morsicato's bottle of lindane lotion; the lotion was to be applied at bedtime and washed off after twelve hours. The directions on Mrs. Morsicato's bottle of lindane lotion, however, were incorrect; Mrs. Morsicato's bottle directed her to apply the lotion every twelve hours. After applying lindane lotion every twelve hours for several days, Mr. Morsicato developed skin irritation, which physicians told him was due to overexposure to lindane lotion.

Mr. and Mrs. Morsicato sued Sav-On pharmacy for physical injuries. The district court granted a directed verdict in favor of the Morsicatos on the issue of Sav-On's negligence because Sav-On admitted to mislabeling Mrs. Morsicato's prescription. The jury heard testimony regarding causation, comparative negligence, and damages.

Dr. Michael Schneck ("Schneck") testified on behalf of Sav-on regarding causation. Schneck testified that sources other than lindane lotion could have caused the Morsicatos' injuries. The Morsicatos objected to Schneck's testimony on the grounds that it was speculative. The court subsequently explained to Schneck that when testifying to causation, medical experts must testify that the proposed cause of a party's injuries was more-likely-than-not the cause of the injuries. Schneck admitted that his opinion as to causation did not meet the more-likely-than-not evidentiary standard. After the court further explained the evidentiary standard, however, Schneck changed his mind and testified that his theory of causation was the most likely cause of the Morsicatos' injuries.

¹ By Danielle Oakley

The jury returned a verdict for Sav-On, finding that Sav-On's negligence did not cause the Morsicatos' injuries. The court entered judgment on the verdict. The Morsicatos filed a motion for a new trial, which the district court denied. The Morsicatos appealed.

Discussion

The Nevada Supreme Court has previously held that medical experts testifying about causation of injuries must state their opinions to a reasonable degree of medical probability; speculative causation testimony is insufficient to support a finding of causation.² The Court has since recognized, however, that not *all* medical expert testimony must be stated to a reasonable degree of medical probability. Whether expert testimony must be stated to a reasonable degree of medical probability depends upon the testimony's nature and purpose. For example, in *Banks v. Sunrise Hospital*,³ the Court held that the medical expert testimony regarding causation in that case was admissible, despite the fact that the expert did not state his opinion to a reasonable degree of medical probability.⁴ In this case, the Court clarified the apparent conflict between *United Exposition Service Co.* and *Banks*.

The Court distinguished *Banks* on the grounds that the expert's testimony regarding causation in that case was about the operation of medical equipment, whereas the testimony here regarded the standard of care of a medical professional and causation. The Court noted that its opinion in *Banks* was "not intended to modify or change in any way the requirement that medical expert testimony, regarding the standard of care and causation in a medical malpractice case, must be based on testimony made to a reasonable degree of medical probability."⁵

Because Schneck's opinion as to causation of the Morsicatos' injuries was speculative and never stated to a reasonable degree of medical probability, the Court found that the lower court abused its discretion in admitting the testimony. Accordingly, the Court remanded the case for a new trial.

Conclusion

Because Schneck's opinion regarded causation, which was an ultimate issue in the case, and because the case regarded the standard of care of a medical professional, as opposed to malfunctioning medical equipment, Schneck's testimony was inadmissible because Schneck did not state his opinion to a reasonable degree of medical probability.

² *United Exposition Serv. Co. v. SIIS*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

³ 120 Nev. ___, 102 P.2d 52 (2004).

⁴ 120 Nev. at ___, 102 P.2d at 60-61.

⁵ *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. Adv. Op. 18 at *6 (2005).