RECENT DECISION ON EXPERT TRIAL TESTIMONY AND 998 OFFERS

By Reneé A. Richards
Date March 23, 2009

In Easterby v. Clark (Feb. 27, 2009) 09 C.D.O.S. 2454, Division One of the Second Appellate District held that it was reversible error for a trial court to exclude plaintiff's expert testimony because the expert had changed his opinions on causation in between his deposition and the time of trial. The court felt that defense counsel had been given adequate notice and an opportunity to re-depose the expert on causation prior to the time of trial, and that in any event, such variations in expert testimony go to the weight rather than the admissibility of the testimony. In the opinion of the court, defense counsel could have cross-examined and impeached the witness on the differences between the opinions he expressed or did not express at deposition and those expressed at trial. The court also held that an invalid CCP section 998 offer to compromise made subsequent to a valid 998 offer that was not accepted and allowed to lapse extinguished any prior, valid offers.

Plaintiff Diane Easterby was treated by an orthopedic surgeon following an injury to her neck she claimed was the fault of the defendants as a result of an incident that occurred during a dental procedure performed by them. Defendants' counsel took the deposition of plaintiff's orthopedic surgeon. He testified that he performed surgery on the plaintiff for a degenerative spine condition and that he had not been asked to render, nor did he have an opinion on "what caused the surgical procedure, a trauma or something else?"

About four months after the deposition and three months before trial, plaintiffs' counsel wrote defendants' counsel and indicated that the orthopedist had read his deposition and would not be making any changes to his testimony. However, they added that the surgeon had been given some corrected additional information and that "consequently, Dr. Regan will testify at trial that to a reasonable degree of medical probability the event of March 2, 2004, led to plaintiff's surgery." Defense counsel did not re-depose the surgeon after receiving this letter.

A week before trial started, defense counsel filed motions in limine with the court, among them a motion seeking to limit the trial testimony of plaintiffs' experts to those "opinions and conclusions specifically articulated at the time of their depositions, and preclud[ing] plaintiff from providing them with additional information, available but not provided at the time of their depositions." Plaintiff did not oppose this motion.

At trial, the expert testified at length about plaintiff's injury. His testimony suggested that plaintiff's surgery was necessitated by the injury sustained during the dental procedure performed by defendants. "Well, the patient, Denise, had a degenerative condition of the cervical spine. She had a condition of aging of the cervical spine that had bone

spurs….[¶] The question really is[,] did this incident produce a problem that then requires surgery that would not get better without surgery[?] And my feeling is that she had an injury…."

During cross-examination, Dr. Regan testified he had not read any medical records for the patient that predated March 2004 when the injury occurred. Defense counsel attempted to establish that Dr. Regan had not been given any information about multiple automobile accidents and a trip-and-fall the patient had apparently experienced prior to 2004. Defense counsel then was able to get Dr. Regan to state that he could not, with a reasonable degree of medical probability, stated that the surgery was necessitated by the injury at the dentist's office in March 2004.

The trial broke for lunch, and predictably, when court reconvened, plaintiffs' counsel resumed direct questioning of Dr. Regan in order to establish that prior to the March 2004 incident the plaintiff was "asymptomatic," by her own report, but that after the incident she had considerable pain. He also went on to explain he did not render causation testimony at his deposition because he was confused by the way defense counsel referred to the incident.

The following day, defense counsel moved to strike all of Dr. Regan's testimony on causation based on the in limine order. The court granted the motion, then granted defendants' motion for nonsuit because plaintiffs had no causation testimony. Defendants then filed their memorandum of costs, including a claim for expert fees, based on CCP section 998. Plaintiffs moved to tax costs, which the trial court granted, and timely appealed from the trial court's judgment order.

On appeal, plaintiffs contended that the trial court erred when it excluded their expert's testimony and that error was prejudicial. They pointed out that they gave defendants plenty of time to re-depose their expert and had notified them in writing three months before trial that their expert intended to offer causation testimony. Defendants claimed plaintiffs were precluded from offering such testimony at trial if it was not offered at deposition. The appellate court sided with plaintiffs.

