Good Rulings on Experts and Summary Judgment from Mississippi

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According to the novels penned by a certain Mississippi lawyer (and the movies based on said novels), corporate defendants are always bad, their lawyers are worse, and juries end up pounding both. Think of Jon Voight during his closing argument in **The Client**, wagging his finger at the jury while scolding them to "be just, be just," and then the jury burning out a calculator to arrive at their stratospheric verdict. It's a morality play, pure and simple -- with an emphasis on the "simple." Reality matters hardly at all. Legal rules matter even less.

Reality is different. We've been on panels with judges from Mississippi, and they have consistently impressed us as judges who are smart and serious-minded. They care a lot about following the rules. It's nice to highlight a recent case from Mississippi where the court applied the law carefully and a device company got a fair shake. In *Smith v. Johnson & Johnson*, 2011 U.S. Dist. LEXIS 98719 (S.D. Miss. Aug. 31, 2011), the plaintiffs claimed that vaginal mesh surgical material was defective and lacked adequate warnings. The defendant filed a summary judgment motion. As part of their effort to fend off that motion, the plaintiffs submitted reports and affidavits from their experts. Using an expert to cobble together an issue of material fact is easy, right? Maybe not, especially if the court is paying close attention.

One of the plaintiff experts was designated past the deadline. We've seen that before. In our experience, plaintiffs get away with late filings of pretty much anything (motions, exhibit lists, etc.) pretty much all the time. Defendants are held to a different standard. It's not remotely fair, but we've gotten used to it. And yet, remarkably, the *Smith* court actually enforced the deadline and precluded that expert from testifying. The court held that there was no sound explanation for the late designation (the plaintiffs predictably said they needed more discovery from the defendant, but the court didn't buy it), that the expert was important but not vital to the plaintiffs' case, that the defendant was prejudiced by the tardiness and might need to add experts or alter trial preparation, and that a continuance was not a proper cure because the plaintiffs had already gotten an earlier continuance and now it was time for the case to "proceed apace." 2011 U.S. Dist. LEXIS 98719 at **11-14.

As for the plaintiff experts who were timely designated, the court struck two of the reports because they offered "naked opinion," were "conclusory," and amounted simply to saying "it is

so." *Id.* at **17-22. We've certainly seen plaintiff expert reports like that. The expert essentially says "I'm very smart and I think plaintiffs should win." And we're not just talking about expert reports; we've seen plaintiff expert trial testimony that sounds like that. Unlike some courts who practice the matador method and wave this sort of thing by, the court in *Smith* read the expert reports carefully and critically, and held that expert "opinions devoid of an underlying factual basis and explanation" cannot "create issues of material fact at the summary judgment." *Id.* at *21-22.

After cutting through the underbrush of tardy or flimsy expert reports, the court got to the key issue raised by the summary judgement motion: did the allegedly deficient warning make any difference? The court applied the learned intermediary doctrine and narrowed the issue down to whether more information about the mesh would have prompted the treating doctor to proceed differently. Interestingly, the court acknowledged the heeding presumption, but pointed out that "'heed' in this context means only that the learned intermediary would have incorporated the 'additional' risk into his decisional calculus. The burden remains on the plaintiff to demonstrate that t he additional non-disclosed risk was sufficiently high that it would have changed the treating physician's decision to prescribe the product for the plaintiff." Id. at *31 (citations omitted). That is, the heeding presumption is part of the causation analysis, but does not end it.

In *Smith*, the defendant conceded that the Adverse Reactions section of the label understated the number of known adverse reactions. A shrewd concession, that. It probably earned credibility with the judge. More important, it did not undermine the defendant's summary judgment motion because the treating doctor testified that he had read the Adverse Reactions section and disagreed with it -- he knew from his own experience that there were more adverse reactions. So he was not misled. Further, that doctor testified that he felt the package adequately warned him, that he thought the mesh was appropriately prescribed at the time, that he kept abreast of the relevant medical literature, and that the mesh product in question was the best product available at the time. Id. at **33-34. Further further, the doctor testified that the Contraindications section of the product insert functioned as a much stronger warning than the Adverse Reactions section, as it referenced potential infections and the need for subsequent removal. (Obviously this court would not buy the typical plaintiff lawyer insistence that nothing can be called a "warning" unless it resides in a section of the label called Warnings. That argument is silly. In the old **Lost in Space** television show Robbie the Robot

would roll around and say things like "Danger Will Robinson!" or "Warning! Warning! Aliens are attacking!" Apparently, according to plaintiff lawyers, if Robbie just said "Aliens are attacking!" that wouldn't be a warning. While we're at it, can we agree that the **Lost in Space** show was flat-out creepy?)

In any event, putting aside what the doctor did say in his deposition, what was most important was what he did NOT say. The plaintiffs never could get him to say that a certain specific piece of additional information would have caused him not to choose the defendant's product. Plaintiffs almost never can do that. For that reason, most failure-to-warn cases should, like *Smith*, go away on summary judgment. Perhaps courts will figure out that one way to enhance judicial economy would be to front-end the warning causation issue and resolve it before requiring expensive discovery of company witnesses and files (especially ediscovery).

And if there was a way to shorten Grisham novels and make them more realistic -- well, we're in favor of that too.