

Who would have thought that a visit to Wal-Mart would turn into a lesson in the use of expert evidence at trial? But that is exactly what happened to Bonnie Rodrick when she visited a Wal-Mart in Maryville, Mo., and tripped on a rug, fracturing her hip.

Tragically for Ms. Rodrick, her hip did not heal well. After multiple surgeries, including a total hip replacement, she was left needing to use a wheelchair or walker and suffered a variety of physical limitations.

Ms. Rodrick sued Wal-Mart for her injuries in U.S. District Court for the Western District of Missouri. When the jury returned a verdict in Wal-Mart's favor, Ms. Rodrick filed a motion for a new trial. The judge denied her motion and she appealed to the 8th U.S. Circuit Court of Appeals.

Expert's Report Violated Rule 26

One of her principle arguments on appeal was that the trial judge should not have admitted the testimony of Wal-Mart's medical expert because his written report did not comply with Rule 26(a)(2) of the Federal Rules of Civil Procedure.

As readers of this blog most likely know, that rule requires litigants to disclose their expert witnesses in advance of trial and to accompany the disclosure with a written report prepared and signed by the expert.

Although the expert in this case did submit a report, of sorts, it violated the rule in multiple ways. The rule requires the report to be signed; this report was not. The rule requires the report to state the expert's opinions and reasons for them; this report did not. The rule requires the report to identify the facts or data considered by the expert; this report had none. The rule requires the report to be updated when necessary; this report was not.

The trial judge agreed with Ms. Rodrick that the expert's report failed to comply with the requirements of Rule 26. Even so, the judge ruled that use of the report at trial was "harmless" because there would be no surprise or prejudice to Ms. Rodrick. In fact, Ms. Rodrick had received the report a year and a half before trial and never objected until the day the expert was to testify.

As it turned out, the actual report was never offered or admitted into evidence. Wal-Mart's counsel marked it as an exhibit and the litigants discussed it extensively with the judge, but it was never put into evidence.

Violation OK if 'Harmless,' Court Says

The court did, however, allow the expert to testify. In her appeal to the 8th Circuit, Ms. Rodrick argued that the expert should never have been allowed to testify, given the deficiencies of his written report and the failure to comply with Rule 26.

The 8th Circuit rejected Ms. Rodrick's position, adopting a rule carved out by the 10th Circuit in 2002. "A district court can allow evidence violating Rule 26(a) if the violation was justified or harmless," the 8th Circuit said. In applying this rule, the circuit panel added, the trial judge should consider:

- The prejudice or surprise to the party against whom the testimony is offered.
- The ability of the party to cure the prejudice.
- The extent to which introducing such testimony would disrupt the trial.
- The moving party's bad faith or willfulness.

In this case, the judge limited the expert's testimony to what he had described in his report. For that reason, his testimony would have been no surprise to Ms. Rodrick, the circuit panel concluded. If the expert's testimony had been incorrect, the panel added, Ms. Rodrick could have cross-examined him on these points and called her own rebuttal witnesses.

"Ultimately, the court's admission of [the expert's] testimony could have had only a slight impact, if any at all, on the jury's verdict, and we will not reverse on this basis," the panel held. "Admission of this testimony was harmless. Primarily, [the expert's] testimony informed the issue of damages, an issue never reached by this jury given their finding of no liability. His testimony did not run to Wal-Mart's alleged liability on the date of the accident."

Although Ms. Rodrick lost at trial and on appeal, her case did provide the circumstances for the 8th Circuit to lay down a new standard for expert evidence that fails to comply with Rule 26. Maybe other litigants will now be better prepared to address similar evidentiary infirmities in their own cases.

The case is *Rodrick v. Wal-Mart Stores East*, No. 11-1085 (8th Cir., Jan. 20, 2012).