

WASHINGTON CASE UPDATE

Conclusory Expert Testimony Will Not Defeat Summary Judgment

From the Desk of Kyle D. Riley: In medical malpractice cases, the element of causation is commonly established with expert testimony. However, the expert must be careful not to make conclusory factual statements. Read on to see why.

Claims Pointer: In this case arising out of alleged dental malpractice, the Washington Court of Appeals held that the plaintiff's expert's testimony was conclusory in nature and did not establish causation. The case is a reminder to experts, attorneys, and insurers alike that expert testimony must not be conclusory in nature in order to establish causation.

case in point...

Taylor v. Nohr, No. 74127-6-I, Washington Court of Appeals, Division One (November 7, 2016) (unpublished)

Kerry Taylor ("Taylor") received dental care from Dr. Alan Nohr ("Dr. Nohr") for more than three years. During that time, Dr. Nohr extracted a decayed tooth, restored four teeth, and placed one bridge. Nearly three years later, Taylor filed a complaint against Dr. Nohr, alleging he was negligent in his care and treatment of her.

Taylor obtained an expert, Dr. Kim Larson ("Dr. Larson"), who repeatedly testified during depositions that he could not say that any alleged negligence by Dr. Nohr caused any injury to Taylor. On the basis of this testimony, Dr. Nohr moved for summary judgment, arguing that Taylor had not met her burden of proving causation.

Taylor responded to Dr. Nohr's motion for summary judgment and attached a "corrected" transcript of Dr. Larson's testimony. In this corrected transcript, Dr. Larson changed his testimony to opine that Dr. Nohr's negligence caused injury to Taylor.

Dr. Nohr replied, arguing that the court should reject Dr. Larson's corrected testimony, and that even his changed testimony was insufficient to defeat summary judgment because it was too conclusory to prove causation. The trial court agreed and granted summary judgment for Dr. Nohr. Taylor appealed.

In a medical malpractice case, the plaintiff must prove that the defendant's negligence proximately caused his or her injury. Generally, proximate cause must be established by expert testimony, but such testimony cannot merely be conclusory statements of fact.

In his corrected deposition, Dr. Larson asserted that Dr. Nohr violated the standard of care by not documenting certain diagnoses in Taylor's chart before treating her teeth. When asked whether this violation caused any injury to Taylor, Dr. Larson opined that Dr. Nohr caused an injury because crowning teeth without a reason irreversibly damages teeth, and Dr. Nohr had no reason to perform the procedure clearly written in the chart. Additionally, Dr. Larson opined in his declaration that "at the very least, Ms. Taylor has been damaged by suffering through unnecessary unjustified treatment which caused her harm and pain."

According to the Court of Appeals, Dr. Larson failed to identify any specific facts establishing that any negligence by Dr. Nohr caused injury to Taylor. Dr. Larson opined that because Dr. Nohr failed to document certain diagnoses in Taylor's medical chart, he had no diagnosis or reason to treat those teeth and therefore damaged them. The court pointed out that the fact that Dr. Nohr did not write certain diagnoses on Taylor's medical chart did not mean that he did not have a diagnosis or reason to perform the work, or that the work damaged Taylor's teeth. As such, Dr. Larson's purported facts were not evidentiary in nature; rather, they



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were conclusory statements. Because even Dr. Larson's corrected affidavit failed to allege specific facts establishing causation and was insufficient to defeat Dr. Nohr's motion for summary judgment, the trial court was affirmed.

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case. It cannot be cited as authority to a court of law.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/741276.pdf>

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