

WHEN TO CHALLENGE AN EXPERT'S QUALIFICATIONS: IMPLICATIONS OF RASOR

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In *Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160 (2017), the Arizona Supreme Court resolved a split of authority among the court of appeals when it held that a defendant may move for summary judgment based on a proposed expert's lack of requisite qualifications under A.R.S. § 12-2604 without first challenging the sufficiency of the expert affidavit under § 12-2603. This ruling was generally seen as very favorable to the healthcare liability defense bar. On closer examination, however, *Rasor* may not be the boon it first appeared to be.

Legal Landscape

In most cases, Arizona law requires that a plaintiff prove his or her medical negligence claims through expert testimony. A.R.S. § 12-2603 requires a medical negligence plaintiff to serve with his or her initial disclosure statement a preliminary expert opinion affidavit supporting the plaintiff's claims that the defendant healthcare provider fell below the standard of care, and that such breach caused plaintiff's injuries. This is sometimes referred to as an "affidavit of merit" because it requires plaintiffs to make a preliminary showing that they will be able to produce an expert to support their claims at trial. This requirement allows courts to dispose of meritless cases before a defendant is required to invest significant time and expense in defense of a case that the plaintiff will be unable to prove at trial. Section 12-2603 provides that a plaintiff whose preliminary expert affidavit is successfully challenged shall be given a reasonable time to cure the deficiency. A plaintiff may disclose a different expert at the time of testifying expert disclosures.

As a companion statute, § 12-2604 sets forth the requirements for standard of care experts: a retained expert's specialty must mirror that of the defendant to the extent that the care and treatment at issue falls within that specialty. More specifically, in the year preceding the incident underlying the lawsuit, the retained expert must have spent a majority of his or her professional time in the active clinical practice or accredited instruction of the same specialty of the defendant.

Before *Rasor*, there was a lack of clarity as to: 1) whether a defendant was required to challenge an expert's qualifications at the preliminary affidavit stage before challenging a disclosed testifying expert's qualifications, 2) whether a plaintiff would be entitled to substitute experts, and 3) whether a dismissal would be on the merits such that the case could not be refiled.

Rasor v. Northwest Hospital, LLC

In *Rasor*, the plaintiff developed a pressure ulcer over her tailbone while in a medically-induced coma in the ICU. The wound worsened, allegedly resulting in permanent residual damage. The plaintiff alleged that the ICU nursing staff fell below the standard of care by failing to properly prevent and care for the wound, which caused the wound and subsequent injuries.

In support of her claims, the plaintiff served a preliminary expert affidavit from a certified wound care nurse. The defendant did not challenge the wound care nurse's qualifications at that time. After the plaintiff disclosed the same wound care nurse as her testifying expert, she filed a preemptive motion asking the court to find that the wound care nurse was qualified to testify to the standard of care applicable to the ICU nurse. Shortly thereafter, the defendant filed a motion for summary judgment, arguing that the wound care nurse was not qualified under § 12-2604 because the care and treatment at issue was administered by ICU nurses and, therefore, the plaintiff could not prove her claims. At oral argument on the plaintiff's preemptive motion, the trial court ruled that the wound care nurse was qualified to testify about the standard of care for wounds but expressed concern about whether the nurse could testify as to causation. The trial court later granted the defendant's motion for summary judgment without explanation.

The court of appeals held that the wound care nurse did not meet the requirements set forth in § 12-2604 because the specialty at issue was ICU nursing, and not wound care, notwithstanding that the injury involved the development and worsening of a pressure wound. However, the court of appeals also held that the plaintiff should have been permitted an opportunity to find and substitute a new expert who would qualify under the statute, in part because the defendant had not challenged the sufficiency of the wound care nurse's qualifications until after the testifying expert disclosure deadline had passed.

