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Evidence and Practice Tips

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This article presents a discussion of four recent decisions of Illinois courts on issues concerning expert testimony. The Illinois Supreme Court grappled with the issue of expert reconstruction testimony and whether such testimony may be admitted when there is also eyewitness testimony in *Watkins v. Schmitt*, 172 Ill.2d 193, 665 N.E.2d 1379, 216 Ill.Dec. 822 (1996). The Illinois Appellate Court for the First District in *Giraldi v. Comm. Consolidated School Dist. No. 62,* 279 Ill.App.3d 679, 665 N.E.2d 332, 216 Ill.Dec. 272 (1st Dist. 1996), and the Illinois Appellate Court for the Fifth District in *Bloome v. Wiseman, Shaikewitz, et al.*, 279 Ill.App.3d 469, 664 N.E.2d 1125, 216 Ill.Dec. 197 (5th Dist. 1996), struggled with the proper application of Federal Rule of Evidence 703 which was adopted by the Illinois Supreme Court in *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981), *cert. denied*, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981). In *Magee v. Huppin-Fleck*, 279 Ill.App.3d 81, 664 N.E.2d 246, 215 Ill.Dec. 849 (1st Dist. 1996), another panel of the Illinois Appellate Court for the First District dealt with the issue of the proper subject matter of expert testimony. Each decision is discussed below.

The Admissibility of Expert Reconstruction Testimony Where There is Also Eyewitness Testimony: *Sometimes You See It, Sometimes You Don't*

Watkins v. Schmitt, 172 Ill.2d 193, 665 N.E.2d 1379, 216 Ill.Dec. 822 (1996).

In *Watkins*, the Supreme Court revisited the same issue addressed in *Zavala v. Powermatic, Inc.*, 167 Ill.2d 542, 658 N.E. 2d 371, 212 Ill.Dec. 889 (1995): whether expert reconstruction testimony may be admitted when there is also eyewitness testimony. In *Zavala*, the plaintiff was the only eyewitness and lost two fingers in a drill press accident. The plaintiff claimed that her fingers were cut and not pulled off. The defendant's reconstruction expert testified that the only way the accident could have occurred was if the glove which the plaintiff was wearing had become caught in a piece of equipment located in the drill press. The defendant's expert concluded that the plaintiff's fingers were pulled off and not cut off because the equipment presented only an entanglement and not a cutting hazard. In *Zavala*, the Court concluded that the expert's testimony was proper, reasoning that his opinion as to how the accident happened focused on "human factors" and the operation of the equipment and that such information was "clearly beyond the ken of the average juror." *Zavala*, 167 Ill.2d at 546. According to the Court in *Zavala*, the existence of eyewitness testimony was not the conclusive factor in determining whether accident reconstruction testimony was admissible.

In *Watkins*, an intersection collision occurred between a cement truck on a preferred highway and a car attempting to cross the highway when the intersection was partially obstructed by a stopped school bus. Two eyewitnesses and the driver of the cement truck testified that the cement truck was traveling between 20 and 35 mph as it approached the intersection. The testimony of the two eyewitnesses and the driver varied only slightly. The plaintiff proffered the testimony of a deputy sheriff who had taken week-long courses in on-the-scene accident investigation and vehicular dynamics at the Northwestern Traffic Institute, who had performed numerous calculations at accident scenes and who had testified in several criminal cases but who had never taken the test for state certification in accident reconstruction.

The deputy measured the skid marks left by the cement truck and then would have testified that the skid marks left by the truck showed that the speed of the truck when the skid began was a minimum of 52.8 mph and was still 36 mph at the time of the impact with the car. The trial court barred the deputy from giving the expert reconstruction testimony as to the speed of the truck and ultimately granted summary judgment in favor of the defendants, the truck driver and his employer and the operator of the school bus against whom a claim had been made of unreasonably obstructing the view at the intersection by having the bus stopped for an excessive period of time.

