

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

S.Ct. CIVIL NO. 01-05
(High Ct. Civil No. 1997-261)

THE REPUBLIC OF THE MARSHALL ISLANDS
Plaintiff-Appellant,

-v-

AMERICAN TOBACCO COMPANY, et al.,
Defendants-Appellees.

AMERICAN TOBACCO COMPANY, et al.,
Defendants-Cross-Appellants,

-v-

THE REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff-Cross-Appellee.

APPEAL FROM THE HIGH COURT

MAY 9, 2002

FIELDS, C.J.
GOODWIN, A.J. *pro tem*,¹ and KURREN, A.J. *pro tem*²

Argued and Submitted April 17, 2002

SUMMARY:

Plaintiff, the Republic of the Marshall Islands ("RMI"), sued a number of tobacco manufactures and distributors for damages allegedly caused by selling defective cigarettes to its residents and thereby creating medical expenses which the RMI government was required by its own laws to pay. On defendants' motion for summary judgment, the High Court concluded that the Government had presented no admissible evidence of damages and entered judgment for defendants on all common law causes of action. The High Court retained jurisdiction to review a statutory claim asserted under the Consumer Protection Act. The RMI then moved unsuccessfully to reopen the record and introduce alternative evidence of damages. Thereafter, the parties stipulated to dismissing the remaining statutory claim "with prejudice" so that a final, appealable judgment could be entered. The Supreme Court affirmed.

DIGEST:

1. APPEAL AND ERROR - *Decisions Reviewable-Finality of Determination*: Only final judgments are reviewable.

2. APPEAL AND ERROR - *Same - Same*: Voluntary dismissals, granted without prejudice are not final decisions and do not transform an earlier partial dismissal or partial summary judgment order into a final decision.

3. APPEAL AND ERROR – *Review - Discretionary Matters- Evidentiary Matters*: The standard for review of evidentiary ruling is abuse of discretion.

4. EVIDENCE - *Expert Testimony*: Before admitting expert testimony, trial courts have a unique obligation to inquire into the reliability of the expert's methodology, considering factors as: whether the proffered theory or technique has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error; the standards for controlling the technique's operation; and the degree to which it is accepted as reliable within the relevant scientific community. *Kumho Tire*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. 592-94).

5. EVIDENCE - *Same*: Contradictory opinions from an expert is an acceptable ground for disqualification.

6. EVIDENCE - *Same*: Mere speculations by an expert, however, do not make them expert opinion. *See Stokes v. L. Geismar, S.A.*, 815 F.Supp. 904, 910 (E.D. Va. 1993), *aff'd*, 16 F.3d 411(4th Cir. 1994) ("the proffering of an expert ... who will bless a guess-based theory will not suffice to withstand summary judgment."). The courtroom is not the appropriate venue for casual musings of scientists.

7. APPEAL AND ERROR – *Review - Questions of Law - Summary Judgments*: The standard of review for summary judgment is *de novo*.

8. DAMAGES - *Generally*: A court cannot hold defendants liable for engaging in lawful activities (i.e., selling and distributing cigarettes in the Marshall Islands). Without evidence linking defendants' allegedly illegal activities to claims of damages, the Court declined to consider the plaintiffs claims beyond summary judgment.

9. DAMAGES - *Proof of Amount*: Although the amount of damages need not be certain or definite, the evidence must nevertheless provide the jury with some guidance on damage estimates. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988); *see also* Restatement (Second) of Torts § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages ... if, but only if ... he establishes ... the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.").

10. CIVIL PROCEDURE – *Motions - Summary Judgments – Proof of Damages*: Without a reasonable methodology, summary judgment against the Government is appropriate because the jury is left with no proper proof of damages. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d at 1372.

11. APPEAL AND ERROR – *Review - Discretionary Matters - Motions in General*: The standard of review for the denial of a motion to reopen discovery is abuse of discretion.

OPINION BY GOODWIN, A.J.

The Republic of the Marshall Islands ["RMI"] sued a number of tobacco manufactures and distributors for damages allegedly caused by selling defective cigarettes to its residents and thereby creating medical expenses, which the RMI government was required by its own laws to pay. The government appeals the summary judgment in favor of the defendants, granted by the High Court, Justice Johnson, presiding. We have jurisdiction pursuant to Article VI, Section (2) of the Marshall Islands Constitution, and we affirm.