The court said the fact an expert's testimony at trial may diverge from his deposition testimony is not a proper basis for excluding the trial testimony. Here, defendants were given ample notice of the planned causation testimony and an opportunity to depose the expert. The fact that Dr. Regan did not change his deposition transcript did not foreclose the possibility that he could offer a causation opinion at trial, regardless of what plaintiffs did to put defendants on notice of the expert's anticipated trial testimony.

The court emphasized "the fact that an expert's testimony at trial differs from his deposition testimony goes to the expert's credibility; it does not, without some further

evidence of prejudice to the opposition party, serve as ground for exclusion….Such 'surprises' go to the weight, not the admissibility." The appellate court went on to say that after receiving plaintiffs' letter in January 2007, "defendants could have no reasonable expectation that [Regan] would perjure himself by rigidly sticking to his deposition testimony."

Finally, the court was unpersuaded by defendants' argument that plaintiffs "never advised [them] that Dr. Regan would testify as a retained expert" and that when he changed his testimony to include opinions on causation "he morphed from acting as a non-retained treating doctor with no opinion, whatsoever, as to causation, to a retained expert witness, with a new opinion as to causation." It noted that a treating physician is certainly a "percipient expert," but his testimony need not be limited to personal observations. The court pointed out that the "apparent conflicts and backpedaling in Regan's testimony certainly go to the weight of his opinion. They do not, however, 'morph' Regan from a treating physician to a retained expert and serve as a basis for striking his testimony." By striking Regan's testimony, the trial court committed reversible error.

In the final paragraph of the court's discussion on the expert witness issue, the court seemed to take the defense counsel to task for not engaging in the "traditional response[s] to a witness whose testimony is considered flawed" such as cross-examination, impeachment, argument, and perhaps rebuttal. The court observed that defense counsel seemed fully skilled in those arts, and would be well-armed for the retrial to which plaintiffs were entitled.

As for the 998 issue, in sum, defendants had served a 998 offer to each plaintiff to waive the costs of defense if each of them would allow judgment to be entered for defendants and against each plaintiff. Neither plaintiff responded to these offers. About seven months later, defendants issued a second, flawed 998 to both plaintiffs jointly in which defendants offered to pay $9,999 in exchange for a dismissal with prejudice. Again, plaintiffs let the offer lapse without responding to it. When defendants got the nonsuit, they sought expert fees in their costs memorandum, which the trial court taxed.

Both sides agreed that defendants' second 998 offer was flawed; defendants claimed that since the first 998 was not accepted, it "expired by operation of law" and might still be enforced by the court in its discretion under section 998(c)(1). The court rejected this and said there is a bright-line rule "that a later 998 offer extinguishes all previous 998 offers, even if the later offer is made long after the earlier offer expired." Because the second 998 offer was flawed in that it was made to both plaintiffs jointly and not apportioned, it was invalid. The appellate court found the trial court ruled correctly by taxing defendants' costs bill for the expert witness fees.

There are a couple of important things to be learned from this decision. First, even if a

treating physician changes his testimony in between the time of deposition and trial to include causation or other expert opinion testimony, it would be wise to seek his or her further deposition if you are made aware of the new testimony prior to trial. Second, with any expert, if opposing counsel gives you notice that his or her expert has changed or plans to render additional testimony beyond the scope of what was rendered at deposition, it is prudent to take a second deposition to get at those opinions prior to trial. Finally, whether or not you are given notice of the changes to the other side's expert's testimony, it would be best to preserve the record by objecting to the expert's testimony, but also to be prepared to cross-examine, impeach and argue the credibility of the expert at trial, particularly if the physician claims to have gotten additional information after the deposition that could reasonably form the basis for new or different testimony. It is not advisable to simply assume that because an expert (particularly, as here, an unretained expert) changes his or her testimony between the deposition and trial, that the expert's testimony will be excluded or that such exclusion is appropriate.

This case also serves as a strong reminder that 998 offers to compromise to multiple parties "must be explicitly apportioned among the parties to whom the offer is made so that each offeree may accept or reject the offer individually." Even if the first of two 998 offers to compromise is valid and lapses, if a second, invalid offer is made, it precludes the offeror from recouping expert fees under the "bright line rule" elucidated by the court.