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OREGON LAW UPDATE

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Federal Court Upholds Low Bar Regarding Admissibility of Expert Testimony

From the desk of Jeff Eberhard: Establishing a cause and effect relationship for a medical diagnosis can be extremely difficult, many times resulting in the use of expert testimony that fails to identify the sole cause of a medical condition. A recent Ninth Circuit opinion analyzes whether a medical expert's testimony relating to a substantial cause of a medical condition is admissible.

Claims Pointer: Under the Federal Rules of Evidence ("FRE"), in order to be deemed reliable, an expert's testimony need only identify a substantial factor contributing to a condition, and need not identify the cause of a condition. The Court applies a liberal thrust favoring admission of the testimony as relevant if it is based on knowledge with a valid connection to the condition at issue.

Messick v. Novartis Pharm. Corp., 13-15433, 2014 WL 1328182 (9th Cir. Apr. 4, 2014)

Linda Messick was diagnosed with breast cancer and was treated with Zometa, a bisphosphonate, in response to her development of osteoporosis after chemotherapy and steroid therapy. Such drugs are used to reduce or eliminate the possibility of skeletal-related degeneration and injuries to which cancer patients are particularly susceptible. Novartis Pharmaceuticals Corporation ("Novartis") produces Zometa, which was approved by the FDA. After Messick encountered several dental problems, two oral specialists examined her and discovered osteonecrosis near three of her teeth. Both doctors treated her under the assumption that she was suffering from bisphosphonate-related osteonecrosis of the jaw ("BRONJ"), a condition recognized by the American Association of Oral and Maxillofacial Surgeons ("AAOMS"). While osteonecrosis of the jaw ("ONJ") may be caused by many factors, the AAOMS's diagnostic definition of BRONJ sets out its unique features: it lasts more than eight weeks, and is not related to radiation therapy.

Messick's BRONJ healed about three years after diagnosis. She and her husband brought suit against Novartis for strict products liability, negligent manufacture, negligent failure to warn, breach of express and implied warranty, and loss of consortium. To support her claims, Messick offered Dr. Jackson's testimony on ONJ and BRONJ generally, and on the causal link between her bisphosphonate treatment and later development of BRONJ. To make this opinion, Dr. Jackson relied heavily on his experience in clinical trials and a review of Messick's medical records. While the action was pending, Novartis filed a motion to exclude Dr. Jackson's specific causation testimony, and a motion for summary judgment. The district court granted those motions, and Messick appealed the exclusion of Dr. Jackson's causation testimony and the ensuing grant of summary judgment to Novartis.

Under federal law, admission of expert testimony under FRE 702 should be applied with a "liberal thrust" favoring admission under the infamous *Daubert* standard, which requires expert testimony to be both relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In this case, the Ninth Circuit ruled that the district court abused its discretion by excluding Dr. Jackson's testimony as irrelevant and unreliable.

The Ninth Circuit concluded that the district court applied a too-high bar for relevancy noting that the relevancy bar only requires that "the evidence logically advances a material aspect of the proposing party's case" with "a valid connection to the pertinent inquiry." Applying California products liability law, the Court ruled that Dr. Jackson's testimony was sufficient to state that Messick's use of a bisphosphonate (Zometa) was a substantial factor in her development of BRONJ. Therefore, Dr. Jackson's testimony was relevant.

The Ninth Circuit acknowledged the district court's duty to act as a "gatekeeper" to exclude junk science that does not meet FRE 702's reliability standards. The reliability threshold requires that the expert's testimony have "a reliable basis in the knowledge and experience of the relevant discipline." The Ninth Circuit noted that in the context of medical causation, it can be difficult to determine precisely how the damage occurred. Due to that inherent uncertainty, federal courts do

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not require that an expert be able to identify the sole cause of a medical condition in order for his or her testimony to be reliable. It is enough that the expert testifies as to a substantial causative factor of the medical condition. While the district court must act as a gatekeeper to exclude "junk science" under *Daubert*, FRE 702(a) includes within its scope all evidence that would "help the trier of fact ... to determine a fact in issue." The Ninth Circuit went on to state that "[a] doctor using a differential diagnosis grounded in significant clinical experience and examination of medical records and literature can certainly aid the trier of fact and cannot be considered to be offering 'junk science.'"

The Ninth Circuit found that district court abused its discretion in excluding the Dr. Jackson's testimony. Due to the Ninth Circuit Court's finding that it was improper to exclude this expert testimony, there was an issue of material fact. Therefore, summary judgment in favor of Novartis was improper.

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