FACTS AND PROCEDURAL HISTORY

The Republic of the Marshall Islands is a sovereign nation with a population of approximately 50,000. Under its constitution, the RMI government ("the Government") provides its citizens and residents free medical benefits and services, including treatment in public clinics and hospitals throughout the country. The Government alleges that, since the 1950's tobacco companies have conspired to conceal and misrepresent the health risks associated with smoking. As a result of the conspiracy, the Government alleges that the public was kept unaware of the health effects of smoking, and that many RMI residents thereby became addicted to smoking and developed lung cancer, among other afflictions. Not all smokers could pay for treatment. For those who could not afford care, the Government alleges that, pursuant to its constitutional obligation, it has borne the cost of treating tobacco-related illnesses.

On October 20, 1997, the Government filed an action for damages and injunctive relief against each of the eighteen originally named defendants. The Government sought recovery under various legal theories, including one statutory claim under RMI's Consumer Protection Act, and ten common law causes of action including fraud, conspiracy, products liability, negligence, and breach of warranty. All defendants filed timely motions to dismiss for lack of personal jurisdiction. The High Court granted the motions to all but five "manufacturer" defendants ("Tobacco").³

Tobacco then moved to dismiss for failure to state a claim pursuant to [Marshall Islands Rules of Civil Procedure] Rule 12(b)(6), alleging that the economic injuries were too remote to satisfy the common law's requirement proximate causation. When the motion was denied without prejudice, Tobacco filed a petition for writs of *mandamus* or prohibition to challenge the continuing jurisdiction of the High Court to proceed with this litigation. We declined to consider the merits of the interlocutory rulings of the trial court and denied the petition without prejudice, but noted that any errors of law that might occur in the trial court could be assigned as error on appeal from a final judgment. *See RepMar v. ATC, et al. (1)*, 2 MILR 133, 133 (Apr 5, 1999).

While the above-described petition was pending in this Court, the High Court issued a series of scheduling orders. Of particular concern in this appeal is the testimony of Dr. Vincent Miller, produced in keeping with a scheduling order on the discovery of expert testimony.

Dr. Miller created an economic model to calculate the dollar amount that the Government had already spent ("past damages") and would reasonably spend on tobacco-related health

care ("future damages"). Both damage estimates depend on the rate at which smokers utilize RMI medical services more than non-smokers. Also known as the "smoking attributable fraction" ("SAF"), this rate, when multiplied by past and future health care costs, yields the total cost of additional health care utilization attributable to smoking.

Based on survey responses from approximately five percent of the RMI population. Dr. Miller initially reported that smokers use the RMI medical system 14.6 percent more than non-smokers (SAF = 14.6%), and produced a total damage estimate of \$4.6 billion. He later withdrew that estimate because of errors in coding the RMI survey responses. Once corrected, the model yielded an SAF that was close to zero percent, indicating that RMI smokers do not use medical services measurably more than non-smokers.

Tobacco argued to the High Court that Dr. Miller's model failed to produce any evidence of damages, and moved for summary judgment. Even though discovery had concluded, the High Court deferred ruling on the motion and permitted the Government to rework its damage analysis. On the second attempt, Dr. Miller abandoned the RMI data and based his economic model on the National Medical Expenditure Survey ("NMES"), a database containing medical profiles of approximately 25,000 Americans, residing in the United States.

Tobacco then challenged Dr. Miller's substitution and renewed its motion for summary judgment. At the end of a two-day hearing, the High Court excluded Dr. Miller's proposed expert testimony as unreliable. Concluding that the Government had presented no admissible evidence of damages, the High Court entered judgment for Tobacco on all common law causes of action. The High Court retained jurisdiction to review the statutory claim asserted under the Consumer Protection Act.

The Government moved unsuccessfully to reopen the record and introduce alternative evidence of damages. Thereafter, the parties stipulated to dismissing the remaining statutory claim "with prejudice" so that a final, appealable judgment could be entered. This appeal followed.

JURISDICTION

We have jurisdiction over this appeal because the partial summary judgment became a final order when the parties stipulated to dismiss the Government's remaining claim "with prejudice" and the High Court entered final judgment in favor of Tobacco.

