

Court of Appeal limits trial courts' gatekeeper functions under Sargon

August 14, 2015

Cooper v. Takeda Pharmaceuticals America, Inc.
(Aug. 13, 2015, B250163) __ Cal.App.4th __

Nancy Cooper sued Takeda Pharmaceuticals America, Inc., claiming ingestion of the drug Actos caused Jack Cooper, plaintiff's deceased husband, to contract bladder cancer. At trial, her only evidence of causation was the expert testimony of Dr. Norman Smith, who based his causation opinion on a "differential diagnosis" which the court defined as "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." Dr. Smith never examined, met, or spoke to Cooper, never spoke to any of Cooper's treating physicians, never reviewed the deposition testimony of Cooper, her family members, or her husband's treating physicians, never spoke with any of Cooper's co-workers to assess the possibility of occupational exposure to carcinogens or otherwise investigated possible occupational exposures. Dr. Smith also testified that he assumed Cooper had stopped smoking in the 1970's based on her counsel's representations, even though his medical records indicated that he continued to smoke into the 1990's.

The jury returned a verdict in favor of Cooper, awarding \$5 million in compensatory damages and \$1.5 million in damages for loss of consortium. The trial court, acting under the "gatekeeper" principles articulated in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, granted Takeda's motion to strike Dr. Smith's testimony on the ground it lacked foundation, was speculative, and lacked the intellectual rigor used by experts in his field. The trial court then granted Takeda's motions for JNOV and, in the alternative, for a new trial, on the ground that Cooper had failed to present admissible evidence supporting the essential element of causation.

The Court of Appeal reversed both the JNOV and the new trial order. The appellate court held that the trial court erroneously struck Dr. Smith's testimony because, despite all its infirmities, the testimony was adequate proof that Actos was a "substantial factor" in causing Cooper's bladder cancer. The court reasoned that Dr. Smith's testimony was supported by epidemiological studies showing that certain population groups had a higher incidence of bladder cancer after taking Actos. The court explained that, because California *substantive* law does not require the elimination of all possible alternative causes, an expert such as Dr. Smith should be permitted to offer a causation opinion without eliminating all other possible causes, even when giving a differential diagnosis.

More Information

For more information about this matter, please contact Curt Cutting or Jason Litt (818.995.0800).