Second Circuit Labels Expert's Testimony a Sham in Pharmaceutical Products Liability Litigation

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As a little kid, I did not have an immediate appreciation that my actions could get me into trouble, and so, without thought, I told the truth. My dad would ask, "Did you write your name on the wall?" I would respond, "Absolutely. Isn't it great?" My mom would ask, "Did you finish your chicken?" and I would respond, "No, I fed it to the dog." It was only after seeing their reactions and realizing that I had something at stake (television time) that I embellished my answers: "Oh, you were talking about the wall in the living room. I thought my teacher had called you to tell you how great I was at writing my name on the blackboard, which is attached to a wall. I don't know who wrote on the living room wall, but if I had to guess it was [one of my sisters] trying to frame me." Or, "I did finish the chicken, it was so good that I took an extra piece to share it with the world, and I started with the dog." Suffice to say, my revised stories did not have their desired effect, and my parents would rightfully punish me.

Like my mischievous younger self, parties trying to wriggle out of summary judgment have been known to bend the facts toward the incredible. However, like my parents, courts may not be willing to entertain such contrivances. Though determinations of a witness's credibility are normally left to juries, as the Second Circuit recently held in *Secrest v. Merck, Sharp & Dohme Corp.*, 11-cv-4358, slip op. (January 30, 2013), when a witness completely contradicts his prior testimony, a court considering a motion for summary judgment may properly disregard such testimony as a "sham."

Secrest is part of *In re: Fosamax Products Liability Litigation*, an MDL pending in the Southern District of New York. Fosamax is a prescription drug manufactured by Merck commonly used to treat bone conditions such as osteoporosis. The claims in the MDL relate to the alleged link between Fosamax and osteonecrosis – bone death – of the jaw ("ONJ"). In July 2005, after receiving reports in 2003 and 2004 of Fosamax patients developing ONJ, Merck and the FDA agreed that Merck would include a warning regarding the reports in the Fosamax label.

Plaintiff Linda Secrest took Fosamax from 1998 to 2005 to prevent factures and osteoporosis. From June 1998 to March 2003, Dr. Lawrence Epstein, Secrest's long-time primary care physician, prescribed Fosamax to her. Starting in December 2003, Dr. Dennis Hidlebaugh was the prescribing physician. In 2004, after Secrest developed a serious and chronic infection in and around her jaw, she was diagnosed with ONJ, and was instructed to stop taking Fosamax, which she did in April 2005.

In 2008, Dr. Epstein was deposed as a fact witness. At that deposition, he testified that he "'did not know that [Secrest] was on Fosamax from 2003 to 2005 because [he] wanted her on [a different drug].'" In January 2011, Merck filed for summary judgment arguing, among other things, that plaintiff's failure to warn claims fail because, if Dr. Epstein were not aware of plaintiff's Fosamax use, he could not have been affected by any allegedly inadequate warning.

In response to Merck's motion for summary judgment, Secrest did not offer any evidence from Dr. Hidlebaugh, who was the prescribing physician when she developed ONJ. Instead, Secrest offered the "expert" testimony of Dr. Epstein, who, she claimed, had continued to consult with her about her Fosamax use. Dr. Epstein, now a paid plaintiff's expert, was re-deposed in February 2011 where he "told a diametrically different story" than he told in 2008. Whereas in 2008, he testified that he was not aware that plaintiff was continuing to take Fosamax from 2003-2005 and that he had advised Dr. Hidlebaugh to discontinue its use, in 2011, he testified that he knew plaintiff was taking Fosamax in 2004 and 2005 and he had advised Dr. Hidlebaugh to continue the Fosamax treatment. He also testified that "had Merck warned him about the risk of ONJ, he would have recommended that Secrest stop taking Fosamax."

Conveniently for plaintiff, Dr. Epstein's 2011 expert testimony, unlike his 2008 fact-witness testimony, could help plaintiff avoid summary judgment. Despite the contradictory nature of the new testimony, plaintiff never "proffered a plausible explanation that would allow a reasonable jury to reconcile the inconsistencies in Dr. Epstein's statements." Instead, plaintiff argued that questions of credibility belong to the jury.

The Court did not agree. In affirming the District Court's decision granting summary judgment, the Second Circuit held that the District Court properly disregarded Dr. Epstein's new "clearly contradictory" testimony based on the "sham issue of fact" doctrine, "which prohibits a party from defeating summary judgment simply by submitting an affidavit that contradicts the party's previous sworn testimony." Specifically, the Court noted, "the doctrine applies to stop Secrest from manufacturing a factual dispute by submitting testimony from an expert whom she tendered, where the relevant contradictions between the first and second depositions are unequivocal and inescapable, unexplained, arose after the motion for summary judgment was filed, and are central to the claim at issue."

For defendants, it is encouraging that courts will summarily disregard such "sham" testimony rather than defer such issues to juries. And, to come full circle, as a father, I am similarly able to see through my daughter's attempts at obfuscation. However, unlike the Court in *Secrest*, I normally let such things slide because she is just too cute (and she is only four). I am not in a position to say the same for Dr. Epstein and Secrest.

About the Author

Mr. Spatz has extensive experience handling complex litigation and arbitration, particularly products liability, class action, and multi-district litigation. He has supervised discovery in multi-district federal litigation and state court cases, devised modes for valuing plaintiffs' claims, and designed and managed large-scale complex settlement programs for multi-district products liability actions. He is a graduate of the University of Pennsylvania Law School, where he was Associate and Senior Editor of the Journal of Constitutional Law, earned a Master of Bioethics from the University of Pennsylvania School of Medicine, and graduated from Brown University with honors.

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