The Government urges this Court to review the appeal without requiring dismissal of the statutory claim "with prejudice." The Government contends that the "with prejudice" rule creates unfair choices for the party who lost on partial summary judgment: it must either pursue the remaining claims and incur additional litigation fees, or completely give up viable claims for the sole purpose of expediting an appeal.

[1-2] The Government's argument overlooks well-established principles of jurisprudence, and flies in the face of its own Constitution. Article IV, Section 2(2)(a) of the RMI Constitution authorizes this Court to review appeals from a final decision of lower courts. *See Bokmej v. Lang and Jamodre*, 1 MILR (Rev.) 85, 86 (Nov 13, 1987); *RepMar v. Balos, et al.* (2), 1 MILR (Rev.) 67, 68 (Jan 30, 1987) (only final judgments are reviewable by this Court). By limiting our jurisdiction, the final judgment rule ensures that all claims are raised

in one appeal, thereby avoiding piecemeal adjudication of a single controversy. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Voluntary dismissals, granted without prejudice are not final decisions and do not transform an earlier partial dismissal or partial summary judgment order into a final decision.

A contrary rule invites multiplicity of litigation and unnecessarily expends judicial resources. If we reverse the High Court in an interlocutory appeal of an order granting summary judgment on only parts of a claim, the Government will surely reinstate any claim previously dismissed "without prejudice." Upon the final disposition of that claim, the losing party would seek an appeal to this Court, in endless cycles of litigation.

Because dismissal of some claims without prejudice always leaves open the possibility that the dismissing party would re-file them in the event of reversal, we construe Article IV, Section 2(2)(a) to mean exactly what it says. Literal reading will protect the judicial branch from piecemeal appeals. Similar concerns have led us to decline reviewing an earlier petition of writ from Tobacco. *See ATC, et al. (1), supra* (interlocutory and piecemeal appeals in most cases waste time and judicial resources). Our precedent as well as pragmatism guide our conclusion that exercising jurisdiction when the parties have dismissed remaining claims "without prejudice" undermines the policies that are the basis of the final judgment rule.

THE MERITS OF THE SUMMARY JUDGMENT

I Exclusion of Dr. Miller's Testimony

[3] The Government contends that the High Court erred when it excluded Dr. Miller's damage estimates. We review alleged errors in the High Court's evidentiary rulings for an abuse of discretion. *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001).

At issue is the scientific trustworthiness of Dr. Miller's approach to calculating the SAF and, in particular, his substitution of American for RMI population data. The Government argues that Americans and Marshallese have similar physiological responses to smoking because human biology is the same regardless of nationality. In other words, because an American smoker is just as likely to develop tobacco-related illnesses as his RMI counterpart, statistics gathered in one place are as good as those gathered elsewhere. Therefore, Dr. Miller's substitution, the government argues yields reasonable, if not perfect, estimates of medical expenditures incurred by the RMI as a result of smoking.

The flaw in the Government's argument is that in addition to being a reasonable proxy for actual damages, evidence of injury must also be reliable. The High Court correctly recognized the relevance of *Daubert v. Merrel Dow Pharm, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court imposed a "gate-keeping" obligation on trial courts to distinguish science from mere speculation. *Daubert*, 509 U.S. at 589-90. This gate-keeping requirement ensures that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

[4] The trustworthiness concerns expressed in *Daubert* and its progeny are applicable here. Before admitting expert testimony, trial courts have a unique obligation to inquire into the reliability of the expert's methodology, considering factors as: whether the proffered theory

or technique has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error, the standards for controlling the technique's operation; and the degree to which it is accepted as reliable within the relevant scientific community. *Kumho Tire*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. 592-94).

The High Court aptly considered these factors before excluding Dr. Miller's testimony. During its two-day hearing, the High Court heard Tobacco recite from transcripts of Dr. Miller's deposition, in which he essentially conceded that his methodology failed under *Daubert*. For example, Dr. Miller testified that the model using American data has never been applied to draw conclusions about the SAF of a foreign population. Dr. Miller also admitted that no published literature has reported, and no scientific community has recognized, SAF results derived from substituting American for a foreign population. Dr. Miller even admitted that, without more corroborative data, he would not submit results from his own model for publication. Finally, Dr. Miller admitted that no evidence supported his conclusion that the new SAF represents a reliable proxy for actual medical utilization rates in the Marshall Islands. On the basis of his own testimony, Dr. Miller disqualified himself as an expert witness on damages.