In *Watkins*, the Court reasoned that the fact that there were three eyewitnesses who could testify as to the speed of the cement truck did not amount to an absolute bar to expert reconstruction testimony and instead indicated that it was necessary to examine whether expert reconstruction testimony would be needed to explain scientific principles to a jury and to enable the jury to make factual determinations. The Court found that the expert testimony at issue in *Watkins* was distinguishable from the testimony held to have been properly admitted in *Zavala*. The Court believed that in order to analyze the drill press that a person would need to have knowledge of the mechanics of the device and an application of scientific principles. The Court felt that "any lay person with a reasonable opportunity to observe and," with ordinary experience with moving vehicles, could estimate the speed of a car. Therefore, the Court held that the trial court did not err in barring the sheriff's deputy from giving expert testimony. In reaching its conclusion, it did not consider the deputy's qualifications as a reconstruction expert as the issue was not raised by the parties and, according to the Court, was not necessary to its holding.

Since this case reached the Supreme Court following the grant of summary judgment to the defendants, the Court then further analyzed the evidence to determine whether summary judgment was properly granted. The Court agreed that the deputy should be allowed to testify as to any physical evidence he observed at the scene including the skid marks left by the cement truck since this was not expert testimony. The Court noted that the record showed that the cement truck slid approximately 59 feet before the collision and 65 feet after the collision and then made the following statement:

> Evidence of such lengthy skid marks raises factual questions as to whether [the driver's] speed was possibly greater than the estimates given by the eyewitnesses. *Watkins* at 208.

The Court reasoned that given that eyewitnesses estimated the truck's speed at between 20 and 35 mph, if a jury concluded these estimates were low estimates, the
possibility existed that the driver of the truck was violating a 35 mph speed limit. Therefore, genuine issues of material fact existed concerning the plaintiffs' claim against the driver and operator of the cement truck thereby precluding summary judgment.

The Court's opinion seems to reason that the eyewitnesses might be mistaken as to the speed of the cement truck and that the jury is able to determine from the testimony of the eyewitnesses whether the eyewitnesses are mistaken or not and that therefore a question of fact is created. Remember that the Court earlier held that the issue was so simple that no expert testimony was needed and that "any lay person with a reasonable opportunity to observe and ordinary experience with moving vehicles can estimate the speed of a car." If this is true, then query upon what basis would a jury ever decide that the operator of the cement truck was going faster than 35 mph since the estimates from the eyewitnesses were all between 25 and 35 mph.

This opinion suffers from a more fundamental flaw. It is difficult, if not impossible, to rationally distill a rule of law concerning the admissibility of expert testimony when eyewitness testimony is available based upon the Supreme Court's decisions in *Zavala* and *Watkins*. Two justices dissented (Heiple and Nickels) arguing that the matter of physics involving weight, mass, measured skid marks, weather, pavement friction and surface conditions lend themselves to scientific analysis from an

expert relative to speed of the cement truck the same as the issues presented in *Zavala*. Without any reasonable distinction between *Zavala* and *Watkins*, we are left with only a guess as to when expert testimony on any issue will be admissible when eyewitnesses are available.

Are Hearsay Facts or Data Relied Upon By an Expert Admissible Into Evidence or May They Simply Be Used By the Expert But Not Disclosed to the Jury?

Giraldi v. Comm. Consolidated School Dist. No. 62, 279 Ill.App.3d 679, 665 N.E. 2d 332, 216 Ill.Dec. 272 (1st Dist. 1996) and *Bloome v. Wiseman, Shaikewitz, et al.*, 279 Ill.App.3d 469, 664 N.E.2d 1125, 216 Ill.Dec. 197 (5th Dist. 1996)

Perhaps no issue has confused the law of evidence in Illinois more than the Supreme Court's adoption of Federal Rules of Evidence 703 and 705 in *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981). In *Giraldi*, the court directly held that Rule 703 did not create an exception to the hearsay rule and that the facts or data relied upon by the expert are not admitted for their truth but only for the limited purpose of explaining the basis of the expert witness's opinion. The trial court may prevent an expert from testifying as to the facts and data that support an opinion when the probative value in explaining the expert's opinion pales beside the likely prejudicial impact or the tendency to create confusion. In so ruling, the court relied upon *City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381, 144 Ill.Dec. 93 (1990), *cert. denied*, 498 U.S. 900, 111 S.Ct. 256, 112 L.Ed.2d 214 (1990). *Giraldi* involved a claim against a school bus company and school district seeking money damages for sexual abuse of a minor student by a bus driver. The minor plaintiff was unable to testify at trial, presenting serious proof problems for the plaintiff. Plaintiff asked his medical expert to testify as to the facts that helped form his diagnosis of the minor plaintiff's condition. The expert's understanding of the sexual abuse came from the police report which contains statements made by the minor plaintiff. Plaintiff contended that the evidence was admissible under Federal Rule of Evidence 703.

