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Leavitt v. Siems, 130 Adv. Nev. Op. 54 (July 10, 2014)¹
CIVIL LAW: MEDICAL MALPRACTICE

Summary

The Court considered three distinct issues on appeal: (1) whether a defense expert's alternative causation testimony needs to be stated to a reasonable degree of medical probability when being used to challenge an element of the plaintiff's claim; (2) whether ex parte communication with an opposing party's expert witness is improper; and (3) whether an employee's default may be used against an employer codefendant who is contesting liability.

Disposition

The Court concluded that: (1) expert alternative causation testimony is permissible; (2) ex parte communication, even when improper, only warrants a new trial when prejudice is established; and, (3) an employee's default may not be used against an employer codefendant contesting liability.

Factual and Procedural History

Appellant Leavitt met with respondent Jon L. Siems, M.D., for a consultation regarding Lasik corrective vision surgery. Respondent performed Lasik corrective surgery on both of her eyes. After the surgery, Appellant lost vision, experienced irritation, and later developed other ocular complications.

Appellant subsequently sued Respondent, asserting claims for medical malpractice and professional negligence. Ultimately, the case went to trial against Respondent. At trial, defense counsel argued contributory negligence on the theory that Appellant abused numbing eye drops after the surgery.

To support the eye-drop-abuse argument, defense counsel called an expert witness, an ophthalmologist, to testify that he had discharged Leavitt as a patient for noncompliance. The expert stated that the use of the numbing eye drops may have caused Appellant's vision to deteriorate and contributed to her lack of improvement. In contrast, Appellant presented expert testimony that Respondent failed to exercise the proper standard of care. Her expert explained that Appellant's complications were not consistent with eye drop abuse.

The jury found in favor of the defense. Appellant filed a motion for a new trial, or alternatively, for judgment as a matter of law, based in part on what Appellant argued was an improper drug-abuse defense and on the use of the defense's expert testimony to establish an alternative cause of her condition without requiring that the testimony be stated to a reasonable degree of medical probability.

The district court denied the motion for new trial, or alternatively, for judgment as a matter of law. Appellant then filed a motion for final judgment in the district court. The district court denied the motion and Leavitt appealed.

¹ By Michael Paretti

Discussion

Admission of expert testimony

Appellant argued that the district court did not properly apply *Williams v. Eighth Judicial District Court*, 262 P.3d 360 (2011), and accordingly erred by admitting the expert's testimony and denying a new trial or judgment as a matter of law.

Contrastingly, the Nevada Supreme Court held that the district court correctly applied *Williams*. In *Williams*, the Court maintained that "medical expert testimony must be stated to a reasonable degree of medical probability."² "Any expert testimony introduced for the purpose of establishing causation must be stated to a reasonable degree of medical probability. However, defense experts may offer opinions concerning causation that either contradict the plaintiffs expert or furnish reasonable alternative causes to that offered by the plaintiff," without having to meet that standard.³ Thus, the district court did not err in applying *Williams* to this case.

Witness tampering

Appellant argued that the district court erred in not granting a new trial based on witness tampering because defense counsel had direct, unauthorized communications with Appellant's expert witness. Respondent argued in response that communication with Appellant's expert was necessary to schedule and coordinate the trial testimony.

Based on striking a balance between the desire for confidentiality and the need for full disclosure of relevant medical information, the Court determined that there is no need to allow ex parte communication with the opposing party's expert witness without express consent. Accordingly, Respondent's conversations with Appellant's expert witness were improper.

Even still, the Court maintained that because the Appellant's expert witness testimony did not change as a result of the ex parte contact, Appellant failed to demonstrate any prejudice resulting from the improper ex parte discussions. Thus, a new trial was not warranted.⁴

Default judgment

Lastly, Appellant argued that the district court erred in entering default judgment solely against one of the doctors in Respondent's practice individually, and not also as an employee of Respondent, because the doctor was acting within the scope of her employment. The Court declined to extend the doctor's inability to contest liability and causation to the Respondent's practice. In Nevada, "the answer of a co-defendant inures to the benefit of a defaulting defendant when there exists a common defense as to both of them."⁵ The Court declined to use a default judgment as a foundation for vicarious liability against an answering codefendant.⁶ Thus, the Court we affirmed the district court's order entering judgment against the doctor individually only.

² 262 P.3d at 367-68 (*quoting* *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005)).

³ *Id.* at 368.

⁴ *Wyeth v. Rowatt*, 244 P.3d 765, 775 (2010).

⁵ *Sutherland v. Gross*, 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989).

⁶ *See W. Heritage Ins. Co. v. Superior Court*, 132 Cal. Rptr. 3d 209, 221 (Ct. App. 2011).

Conclusion

The Court concluded that the district court appropriately applied *Williams*, which clarified existing law on medical expert testimony, to the instant matter. Furthermore, the Court reiterated that ex parte communication with an opposing party's expert witness is improper. However, because the Appellant did not demonstrate prejudice, the improper communication does not warrant a new trial. Lastly, the Court determined that a co-defendant doctor's default may not be used against the Respondent's practice as an answering employer codefendant who is contesting liability. Therefore, the Court affirmed the district court's judgment and post-judgment orders in this case.