Expert Appeals His Exclusion to the Supreme Court

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When a trial judge, after a *Daubert* hearing, decides to exclude the testimony of an expert witness, the party that proffered the expert can decide whether to challenge that decision on appeal. But if the party decides not to appeal, can the expert, out of concern for the impact of the decision on his professional reputation, appeal the ruling on his own?

That was precisely the issue in a case that recently made it all the way to the U.S. Supreme Court. But before we get to the Supreme Court's decision, it is helpful to have some background on how the case found its way there.

The underlying lawsuit involved allegations of so-called "popcorn lung." The plaintiffs, Larry and Ruth Newkirk, sued ConAgra Foods Inc. in federal court in the Eastern District of Washington alleging that Mr. Newkirk's consumption of microwave popcorn – some five to seven bags a day for 11 years – caused him to develop severe and progressive lung damage and reduced life expectancy. The cause of the damage, plaintiffs alleged, was diacetyl, a flavoring agent used to provide a buttery taste and a sense of creaminess.

To prove the link between diacetyl and Mr. Newkirk's lung damage, plaintiffs offered the expert opinion of Dr. David Egilman, who the trial judge described as "a very accomplished scientist who has served as an expert witness in other cases involving microwave popcorn workers and is being proffered as an expert witness in at least one other microwave popcorn case."

The defendants countered with multiple motions to exclude Dr. Egilman's opinions as to general and specific causation. After conducting a *Daubert* hearing on the motions, U.S. District Judge Rosanna Malouf Peterson issued a decision on July 2, 2010, in which she granted the motions to exclude. *Newkirk v. ConAgra Foods, Inc.*, 727 F.Supp.2d 1006 (E.D. Wash. 2010).

To put it mildly, Judge Peterson's ruling was not kind to Dr. Egilman. Applying the three-pronged test for admissibility required by Federal Rule of Evidence 702 – that the testimony is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reliably applied those principles and methodology to the facts of this case – she concluded that Dr. Egilman's testimony failed on all counts.

Specifically, the judge found that Dr. Egilman failed to cite any facts or data in support of many of his opinions and that, where he did cite published studies, he manipulated the data "to reach misleading conclusions of his own." She further found that his reasoning and methodology were not scientifically valid and that his testimony was not the product of reliable principles and methods. The bulk of his conclusions, she wrote, did not rise above "subjective belief or unsupported speculation."

Was the Expert 'Aggrieved'?

Believing that Judge Peterson's ruling went far beyond the findings required by *Daubert* and defamed him in performing his professional responsibilities, Dr. Egilman filed an appeal with the 9th U.S. Circuit Court of Appeals. Even though he was not a direct party to the case, he argued that he was "aggrieved" by the judge's defamatory statements and therefore entitled to seek relief.

"As a consequence of the judge's attack I am personally, and unfairly, harmed," he wrote in support of his appeal. "Any harm that I might suffer if a judge fairly rejected my arguments is something I would have to live with. But harm suffered as a consequence of an ad hominem attack, which I had no chance to refute, is unfair."

The 9th Circuit did not see it that way. In an unpublished, three-paragraph opinion released on Sept. 5, 2012, the circuit court held that Dr. Egilman lacked standing to appeal the order excluding his testimony. *Newkirk v. ConAgra Foods, Inc.*, 493 Fed.Appx. 862 (9th Cir. 2012).

For a nonparty to have standing to file an appeal, the court reasoned, it must show (1) that it participated in the district court proceedings, and (2) that the equities of the case weigh in favor of hearing the appeal. Dr. Egilman did not meet the first part of this test, the court concluded.

"Appellant's participation in the district court consisted of filing reports in his capacity as an expert," the court explained. "His participation was not akin to party participation. He did not file papers objecting to the order excluding his testimony. He did not argue the legal merits of the motion to exclude his testimony."

The court added that it saw no other reason to depart from the general rule that only a party to a proceeding who receives an adverse ruling may appeal. "We conclude that Egilman does not have standing to appeal the district court's order, that we lack jurisdiction, and that this appeal should be dismissed."

The Supreme Court Rules

On Dec. 4, 2012, Dr. Egilman sought review of the 9th Circuit's opinion by filing a petition for a writ of certiorari with the Supreme Court. In his petition, he defined the question presented as, "Whether a nonparty to a district court proceeding has a right to appeal a decision that adversely affects his interest, as the Second, Sixth, and D.C. Circuits hold, or whether, as six other circuit courts hold, the nonparty must intervene or otherwise participate in the district court proceedings to have a right to appeal."

The high court considered the petition in a closed conference on March 15. On March 18, the court issued an order denying the petition.

The Supreme Court's order provided no explanation for its denial of Dr. Egilman's appeal. But the ruling in the 9th Circuit and the outcome in the Supreme Court, taken together, provide the only answer we have to the question of whether an expert can

appeal his own exclusion. That answer, these outcomes tell us, is a clear and unequivocal no.

Should an expert be allowed nonparty appeal of a ruling excluding his or her testimony if such a ruling adversely affects the expert's professional reputation?

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