The Artist and a Daubert Opinion

Thursday, March 01, 2012

So *The Artist* won. Some of us (maybe only one of us) didn't even know it was a silent movie. Imagine going to that movie without knowing it was silent. *That's* failure to warn. At least when Mel Brooks made *Silent Movie* you knew what you were getting. And in his movie the French guy spoke.

Alright, on to legal stuff. We found a number of interesting Daubert decisions in the court's opinion in Hershberger v. Ethicon Endo-Surgery, Inc., No. 2:10-cv-00837, 2012 U.S. Dist. LEXIS 18799 (S.D.W. Va. Feb. 15, 2012), so we thought we'd discuss a few of them here. This is a device case. The plaintiff claimed that a stapler used during her colostomy reversal procedure was defectively manufactured because it didn't contain the staples that it was supposed to contain, requiring a second stapling procedure. *Id.* at *2-4. The defense, on other hand, argued that the stapler did in fact contain staples but one of the surgeons prematurely and negligently discharged the stapler. *Id.* As trial approached, the parties filed a number of motions in limine to exclude testimony from experts and treating physicians related in one way or the other to this issue.

The attending surgeon sought to testify that no staple was discharged at all during the first firing of the stapler – supporting plaintiff's claim that it was defective – but rather a staple found in the plaintiff instead got there during a second stapling. *Id.* at *16-19. The defense's response was based on a simple and seemingly effective argument. The attending physician had already admitted that *he didn't see any staples* inside the plaintiff during the procedures so he could not testify on when it got there. The court allowed the testimony, however, ruling that the doctor's opinion was "a product of [the doctor's] experience and observations in the role of treating physician." *Id.* at *18. We aren't too surprised by this. This ruling falls into a category that we've often seen at trial, whether appropriate or not: treating doctors get to testify about an awful lot of things as long as the testimony can be linked to their treatment of the plaintiff.

But in this case the plaintiffs wanted it all. They not only wanted to be allowed to use the treating surgeon's testimony to support their claim but also to exclude the defendant from offering testimony from an expert disagreeing with the conclusions and reports of the treating surgeons. No go, said the Court:

> *"In formulating their opinions, expert witnesses may be called upon to sift through conflicting testimony and data to arrive at an opinion of the most likely course of events. Such determinations of judgment,*

> *provided they are well-reasoned and explained, do not render expert testimony inadmissible. . . . [The defense expert's] choice to credit some facts contained in the treating physicians' reports and testimony but not other facts is an issue for cross-examination, not a threshold question of admissibility."*

Id. at *11. In fact, the court went on to say that the defense expert's choices on which testimony and data to credit and which to discredit appeared "well founded." *Id.* at *11 n.5. Maybe the most interesting decision contained in this opinion, however, was on the defense's motion to exclude a plaintiff's expert from testifying that "based upon the lack of staples in the stapler [reported by the treating physicians], the stapler was defective." *Id.* at *22. Defendant's argument to exclude this opinion was simple and one we like: this is no expert opinion at all. The testimony would simply credit or parrot the treating surgeons' testimony on the absence of staples and use that to then give an opinion that a stapler without staples is defective, which calls upon no specialized expertise. *Id.* at *23. In fact, the plaintiffs inadvertently conceded this point. They defended this opinion by arguing that it was "a matter of common sense." *Id.* at *23. Exactly. Jurors have common sense and no need for an expert to help them with it.

As we have often had to argue at trial, expert opinion is not meant to parrot or cheerlead the testimony of others, and it isn't needed to tell jurors things that they can figure out themselves. And this court got it right. It ordered the expert to remain silent. *Id.* at *24. *That's* the kind of silent movie we like.

Labels: Daubert, West Virginia