Reasonable Certainty and Defense Experts

Thursday, August 04, 2011

The other day we saw the Nevada Supreme Court's decision in Williams v. Eight Judicial District Court, ___ P.3d ___, 2011 WL 3206963 (Nev. July 28, 2011). One of the two "novel" questions the court decided in Williams is "whether defense expert testimony offering alternative causation theories must meet the 'reasonable degree of medical probability' standard" as plaintiff-side experts. Id. at *1. The Nevada court unanimously held that, because defendants don't have the burden of proof, defense experts' opinions don't have to meet that standard, because that would effectively be shifting the burden of proof to the defendant:

> "[W]hen a defense expert's testimony is used to contradict a plaintiff's causation theory by comparing that theory to other plausible causes, each additional cause does not need to be stated to a greater-than-50-percent probability. To hold otherwise would severely hinder a defendant's ability to undermine the causation element of the plaintiff's case and could result in an unfair shifting of the burden of proof to the defendant."

2011 WL 3206963, at *7. The court relied primarily on Wilder v. Eberhart, 977 F.2d 673 (1st Cir. 1992), which reached a similar result under New Hampshire law:

> "Were we to accept plaintiff's argument that once a plaintiff puts on a prima facie case, a defendant cannot rebut it without proving another cause, the resulting inequities would abound. For example if ninety-nine out of one hundred medical experts agreed that there were four equally possible causes of a certain injury, A, B, C and D, and plaintiff produces the one expert who conclusively states that A was the certain cause of his injury, defendant would be precluded from presenting the testimony of any of the other ninety-nine experts, unless they would testify conclusively that B, C, or D was the cause of injury. . . . We think that such a result does not reflect the state of the law in New Hampshire, and furthermore would be manifestly unjust and unduly burdensome on defendants."

Id. at 676-77.

We nodded when we saw that, because we're quite familiar with this rationale from cases decided under Pennsylvania law. In Pennsylvania, a defense expert need not (although we'd certainly prefer that they did) offer any opinions to a reasonable degree of medical certainty,

basically for the same reason – that defendants don't bear the burden of proving causation. Most recently, in Jacobs v. Chatwani, 922 A.2d 950 (Pa. Super. 2007), the court reaffirmed this principle in the context of medical malpractice:

"In any event, Pennsylvania law does not require a defense expert in a medical malpractice case to state his or her opinion to the same degree of medical certainty applied to the plaintiff, who bears the burden of proof at trial."

Id. at 960. Jacobs relied upon Neal v. Lu, 530 A.2d 103 (Pa. Super. 1987), another malpractice case, and the seminal case in Pennsylvania for this proposition. Neal held:

"Absent an affirmative defense or a counterclaim, the defendant's case is usually nothing more than an attempt to rebut or discredit the plaintiff's case. Evidence that rebuts or discredits is not necessarily proof. It simply vitiates the effect of opposing evidence. Expert opinion evidence, such as that offered by [the defendant] in this case, certainly affords an effective means of rebutting contrary expert opinion evidence, even if the expert rebuttal would not qualify as proof."

Id. at 110. There are lots of other Pennsylvania cases saying the same thing. E.g., Oxford Presbyterian Church v. Weil-McLain Co., 815 A.2d 1094, 1105 & n. 5 (Pa. Super. 2003) (applying rule to defense testimony in product liability case); Spino v. John S. Tilley Ladder Co., 671 A.2d 726, 738 (Pa. Super. 1996) (same), aff'd on other grounds, 696 A.2d 1169 (Pa. 1997); Smick v. City of Philadelphia, 638 A.2d 287, 290 (Pa. Cmwlth. 1994) (common carrier case).

This is not to say that we necessarily like using experts who can't opine to the same level of certainty as their plaintiff counterparts. When that happens, the other side can – and with some force – criticize our expert on this ground and argue that the jury should find our expert less credible than theirs. So we're not recommending doing this if it's avoidable. But sometimes a legitimate expert simply can't testify to something, particularly where there are a lot of possible causes, to the requisite degree of certainty. That fact doesn't deprive the defendant of the right to any expert testimony at all.

Williams and the Pennsylvania cases have us wondering: How many other states have similar rules? Does any state have a contrary rule holding the defendant to the same standard as plaintiff? We thought we'd take a look. We found less than we thought might be out there, but

a fair number of cases just the same.

The first thing we did was to see if any other cases follow the analysis in Wilder, which the Nevada court found persuasive. That turned up cases applying the same rationale under federal law: Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252 (1st Cir. 1998) (bankruptcy); Morrison v. Stephenson, 2008 WL 618778, at *4 (S.D. Ohio March 3, 2008) (§1983), as well as a number of states adopting lower standards of admissibility for defense experts due to the disparity in who bears the burden of proof.