Although given the opportunity to defend Dr. Miller's methodology, the Government did not do so on *Daubert* grounds. The Government does not claim that its assertion is scientifically reliable, and does not offer evidence of reliability under *Daubert*. Instead, it argued before the trial court, as it does on appeal, that results based on American population data provide a reasonable proxy because of similar physiological responses to smoking. Under the facts presented, the High Court did not err in finding Dr. Miller's methodology unreliable and excluding his testimony.

[5-6] The High Court excluded Dr. Miller's testimony on the additional ground that he had given contradictory opinions. Although considering an expert's conflicting testimony is not mentioned in *Daubert*, the approach is consistent with common sense and clearly acceptable. *See, e.g., Kumho Tire*, 526 U.S. at 152 (trial courts have broad latitude in their approach to determining reliability). Dr. Miller initially disapproved of using American rather than RMI population data in his model because he considered the substitution unscientific and inappropriate. When the original model yielded unsatisfactory results, however, Dr. Miller switched position: not only did he begin using the American data, he also defended the resulting estimates as a "reasonable proxy" to actual damages. Mere speculations by an expert, however, do not make them expert opinion. *See Stokes v. L. Geismar, S.A.*, 815 F.Supp. 904, 910 (E.D. Va. 1993), *aff'd*, 16 F.3d 411(4th Cir. 1994) ("the proffering of an expert ... who will bless a guess-based theory will not suffice to withstand summary judgment."). The courtroom is not the appropriate venue for casual musings of scientists, and the High Court properly discredited Dr. Miller's testimony on the basis of his contradictory opinions.

II Other Evidence of Damages

[7] We next consider the High Court's conclusion that summary judgment in favor of Tobacco is appropriate where, without Dr. Miller's testimony, the Government had failed to offer other reliable evidence of damages. We review a lower court's grant of summary judgment *de novo*. *Owens Corning v. Nat 7 Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 F.3d 484, 491 (6th Cir. 2001); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

A. Fact of injury

The Government's damage claims all share a common premise - that Tobacco's tortious conduct caused economic injury to the Government. *See, e.g., Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292 (1954) (The elements of a negligence claim are "(1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiffs injury; and (4) that plaintiff did in fact suffer injury."). While anecdotal evidence can probably be found to assert that Tobacco's marketing behavior caused certain smoking-related illnesses and therefore some health care costs, the Government offers no evidence to quantify such a contention.⁴

The government offers the testimony of Dr. Neal Palafox, who concludes that smoking increases the incidence of tobacco-related illnesses in the RMI and therefore responsible for a substantial portion of the RMI health care budget. The Government also quotes Tobacco, which admits that smoking causes a number of health problems. While today, no one disputes that smoking can have negative health effects, by itself, that truism does not translate into an actionable claim against Tobacco.

Because smoking makes some persons sick and some sick persons go to hospitals, and the Government pays the bill, the Government claims that it has been unquestionably injured. Accordingly, the issue is not whether there is injury but how much injury. The Government contends that its tobacco-caused injury equals RMI's total expenditures on smoking-related health care. Under this theory, the High Court cannot grant summary judgment to Tobacco if there is evidence to indicate that the Government has spent even one dollar to treat smokers. However, the Government claimed confidentiality of medical records as a reason for withholding all evidence of individual medical care costs.

This strategy is flawed. By equating injury with total cost, the Government is alleging that Tobacco's misconduct is responsible for the consumption of every cigarette on the Marshall Islands and therefore, the medical treatment of every tobacco-related illness. Such a broad assertion cannot survive summary judgment without evidentiary support. As the record stood at the end of discovery, there was no evidence to connect the alleged misconduct of tobacco to a single hospital expense paid by the Government.

The Government offers remarks in an earlier stage of the litigation by High Court Justice Cadra, who found that the court had personal jurisdiction over Tobacco and that the Government had made a *prima facie* showing that "the use of cigarettes manufactured by defendants ha[s] caused injury [to the Government]." Justice Cadra's statement, however, goes to the more general issue of cigarette smoking. It does not shed light on the specific claim that Tobacco's illegal acts have caused injury.

