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The Appellate Division Says Wrong Time, No Frye, and Erroneous Preclusion in Salvaging a Case

By Hillary Frommer

In its recent decision in *Sadek v Wesley*,[1] the Appellate Division, First Department, reversed a Supreme Court decision which completely disposed of a personal injury action by precluding expert testimony. That decision attacks the Supreme Court litigation on all fronts. It chastised the defendants for moving on the eve of trial to preclude expert testimony, and held that the Supreme Court's preclusion was erroneous.

The plaintiff was involved in a motor vehicle accident. When admitted to the hospital he was diagnosed has having suffered an embolic stroke. The plaintiff brought suit, alleging that the accident "precipitated the embolic stroke."[2] The plaintiff designated seven different expert witnesses, including an expert neurologist, Dr. Yazgi, who, according to the plaintiff's CPLR 3101(d) statement and the doctor's own report, would testify that "there was a probable causal relationship between the motor vehicle accident and the [embolic stroke]."[3] Dr. Yazgi issued a supplemental report which appeared to question his initial opinion.

The matter eventually went to trial. After the jury was empanelled, the defendants moved *in limine* to preclude each and every one of the plaintiff's expert witnesses from testifying. Reserving judgment on six of the motions, the Supreme Court granted the motion to preclude Dr. Yazgi's testimony, reasoning that the doctor's initial report was negated by his supplemental report which did not sufficiently establish causation. The court permitted the plaintiff to identify another neurologist, so long as that new expert did not rely on any new theory of causation. Thereafter, the plaintiff identified Dr. Oh as his expert neurologist, and served a CPLR 3101(d) statement which stated that Dr. Oh adopted the opinion contained in Dr. Yazgi's first report, and would testify that the motor vehicle accident was the cause of the embolic stroke. The defendants sought and were granted a *Frye* hearing. At that hearing, Dr. Oh testified "that within a reasonable degree of medical certainty…the accident was a competent producing cause of plaintiff's embolic stroke."[4] He supported his opinion with two published studies: an Israeli study concluding that sudden changes in body position could trigger an embolic stroke; and a Finnish study concluding that a sudden spike in blood pressure could lead to, and result in, an embolic stroke.

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The defendants argued that Dr. Oh espoused two new theories of causation that were not identified in Dr. Yazgi's report. The Supreme Court agreed, and precluded Dr. Oh from testifying, finding that he was relying on new theories which he failed to show "had gained general acceptance in the medical community."[5] The plaintiff was forced to concede that without Dr. Oh's testimony, he could not establish a causal connection between the accident and his stroke. His complaint was then dismissed.

The First Department reversed the Supreme Court's decision upon finding several errors. First, it determined that the lower court erred in precluding Dr. Yazgi from testifying. It held that the defendants' eleventh hour motion to preclude Dr. Yazgi's testimony, on the grounds that the CPLR 3101(d) statement was deficient, was itself improper. The plaintiff had served his CPLR 3101(d) statement more than one year before trial. Had the defendants believed that the statement did not sufficiently set forth the mechanism by which the stroke occurred, as they argued in their preclusion motion, they could (and should) have moved for the expert to provide a more complete explanation of the causation theory. The First Department then found that Dr. Yazgi's first report established a "probable causal relationship" between the accident and the plaintiff's embolic stroke. While the subsequent report may have raised questions about that conclusion, it did not invalidate the proposed testimony. Rather, the court reasoned, the supplemental report merely provided a basis for impeaching the expert at trial.

The court then held that the Supreme Court erroneously precluded Dr. Oh's testimony. The court initially determined that it was an error to hold a *Frye* hearing in the first place. In seeking the hearing, the defendants relied solely on their expert's attestation that a search of the medical literature revealed no support for the plaintiff's causation theory. However, that assertion was vitiated by the two studies cited by Dr. Oh. Without more, the court found, the defendants did not justify a need for a hearing.

The court then held that Dr. Oh's opinion was not entirely a new theory of causation. Although the doctor was prepared to testify that the accident was a probable cause of a blood clot in the brain dislodging, which in turn caused the stroke, the overall causal connection between the accident and the stroke was not new. Moreover, even if Dr. Oh testified that the accident caused a spike in the plaintiff's blood pressure which caused the blood clot dislodgement, that opinion was merely an explanation of the physiological process causing the stroke. A *Frye* hearing was not warranted because such an inquiry is appropriate "only to address the 'question of whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff's situation, or whether, instead, it is connected to existing data only by the *ipse dixit* of the expert.'"[6] As Dr. Oh's opinion on causation was supported by the studies and

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(Continued)

professional journals, the court held that the plaintiff had satisfied the *Frye* requirements. Nothing more was required, and it was up to the jury to decide the ultimate issue of causation.

Finally, the court was troubled by the fact that the defendant deliberately waited until the jury was empanelled before seeking to preclude the expert testimony. Although the CPLR does not provide for any specific time period in which a party must bring motions *in limine*, the court found that "the means by which they were presented to the court reflects an intentional avoidance of the structures of the CPLR's notice provisions for motions. In effect, defendants' strategic decision was akin to an ambush."[7] As litigators know all too well, courts do not like "trial by ambush." The Appellate Division thus salvaged the plaintiff's case which was disposed of solely because expert testimony had been precluded.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

[1] 2014 NY Slip Op 02551, 2014 WL 1420230 [1st Dept April 15, 2014].
[2] 2014 WL 1420230, at *1-2.
[3] *Id*. at *2.
[4] *Id*. at *3.
[5] *Id*. at *4.
[6] *Id*. at *6 *quoting March v Smyth*, 12 Ad3d 307, 312 [1st Dept 2004].
[7] *Id*. at *7.