



Alerts

Maine Court Holds That Expert Testimony is Required to Prove Causation in Legal Malpractice Action

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Brooks v. Lemieux, 2017 WL 1056194 (Me. 2017)

Brief Summary

The Maine Supreme Judicial Court recently held that expert testimony based on supporting facts in the record was required to prove causation between an attorney's alleged negligence and the plaintiff's alleged injury.

Complete Summary

Plaintiff, a long-time union employee, retained the defendant attorney after unsuccessfully filing a grievance over his termination from Bath Iron Works (BIW) and failing to go to arbitration. Defendant filed suit against the union and BIW on plaintiff's behalf in federal district court for breach of the collective bargaining agreement and discrimination, although plaintiff alleged that he had a viable retaliation claim.

After the union and BIW moved for summary judgment, defendant failed to timely file opposing statements of material facts, and summary judgment was granted against plaintiff. In the recommended decision, the magistrate judge noted that defendant failed to cite to record evidence in plaintiff's statement of facts and the opposing statement of facts, resulting in their admission.

Plaintiff thereafter sued defendant for legal malpractice, alleging he breached the standard of care by failing to: (1) timely file responses to statements of material fact supporting summary judgment, (2) follow a local rule governing statements of fact, (3) obtain affidavits from witnesses and (4) conduct adequate discovery.

The trial court granted summary judgment in defendant's favor, concluding that plaintiff failed to prove causation for several reasons. First, the failure to oppose the statement of facts was not causally related to summary judgment because the federal court considered defendant's untimely statement of facts, but relied on the union's statement of facts anyway. Second, plaintiff failed to identify what evidence defendant should have cited, affidavits he should have obtained, and discovery he should have conducted, allowing a fact-finder only to speculate as to any causal link between the alleged negligence and the injury.

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Finally, and most significantly, plaintiff failed to submit admissible expert testimony on causation. The trial court refused to consider plaintiff's expert's corrective affidavit on causation, which contradicted the expert's earlier deposition testimony. Relying on *Zip Lube, Inc. v. Coastal Savings Bank*, the trial court held that the self-contradictory affidavit could not create a disputed issue of material fact given her clear, unambiguous answers in her deposition testimony. 1998 ME 81, para. 10 ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.").

Plaintiff appealed and argued that (1) the trial court applied the incorrect malpractice standard, (2) expert testimony was not required, (3) causation presents a jury question, and (4) plaintiff's expert's affidavit established *prima facie* evidence of causation.

The Maine Supreme Judicial Court disagreed with the plaintiff's argument for a modified malpractice standard under *Niehoff v. Shankman Assocs. Legal Ctr.* because here, the defendant did not fail to timely plead so that "plaintiff's opportunity to get before the fact-finder [was] lost." The plaintiff also failed to explain how the defendant's suit on the plaintiff's behalf under the discrimination statute was material to the trial court's decision.

The court further found that the plaintiff lacked the required expert testimony to establish that plaintiff would have prevailed but for the defendant's alleged negligence. Agreeing with the trial court's reliance on *Zip Lube*, the court reasoned that the plaintiff expert's deposition testimony and subsequent affidavit created a clear contradiction, not a mere discrepancy.

While the trial court erred in refusing to consider the self-contradictory affidavit, the error was harmless because the affidavit was deficient for summary judgment purposes. The affidavit offered conclusory statements that the defendant breached the standard of care without citing the supporting facts to link the alleged negligence to the injury. Ultimately, without competent evidence of negligence, the fact-finder could only speculate about causation (*i.e.*, that the plaintiff would have prevailed in the underlying litigation but for the defendant's alleged negligence), and thus the expert opinion could not suffice to escape summary judgment. Therefore, the Maine Supreme Judicial Court affirmed summary judgment.

Significance of Opinion

This case is significant because it illustrates a plaintiff's expert cannot merely provide conclusory opinions that an attorney violated the standard of care and that but for that violation, the injury would not have occurred. The case underscores the importance of having your expert(s) be well-prepared and fully understand all the facts and evidence in the record, and not provide "net opinions" or opinions based on speculation.

For more information, please contact [Lauren Kus](#) or [Terrence McAvoy](#).

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