



25th Annual Claims Handling Seminars

FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

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WHEN DO YOU NEED AN EXPERT WITNESS?

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WHEN DO YOU NEED AN EXPERT WITNESS?

I. INTRODUCTION

Expert witnesses are an important and frequently necessary component of civil litigation. Experts may not only be critical to the introduction of evidence (i.e. testimonial experts), but may also play a key role in the development, evaluation and preparation of the defense or prosecution of a case (i.e. consulting experts). In addition to attempting to provide you with assistance in determining when an expert may be needed, the article contains a summary of some recent Illinois decisions discussing the use of expert witnesses.

A. Why Do We Need Experts?

Generally, expert testimony is required to introduce evidence regarding matters requiring "scientific, technical or specialized knowledge." Lay witness testimony cannot be used to present evidence on matters beyond the ordinary layman's knowledge or experience. Consequently, if a fact or evidence at issue involves scientific, technical or specialized knowledge that is outside the scope of the ordinary layman's experience or involves complex issues that challenge the layman's comprehension, expert witness testimony is necessary to aid the trier of fact in understanding the evidence or evaluating the issues. On the other hand, expert testimony is not necessary if the evidence or issues are matters within the trier of fact's own perceptions, common sense, common experience or simple logic. Expert testimony cannot be used for statutory interpretation, legal conclusions, or judging the credibility of witnesses.

In federal court, the admissibility of expert testimony is governed by Federal Rule of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In Illinois state courts, "[e]xpert testimony is proper when the subject matter of the inquiry is of such a character that only persons of special skill or experience in that area are capable of forming a correct judgment with respect to the applicable facts." *Harvey v. Norfolk and W. Ry. Co.*, 73 Ill. App. 3d 74, 83, 390 N.E.2d 1384, 28 Ill. Dec. 794 (4th Dist. 1979). "Expert testimony is admissible when the subject matter is beyond the ken of the average juror, . . . the witness has skill sufficient to aid the jury's understanding of the facts," *Lundy v. Whiting Corp.*, 93 Ill. App. 3d 244, 256, 417 N.E.2d 154, 48 Ill. Dec. 752 (1st Dist. 1981), and "the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education, and the testimony will assist the

trier of fact in understanding the evidence." *Friedman v. Safe Sec. Services, Inc.*, 328 Ill. App. 3d 37, 44, 765 N.E.2d 104, 262 Ill. Dec. 278 (1st Dist. 2002). Typically, experts are used "in matters which are complicated and outside the knowledge or understanding of the average person, and even as to matters of common knowledge and understanding where difficult of comprehension and explanation." As stated by the court in *Abrahamson v. Levinson*, 112 Ill.App.2d 42, 50, 250 N.E.2d 796, "There must be a need apparent from the record in the case for scientific knowledge, expertise and experience, which will aid the jury to a correct and a just result." *Ray v. Cock Robin, Inc.*, 10 Ill. App. 3d 276, 281, 298 N.E.2d 483 (2d Dist. 1973).

The use of experts is not limited to the introduction of evidence. Particular circumstances may require the retention of a consulting expert to aid in the defense or prosecution of a case. For instance, an expert can assist in the understanding of factual complexities; in determining strengths and weaknesses of a case (your side and that of the opposition); in preparing written discovery; in preparing for depositions; in attacking opposing expert opinions; and assisting in trial strategy.

B. When Should We Consider If an Expert Is Needed?

A claims professional should consider whether an expert may be needed or not as soon as the claim is made. The initial review of the claim may reveal circumstances where an expert is needed, e.g. questions may be raised about medical treatment, about a particular product involved in the accident, or the mechanics of the accident itself. If the claims professional has access to in-house resources (e.g. access to nurses and doctors who can provide immediate insight into the nature of a claimed injury, whether proper care or excessive treatment was rendered, and opinions as to the necessity of future treatment and disability), those in-house resources can greatly assist in the early evaluation of whether an outside expert may be needed or not.