The Arizona Supreme Court agreed with the court of appeals that the wound care nurse was not qualified to testify about the standard of care applicable to an ICU nurse. However, the Court disagreed that the defendant was required to have challenged the sufficiency of the wound care nurse's qualifications at the preliminary affidavit stage. The Court further disagreed that § 12-2603 automatically permitted a plaintiff to substitute experts at any stage of the litigation. The Court explained that the plain language of §§ 12-2603 and -2604 "do not require that a defendant challenge a preliminary expert affidavit as a precondition for summary judgment . . . [n]or do they state that the 'cure' provision of § 12-2603(F) applies other than in the context of a challenge to the preliminary expert affidavit." The Court further explained that a plaintiff who cannot oppose a motion for summary judgment challenging an expert's qualifications under § 12-2604 may file a Rule 56(d) affidavit and motion for relief requesting time to find a substitute expert. The Court provided guidance that, after a hearing, the trial court may deny the requested relief and grant summary judgment, or it may defer consideration of the summary judgment motion to allow the plaintiff time to find a qualified expert. The Court further advised that the trial court "may consider both the good faith or lack thereof of the plaintiff in proposing [an unqualified expert], as well as the defendant's waiting to challenge the proposed expert until [a] later stage of litigation . . . if the qualifications were plainly inadequate in the affidavit."

Implications

Two questions arise from *Rasor*: (1) when is the right time to challenge an expert's qualifications, and (2) how will a trial court rule?

Section 12-2603 is clear that a plaintiff is automatically entitled to a reasonable amount of time to find a qualified expert when the expert's qualifications are challenged at the preliminary affidavit stage.

But what happens when a defendant challenges the expert's qualifications after the testifying expert disclosure deadline has passed? If discovery is ongoing and no trial is set, then a court may find there is no prejudice from allowing the plaintiff a reasonable amount of time to find a substitute expert. As for considering the conduct of the parties, it is unclear whether that will help the defendant. If the testifying expert is different from the preliminary expert, then the defendant would have grounds to argue that the plaintiff did not act in good faith if the testifying expert is clearly unqualified. If, however, the testifying expert, is the same as the preliminary expert, and it was – or should have been – clear to a plaintiff that the proposed expert is plainly unqualified, then it likely would be equally clear to the defendant, assuming the expert's CV was provided with the preliminary affidavit. In such cases, the parties' conduct loses significance.

If trial is set and the defendant waits until the dispositive motion deadline (ie: approximately 90 days before trial) to challenge the expert's qualifications, then the court might grant the motion on the ground that discovery is closed and there is inadequate time to allow the plaintiff to find a substitute expert. However, the court could also find that the defendant's conduct in waiting until the dispositive motion deadline was not in good faith. In that case, the court could exercise its discretion to continue trial and allow the plaintiff an opportunity to substitute. Such a delay would undoubtedly protract the litigation, giving rise to an argument that the defendant would be prejudiced by such a delay, but the plaintiff would likely argue that the delay was self-imposed by defendant for waiting until the deadline to file the motion.

A defendant could wait until trial to challenge an expert's qualifications on cross-examination. This is risky because the court could find that the defendant waived its objections to the expert's lack of qualifications. The defendant's only recourse at that point would be to challenge the weight and credibility that the jury should afford the expert. On the other hand, the matching-specialties requirement of § 12-2604 is a substantive requirement for plaintiff to establish the necessary elements of proof, and no court has addressed the issue of whether that substantive requirement can be waived.

Conclusion

In order to determine the best course of action for challenging an expert's qualifications, the defendant must consider the strengths and weaknesses of the case, the strengths and weaknesses of the plaintiff's expert (especially when compared with the strengths and weaknesses of the defendant's expert), the availability of qualified experts, and the defendant's willingness to risk a late-stage challenge. For example, in a strongly defensible case, it may be worth proceeding with an unqualified expert and plan to challenge the expert's credibility in cross-examination rather than risk the possibility that the plaintiff could find a better expert if the court allows substitution. That may also be the type of case in which it would be worth moving for directed verdict after establishing the expert's lack of qualifications in cross-examination. But if the plaintiff's expert is strong and there is a limited pool of qualified experts due to the specialty at issue, an early challenge to the expert's qualifications may be the best approach.

In sum, although *Rasor* clarified that a defendant need not challenge a preliminary expert affidavit before moving for summary judgment on the grounds that the disclosed testifying expert is not qualified, it did not limit the court's discretion to allow a plaintiff to substitute experts. Thus, the defendant will need to consider a number of factors specific to the case at hand to determine the best approach to challenging the sufficiency of a plaintiff's expert.