Kentucky: Sakler v. Anesthesiology Associates, 50 S.W.3d 210, 214-15 (Ky. App. 2001); Walker v. United Healthcare, 2010 WL 3092648, at *9 (W.D. Ky. Aug. 6, 2010).

Iowa: Wilson v. The Iowa Clinic, P.C., 2007 WL 6036712 (Iowa Dist. Nov. 14, 2007), aff'd mem., 2009 WL 4114166, at *7 (Iowa App. Nov. 25, 2009) (unpublished).

South Dakota: Allen v. Brown Clinic, P.L.L.P., 531 F.3d 568, 574-75 (8th Cir. 2008).

Washington: Larson v. Nelson, 2002 WL 77763, at *8 (Wash. App. Jan. 18, 2002) (unpublished).

That's not really so great – four jurisdictions, and half of the opinions unpublished – so we kept looking. Thus, we found a number of other courts that made similar holdings without citing Wilder. In Haas v. Zaccaria, 659 So.2d 1130 (Fla. App. 1995), the court held that the standard for expert certainty (without deciding what that standard was) did not "compel[] the conclusion that the defendant doctor is precluded from offering evidence of possible explanations other than his own . . . negligence." Id. at 1133. Accord Jhagroo v. Sinclair, 702 So.2d 254, 254 (Fla. App. 1997).

In Johnesee v. The Stop & Shop Cos., 416 A.2d 956 (N.J. Super. App. Div. 1980), the court held that a defendant was entitled to have an expert testify that the plaintiff's causation claim was bogus, even if the alternatives were merely possible:

"[The defense expert] felt that other causes were more probable, although he could not say which. It is not a defendant's burden to prove by a reasonable medical probability what caused the claimed injury. That is

plaintiff's burden, and a defendant should be able to rebut any such proof by medical evidence negating the claimed cause."

Id. at 959.

In Holbrook v. Lykes Bros. Steamship Co., 80 F.3d 777 (3d Cir. 1996), decided under the Federal Rules of Evidence without any citation to state law, the court held that defense experts offering only possibilities were properly admitted in an asbestos case:

"[Experts] testified for the defense that [an alternative cause] could not be excluded, as it was a distinct possible cause of [plaintiff's injury]. . . . Although that testimony would have been insufficient to prove that [the alternative cause] caused the [injury], a burden which the defense did not bear, it was sufficiently certain and could help the jury to evaluate testimony by plaintiff's experts . . . [on] an issue on which plaintiff bore the burden of proof. Therefore, the court did not err when it refused to strike the defense experts' testimony."

Id. at 786. Accord Imm v. United States, 1990 WL 124496, at *3 (9th Cir. Aug. 24, 1990) (rejecting argument that defense expert should have been excluded for lack of certainty; "[r]easonable medical probability is for the fact finder to determine, and testimony regarding the possible causes of an injury is admissible") (unpublished; applying Texas law); Jordan v. Pinamont, 2007 WL 4440900, at *2 (E.D. Pa. May 8, 2007) ("Defendants are entitled to inform the jury of other medical conditions which reasonably could have caused Plaintiff's complaints, even if it cannot be stated to a reasonable degree of medical certainty that Defendants' proffered alternatives were, in fact, the cause").

In Wisconsin, there are a couple of cases like the Pennsylvania precedent we're familiar with. The Wisconsin Supreme Court has held:

"Although the party with the burden of proof must produce testimony based upon reasonable medical probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with medical proof couched in terms of possibilities."

Peil v. Kohnke, 184 N.W.2d 433, 441 (Wis. 1971). Peil was followed in Roy v. St. Lukes Medical Center, 741 N.W.2d 256, 264 (Wis. App. 2007) ("a defense expert is allowed to produce evidence of possibilities").

Thus, as far as we can tell, most jurisdictions who have decided anything follow the rule announced by the Nevada Supreme Court in Williams – a defense expert, offered to rebut the plaintiff's causation theories, need not testify to the same degree of certainty that is a prerequisite to admissibility of an expert for a plaintiff bearing the burden of proof.

However, all is not sweetness and light. We did find a couple of jurisdictions going the other way. Tennessee and Ohio (back when that state's Supreme Court was extremely pro-plaintiff; it might be different now) have rejected the lower standard of certainty for defense experts, chiefly on the grounds that the testimony would be "speculative." Hunter v. Ura, 163 S.W.3d 686, 703-04 (Tenn. 2005); Stinson v. England, 633 N.E.2d 532, 537 (Ohio 1994).