[8] Nor has the Government offered evidence that a percentage of its health care costs is attributable to Tobacco's alleged misconduct. *See City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992); *see also Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 15 (Minn. 2001) ("[I]n order to prove their claims for damages ... [plaintiffs] must establish a causal nexus between their alleged damages and the conduct of the defendants alleged to violate the statutes."). The closest estimates were furnished by Dr. Miller's damage model. Those numbers are misleading, because they focus on cost attributable to smoking generally as opposed to Tobacco's alleged misconduct. Moreover, Dr.

Miller's testimony cannot be considered because his methodology was found to be unreliable. Nothing else offered by the Government establishes a causal nexus between its alleged damages and Tobacco's misconduct. A court cannot hold Tobacco liable for engaging in lawful activities (i.e., selling and distributing cigarettes in the Marshall Islands). Without evidence linking Tobacco's allegedly illegal activities to claims of damages, we decline to consider the Government's claims beyond summary judgment.

B. Amount of injury

[9-10] Additionally, the evidence tendered by the Government fails to sufficiently quantify its claims of damages. Although the amount need not be certain or definite, the evidence must nevertheless provide the jury with some guidance on damage estimates. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988); *see also* Restatement (Second) of Torts § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages ... if, but only if ... he establishes ... the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."). Without a reasonable methodology, summary judgment against the Government is appropriate because the jury is left with no proper proof of damages. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d at 1372.

The Government contends that the High Court used the wrong damage rule, and that is the reason it found no evidence of damages. The Government contends that the proper inquiry is whether the Government can show that it has spent, or in the future will spend, any money to treat smoking-related diseases caused by Tobacco's misconduct. The Government argues that the High Court ignored this standard and adopted a new rule. Under this "new" rule, damages equal the additional health care costs spent on smokers over non-smokers.

The Government's argument does not advance its damage claims under either definition. Other than Dr. Miller's testimony, which was properly excluded, the Government presented no alternative methodology to calculate damages (until after summary judgment). As noted, testimony that smoking causes cancer does not address the health care costs needed to treat the cancer. The "Infrastructure Damages" expert, Mr. Jerry Kramer, estimated the cost of building and operating future Marshall Islands health care facilities. However, general operating and maintenance costs do not reflect costs attributable to Tobacco's allegedly illegal acts. Finally, the Marshall Islands Five-Year Comprehensive Health Plan lists the percentages of various illness linked to smoking. The incidence of smoking-related illnesses, without more, does not allow a fact-finder to reasonably infer a proper damage amount. Accordingly, we reject the Government's claims of damages where the evidence tendered fails to quantify alleged damages with a reasonable degree of precision.

III Motion to reopen discovery

[11] The Government maintains that, after excluding Dr. Miller's testimony, the High Court erred by not allotting the Government more time to present an alternative damage analysis. We review the denial of the motion to reopen discovery for an abuse of discretion. *Ortiz v. Norton*, 254 F.3d 889, 899 (10th Cir. 2001).

The High Court had given the Government ample opportunity to present its case before ruling on summary judgment. When Dr. Miller's model using RMI population data yielded no damages, the High Court permitted the Government to recalculate its estimates. Instead of

using a different economic model or resorting to other RMI databases, the Government stuck with Dr. Miller's model, this time using American rather than RMI data. After the substitution, the Government fully supported the revised model. It did not move to reopen the record even when prompted by the High Court, but filed the motion only after losing on summary judgment. The Government cannot fault the High Court for denying its untimely request.

IV Disqualification, proximate causation

We do not reach the additional issues raised by the Government because none of them survives the Government's failure to provide evidence of damages. We also decline to consider the merits of Tobacco's cross-appeal in light of our decision to affirm the High Court judgment.

AFFIRMED.

¹Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

²Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

³The Tobacco defendants are: American Tobacco Company; Brown & Williamson Tobacco Corporation; Philip Morris Incorporated; Philip Morris Products, Inc.; and R.J. Reynolds Tobacco Company.

⁴Because injury is not an element of conspiracy, the High Court erred by dismissing that claim for lack of evidence on damages. The Government does not argue the dismissal of its conspiracy claim, however, and we consider the issue waived. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).