

Esther Sivak

Evidence- Fall 2017

Extra Credit Court Observation

Note: Details of this case, including the names of individuals, have been omitted or changed to protect the confidentiality of the data.

**Background:**

I observed four hours of a civil trial. This was a personal injury case where the plaintiff was suing a homeowner for the injuries the plaintiff sustained while painting the defendant's home. According to the testimony presented, the plaintiff attempted to paint a portion of the defendant's home that was difficult to reach and beneath this area of the home was a patio/ sunshade. In order to reach this portion of the house, after checking to see if the patio/ sun-shade was strong enough to hold his weight—by pulling down on the slats, the plaintiff-painter placed wooden boards on the patio and climbed atop the patio/sunshade. The plaintiff-painter was able to paint for a while, until the patio/sunshade collapsed and the plaintiff sustained multiple injuries. The plaintiff argued that he should have been warned by the defendant or, alternatively, the defendant negligently maintained/ constructed the patio/sunshade. The defendant argued that, as a professional, the plaintiff should have known that such a structure was not meant to support human weight and his injuries were the result of plaintiff's negligence not the defendants. Ultimately, it was a plaintiff's verdict, but the jury apportioned 75% fault to the plaintiff, so he was only entitled to 25% of his demand.

**Trial Testimony:**

I was able to observe the examination of three witnesses. I observed the examination of the plaintiff, a plaintiff's expert, and a defense expert.

The direct-examination of the plaintiff was very impassioned; the attorney asked him open-ended questions and the plaintiff was able to tell his story. However, on cross-examination the plaintiff got pretty upset after being asked about why he did not attempt to receive more medical treatment. The plaintiff explained that he could not afford treatment and that the only way he could get the proper care was if he won the case. There were no objections made during the examination of this witness. However, what was interesting was that the jury did submit questions to the judge. The judge conferred with the attorneys (and turned on the very loud white noise), and the witness responded.

The examination of the plaintiff's expert was not really an in-court examination, but rather a video deposition was played for the jury. Apparently the plaintiff's expert—a medical doctor—was out of the country for a conference. Although using video-deposition in trial is not uncommon as governed by Rule 32 of the Federal Rules of Civil Procedure, technically the deposition is still an out of court statement and the statements here were offered for their truth so the deposition qualifies as hearsay. Rule 32 provides that a deposition may be used in court if “(A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it **would be admissible under the Federal Rules of Evidence** if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).” However, I am unsure why this deposition was considered admissible under the rules of evidence because the witness's unavailability was due to his attendance at an out-of-the-country medical conference, and simply being out of the country is not a valid reason for being unavailable under FRE 804. Interestingly, Rule 32 provides its own definition of unavailable and under Rule 32 a witness can be considered unavailable if “(B) that the witness is more than 100 miles

from the place of hearing or trial or is outside the United States.” This is different than rule 804. With these discrepancies, and because I was not at the evidentiary hearing for the trial, I am unsure why the witness qualified as “unavailable.” Nevertheless, assuming the witness was considered unavailable, the deposition would be admissible under Rule 804(b)(1). The video-deposition was effective and defense counsel, who was present at the deposition, made several objections during the deposition, but did not specify what his objections were.

The direct-examination of the defense-expert was very interesting. The defense-expert was there to testify about the patio/sunshade and was there as a construction expert. He testified that the patio/sunshade was properly constructed and that the plaintiff, as a painter, should have known better than to climb on the structure. Defense counsel asked him what his opinion was and how he reached his opinion. Plaintiff’s counsel attempted to discredit the expert by demonstrating that he changed his opinion. He impeached the witness with his deposition. Use of this deposition would fall under a hearsay exemption under Rule 801(d)(1)(A), as an inconsistent statement made under oath. Additionally, there was one objection made by the defense attorney during the cross-examination, “asked and answered.”

**Reflection:**

Observing this segment of the trial was very eye-opening. I was able to see how the jury reacted to the testimony and I was able to see how the attorneys interacted with each other, the judge, and the witnesses. Additionally, although there were not a lot of objections, I was able to consider why the evidence, or testimony that was being given, was or was not admissible. I observed several opportunities where the opposing counsel could have objected, but they did not. Why they didn’t object I am unsure, they may have missed it, or they may have not wanted to look bad in front of the jury. Overall, this was a great learning experience.