

Strobel v. Johnson & Johnson (2021) DJDAR 9894

Trial court improperly disregarded expert witness' opinion that relied on both inadmissible hearsay and general knowledge in the expert's field.

FACTS: Doug Strobel was diagnosed with malignant mesothelioma in February 2019; he was 68 years old when he passed away the following year. Before his death, Strobel sued Johnson & Johnson (J&J), alleging that prolonged exposure to asbestos contained in the corporation's baby powder (JBP) was a substantial contributing cause to his mesothelioma diagnosis.

PROCEDURAL POSTURE: J&J moved for summary judgement. The dispositive issue was whether JBP sold during Strobel's exposure period was indeed contaminated with asbestos. J&J brought in Dr. Matthew Sanchez to opine that it was not contaminated. Strobel argued it was and brought in five asbestos experts, including Dr. Sean Fitzgerald, all of whom contradicted J&J's expert on this point.

Dr. Fitzgerald tested five JBP samples obtained from J&J's own historical archives and would testify that four of those samples tested positive for asbestos. In fact, none of the asbestos-positive samples were from the exposure period. Dr. Fitzgerald's opinion was based upon various third-party documents, some of which were relied upon by J&J's experts (e.g., an FDA-sponsored study and an FDA-issued report). However, Dr. Fitzgerald also relied heavily upon test results provided by Dr. William Longo. Although Dr. Longo had presented the same evidence in other asbestos litigation against J&J, he did not testify in Strobel's case. From these sources of information, Dr. Fitzgerald concluded that asbestos contamination was persistently present in JBP throughout the exposure period.

The trial court ultimately excluded all expert opinions relying on Dr. Longo's test results as inadmissible case-specific hearsay under *People v. Sanchez* (2019). Therefore, the trial court completely disregarded Dr. Fitzgerald's conclusion as to the persistent presence of asbestos in JBP sold during Strobel's exposure period. In the order granting J&J's motion for summary judgement, the trial court held that without Dr. Fitzgerald's conclusion, J&J's Strobel had failed to present evidence presenting a triable issue of legal causation. Strobel appealed. He died while the appeal was pending.

HOLDING: Reversed and Remanded. Because many of the data sources Dr. Fitzgerald used to formulate his conclusion qualify as source material upon which experts in Dr. Fitzgerald's field of expertise would reasonably rely, his conclusion was not founded entirely upon inadmissible hearsay.

DISCUSSION: An expert witness may only convey hearsay as the basis for his opinion if it is general knowledge in the expert's field or if it is independently provable by admissible evidence. However, an absent witness's inadmissible opinion does not become admissible evidence merely by virtue of an expert presenting the same as "general knowledge."

On appeal, the court concurred with the trial court's finding that Dr. Fitzgerald's testimony was inadmissible hearsay *to the extent* it related specifics of Dr. Longo's testing data and results. However, it went on to hold that the trial court had abused its discretion in excluding Dr. Fitzgerald's testimony entirely. In support of its conclusion, the First Appellate District court noted Dr. Fitzgerald's opinion was informed – at least in part – by many of the same trustworthy documents relied on by the other side's experts. This combination of factors was enough to convince the court that the third-party documents were reliable enough to qualify under "general knowledge." The First Appellate District court therefore held that it was an abuse of discretion to exclude Dr. Fitzgerald's conclusion in its entirety. The court's reversed the order granting summary judgement and remanded the case for further proceedings consistent with its opinion.