

This ruling is an extension of the ruling in *Gutierrez*, which established that the burden to overcome a presumption of dangerousness is placed on the acquittee when committed after being found not guilty by reason of insanity. Together, *Gutierrez* and *Williams* establish that the burden to overcome a presumption of dangerousness remains with the acquittee from initial civil commitment until final release. Depending on the charge, this process may extend beyond the maximum sentence if an individual were instead found guilty. While *Williams* addressed federal insanity defense law, individual states have their own laws related to the insanity defense. It remains to be seen how this ruling may or may not affect such state law where applicable.

Interpretation of the “One-Expert Rule” in Malpractice Litigation

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Arizona Supreme Court Considers Whether a Treating Physician Can Answer Hypothetical Questions as a Fact Witness

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In *McDaniel v. Payson Healthcare Management, Inc.*, 512 P.3d 998 (Ariz. 2022), the Supreme Court of Arizona considered whether a treating physician called as a fact witness may offer expert opinion testimony without violating the state’s One-Expert Rule.

Facts of the Case

In July 2011, Dallas Haught injured his knee in a dirt bike accident. His injury was evaluated and treated by Dr. Darnell, a surgeon “affiliated with defendant Payson Healthcare Management” (*McDaniel*, p 1001). As part of his workup, a lab test was performed

for C-reactive protein (CRP), a nonspecific marker for inflammation. Dr. Darnell incorrectly documented the CRP test result to be lower than the true value.

Mr. Haught’s medical condition continued to deteriorate, so he was transferred to another facility for further treatment. The physicians at this facility did not note the CRP test result, and additional CRP tests were not ordered. Eventually, Mr. Haught developed necrotizing fasciitis, “resulting in the surgical removal of all the skin on his right leg” (*McDaniel*, p 1001).

Mr. Haught (through his conservator, Ronnie McDaniel) then sued several health-care providers, alleging medical malpractice. Mr. Haught argued that his providers were delayed in diagnosing necrotizing fasciitis because of the “failure to accurately communicate the CRP test result” (*McDaniel*, p 1001). Mr. Haught asserted that the delayed diagnosis necessitated additional surgical intervention, causing “permanent injuries and disfigurement” (*McDaniel*, p 1001).

At trial, the defendants called several physicians to testify as fact witnesses about the medical care they provided to Mr. Haught. The defense clearly stated that none of these physicians were paid experts. But, Mr. Haught argued that the treating physicians became expert witnesses after they answered hypothetical questions “concerning the CRP result and infectious disease,” and therefore “went beyond [their] personal knowledge of the care they provided” (*McDaniel*, p 1002). Mr. Haught asserted that because the defense “elicited expert testimony from the treating physicians,” (*McDaniel*, p 1002) they violated Arizona’s “One-Expert Rule.” The trial court returned a verdict for the defendants.

Mr. Haught then moved for a new trial based on multiple factors, including the alleged violation of the One-Expert Rule. The trial court denied his motion for a new trial. The trial court concluded that the treating physicians were fact witnesses because “how to diagnose necrotizing fasciitis” was “relevant” in their testimony (*McDaniel*, p 1002), and therefore did not violate the One-Expert Rule. Mr. Haught appealed.

The Court of Appeals reversed the trial court’s determination and held that the defense’s witnesses provided “expert testimony related to the standard of care” (*McDaniel*, p 1002) and thus violated Arizona’s One-Expert Rule. The Supreme Court of Arizona granted review to address whether the Court of

Appeals erred in their reasoning when concluding that the “treating physicians’ testimony on the standard of care” (*McDaniel*, p 1002) violated the One-Expert Rule.

Ruling and Reasoning

The Supreme Court of Arizona referenced prior case law and examined the committee deliberations while the rule was being written, in addition to reviewing the changes to the rule since its inception. The Arizona Supreme Court determined that an “independent expert” is someone who “will offer opinion evidence [and] who is retained for testimonial purposes” (*McDaniel*, p 1003). This definition, used earlier in a lower Arizona court, was later incorporated into the Arizona Civil Code’s relevant rules on expert testimony. The newest version of the One-Expert Rule indicates that each side is entitled to call “only one retained or specifically employed expert to testify on an issue” (Ariz. R. Civ. Proc. 26(b)(4)(F)(i) (2018)). The court further noted that “a fact witness may also offer expert opinion testimony without violating the One-Expert Rule when the witness’ testimony is based on personal observations and actions” (*McDaniel*, p 1003).

The court agreed with the trial court that the treating physicians were fact witnesses, and that the questions they answered concerning the CRP test and its result were “clearly in the context of explaining the treatment they personally provided and did not constitute impermissible expert testimony” (*McDaniel*, p 1004). The court further pointed to case precedents in which defendant treating physicians answered hypothetical questions to demonstrate their knowledge of the relevant area and to support their testimony that they met the standard of care. The court stated that Mr. Haught’s physicians testified regarding the standard of care, but that their testimony was based on “personal observations and personal participation in [Mr.] Haught’s treatment” (*McDaniel*, p 1004); therefore, the court concluded that the defendant physicians did not violate the One-Expert Rule.

Additional consideration was given to whether the treating physicians provided a “deluge” of cumulative testimony and therefore disadvantaged the plaintiff. In this case, the defense counsel argued that “thirteen doctors testified that the standard of care was met compared with just one expert presenting the countervailing conclusion for the plaintiff” (*McDaniel*, p 1004). But, by referencing the committee deliberations during the authorship of the rule, the court

concluded that the purpose of the One-Expert Rule was not to limit cumulative testimony, but instead to “limit the cost of the presentation of multiple retained experts” (*McDaniel*, p 1004). The court pointed to Arizona Rule of Evidence 403 to discuss the presentation of cumulative evidence, which permits a trial court to exclude evidence if “its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence” (*McDaniel*, p 1004).

Discussion

Many jurisdictions use rules like Arizona’s to limit each side to one independent expert per subject. The term “independent expert” is a term of art, and its definition varies between jurisdictions. In Arizona, an “independent expert” is someone who is specifically retained for expert opinion testimony. Because forensic psychiatrists are typically retained as independent expert witnesses on a topic, the court is unlikely to allow their retaining attorney to have additional forensic psychiatric experts testify on the same matter.

Additional expert opinions do not necessarily provide the trier of fact with substantially different evidence. On the other hand, courts may make an exception to One-Expert Rules if additional experts offer meaningfully different opinion evidence with probative value.

Application of One-Expert Rules can be problematic, especially when they are misinterpreted because of vague language distinguishing fact witnesses from expert witnesses. This is especially true in medical malpractice cases in which treating physicians may be expected to answer hypothetical questions to demonstrate that they met the standard of care. As *McDaniel* establishes that treating physicians are not considered “retained or specially employed experts,” physicians in Arizona can answer hypothetical questions to defend themselves without violating the state’s One-Expert Rule.

Pretrial Request for Mental Health Diversion

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