The court rejected the plaintiff's argument that the police report could become substantive evidence when relied upon by his medical expert. The court properly held that the police report was double hearsay – the minor plaintiff's statements to a police officer who then wrote them down in a report and which were then proffered through the testimony of the medical expert. The court reasoned that if the expert testified to the contents of the police report to explain his opinions, there would have been a grave danger of unfair prejudice and that no limiting instruction could ever ameliorate the risk that the jury would be persuaded by emotion and sympathy to misuse the evidence.

Bloome is a legal malpractice claim based upon an underlying medical malpractice suit. The plaintiff claimed that his attorneys allowed his medical malpractice suit to be dismissed with prejudice, withdrew as his counsel when it was known that a motion to dismiss was pending and the withdrawal would result in a peremptory dismissal of the action and otherwise mishandled his medical malpractice claim. Apparently, plaintiff's counsel (the defendant in this suit) did so because a physician reviewed the plaintiff's treatment and determined that no other physician had deviated from

the requisite standard of care and neither the plaintiff nor his counsel could find any other expert who would support his claims.

During the legal malpractice trial, the attorney expert for the defendant partially based his opinion upon letters written to the plaintiff by other attorneys. It appears that the letters were from various other attorneys that the plaintiff had consulted informing the plaintiff that reviewing physicians had found no malpractice, letters from the defendant attorneys informing the plaintiff of various events in his lawsuit and letters from other attorneys informing the plaintiff that the defendant attorneys had committed no malpractice. The Appellate Court for the Fifth District found that these letters were not the type of information reasonably relied upon by an expert in the field of legal malpractice and that the letters were "inadmissable as double hearsay."

The court's analysis seems to evidence a misunderstanding, or at least a lack of clear explanation, of the law and underlying basis of Federal Rules 703 and 705. Whether the facts relied upon by the expert are hearsay or not or whether the facts are "double hearsay" or not is not a relevant consideration for the court in determining whether the expert may rely upon the facts contained in the letters as a basis for the expert's opinion. It is not clear from the court's opinion whether the issue was actually whether the letters could be reasonably relied upon by the lawyer-expert or whether the issue was really whether the contents of the letters could be disclosed to the jury. The issues are not the same, as explained by the *Giraldi* opinion. The court did not explain what sort of facts could be "reasonably relied upon" by an attorney expert for either the plaintiff or the defendant in a legal malpractice action. This should be, and is in fact, the crux of the inquiry. After a finding has been made that the items upon which the expert relies are sufficiently trustworthy to make the expert's reliance upon them reasonable, then and only then, does the issue of whether the expert may disclose the facts or data upon which the expert has relied to the jury, arise.

Expert Testimony Concerning Statutory Interpretation Is Not Proper

Magee v. Huppin-Fleck, 279 Ill.App.3d 81, 664 N.E.2d 246, 215 Ill.Dec. 849 (1st Dist. 1996).

Expert testimony concerning statutory interpretation is not proper even if the witness is an attorney according to the court in *Magee*. *Magee* reached the appellate court on an interlocutory appeal from an order granting a preliminary injunction. The issue presented at the trial court and in the appellate court was whether certain shares of a corporation were issued in violation of the Oregon Business Corporation Act. The trial court permitted an attorney-expert to testify concerning the meaning of the Oregon Act but did not hear any testimony concerning controverted factual issues raised in the complaint for preliminary injunction and the answer thereto. This division of the appellate court held that no witness could testify as to the proper interpretation of a statute, even a statute from another state, even if the witness was an attorney. Rather, the interpretation of the statute is solely a legal issue for the court and not one of fact to be discussed by any witness.