Experience is not enough to make expert witness opinion reliable

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Having experience that aligns with the question put forward in a medical malpractice trial qualifies someone to testify as an expert witness, but it takes more than that to establish that the opinion they are offering is reliable, physicians tell the Michigan Supreme Court.

And it needs to stay that way.

In an amicus brief, the Litigation Center of the American Medical Association and State Medical Societies and the Michigan State Medical Society (MSMS) urge the court to uphold lower-court decisions that determined testimony from a plaintiff’s expert was inadmissible because neither medical journals nor other authorities backed up his opinion.

In the case, Danhoff v. Fahim, the plaintiffs argue that “if an expert establishes his knowledge, experience and skill in a given procedure, and bases his standard of care testimony primarily on that knowledge and experience, without indirect supporting literature where available, Michigan law …. should be interpreted to allow such testimony.”

The AMA Litigation Center and MSMS tell the court that the plaintiffs are making the argument simply to allow their own case to continue moving forward and that if allowed, “methodology, general acceptance, reliability and scientific principles are kicked to the curb.”

“Certainly, experience is not a sound basis for reversing decades of Michigan precedent. Adoption of such a rule would signal a return to the era of ‘unreliable junk science purchased from professional witnesses’ and undo decades of jurisprudence (and legislative effort) to ensure the integrity of the judicial process,” the brief says, in part citing from an earlier court opinion. “The court should reject plaintiffs’ appeal and their proposed rule.”

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

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Science must back testimony

The case stems from a 2015 extreme lateral intrabody fusion (XLIF) that resulted in the patient’s sigmoid colon being punctured. The patient sued, alleging malpractice, and her expert testified that because bowel injuries are rare during these surgeries, a bowel injury shows the breach of the standard of care.

However, the expert did not offer anything other than his own personal belief and experience to show that there was a connection between the low rate of occurrence and malpractice. He also did not counter any of the contradictory literature that the defendants provided in the case. The trial court and Michigan appeals court, relying on case law, said the expert’s testimony could not be admitted as part of the case.

“Plaintiffs advocate for a rule that will save their claim, irrespective of whether it is a good rule, whether it serves Michigan jurisprudence,” the brief says. “Plaintiffs argue against the reliability gatekeeper safeguard and in favor of a porous rule, that allows an expert to testify to his or her subjective theories without having to show that the opinion resulted from an accepted methodology, that it relies upon scientific principles and that it reflects the knowledge and understanding of practitioners within the medical community. This court has consistently rejected such a rule and should do so now.”

Uphold precedent

The Michigan Supreme Court is being asked to decide whether two Michigan Supreme court rulings—Edry from 2010 and Elher from 2016—correctly describe the role of supporting literature in determining the admissibility of expert witness testimony on the standard of care in a medical malpractice case.

In 1993, the U.S. Supreme Court ruled on the admissibility of scientific knowledge. Opinions in Edry and Elher are supported by the Daubert decision, as well as longstanding Michigan precedent that says expert opinion must be backed by literature or other authorities to avoid unproven ideas from entering the courtroom. In addition, Michigan courts on multiple occasions have properly applied the precedents set in Edry and Elher, the AMA Litigation Center and MSMS brief tells the court. The caselaw should continue to be followed, they say.

“So where is this misapplication of Edry and Elher that, plaintiff argues, warrants this court’s review? Amici have not discerned it. Plaintiffs have failed to show that Edry and Elher are routinely misapplied. Rather the cases show that the role of medical literature, as articulated in Edry and Elher has been respected,” the brief argues.