Defense counsel must also consider potential expert needs when the file is initially received. Both attorneys and claims professionals sometimes wait until the approach of discovery deadlines to consult with or retain an expert. While not all cases require or can economically justify the time and expense of retaining an expert, the question whether a factual issue involves matters outside the ken of the average juror is one which the defense team should constantly be considering. If, for example, the claims professional and defense counsel have difficulty in understanding or explaining a factual issue, why should a juror be any different?

Early use of an expert can also provide the defense with invaluable insight into the complexities or disciplines involved in a particular case whether it involves medicine, product manufacturing, specific business practices or complicated injury claims. The expert's perspective on complex issues can assist with the drafting of written discovery, the review of documents and preparation for depositions, not only of opposing experts, but also the plaintiff, co-workers, witnesses and medical care providers.

II. WHEN TO USE EXPERTS

In general, both consulting and testifying experts may be necessary if matters involve scientific, technical or specialized knowledge that is outside the realm of the common experience and knowledge of lay persons. However, whether experts are needed or not will depend upon the particular circumstances of a case, the facts and concepts at issue, and the defense budget. Additionally, what is currently lay person "common knowledge and experience" will change over time and thus makes it difficult to predict with certainty what matters will be outside the ken of the average juror in the future. Thus, it is impossible to list every category and instance where experts *will be* necessary.

Particular types of litigation where experts are commonly used, and will continue to be used in the future, include: (1) product liability; (2) medical malpractice; (3) other professional malpractice; (4) automobile accidents; (5) construction accidents; (6) business and insurance litigation; and (7) claims for damages. The non-exhaustive list below can aid in the identification of circumstances or categories where experts *may be* needed in a particular case.

- Product Liability
 - Design
 - Warnings
 - Product Manufacturing
 - State of the Art
 - Safety Devices
 - Alterations

- Medical Malpractice
 - Standard of Care
 - Proximate Cause
 - Informed Consent
 - Medical Devices
 - Drug Interactions
 - Specific Diseases and Conditions
 - Loss of Chance

- Other Professional Malpractice
 - The Skill and Knowledge Normally Possessed by Members of the Profession
 - Specialized Knowledge Claimed by the Professional
 - Engineering Design or Implementation
 - Accounting Practices

- Automobile Accidents
 - Accident Reconstruction
 - Impact/Crash Analysis

- Crashworthiness
- Independent Medical Examinations
- Construction Accidents
 - Use and Control of Cranes, Material Handlers and Other Machinery
 - Safety Programs and Implementation
 - Use of Scaffolds, Picks, Walkways and Safety Devices for Each
 - Construction Sequencing and Management
- Business and Insurance Litigation
 - Accounting Practices
 - Economics
 - Banking Customs
 - Corporate Management
 - Farm Production
 - Motion Picture Distribution
 - Insurance Claims Processing
 - Labor Relations
 - Securities Investments
- Subjects Related to Damages
 - Lost Past Income
 - Future Income
 - Present Cash Value
 - Effects of Inflation on Damage Awards
 - Lost Profits
 - Value of Particular Assets
 - Value of Services
 - Disability and Disfigurement
 - Permanency of Injuries
 - Likelihood of Future Pain and Suffering
 - Matters Relevant to Punitive Damages Awards

III. ILLINOIS CASE LAW UPDATE: RECENT DECISIONS CONCERNING EXPERT WITNESSES

A. *Thornton v. Garcini*, No. 107028, 2009 WL 3471065 (Oct. 29, 2009)

The Illinois Supreme Court recently held that expert testimony is not needed in a claim for negligent infliction of emotional distress.

In this case, the plaintiff's son, Jason, was born prematurely in a breech position. During childbirth, Jason's head became stuck inside of his mother with the rest of his body outside of

his mother. Jason died when the nurses were unable to complete the delivery. The defendant obstetrician arrived at the hospital 1 hour and 10 minutes later. Jason's mother was left in the position of having a partially delivered child for that period of time. Jason's mother filed suit for wrongful death, survival claims and for intentional infliction of emotional distress from the delivery. The jury found in favor of the defendants on all counts except the intentional infliction of emotional distress claim and awarded \$175,000. The plaintiff appealed, and the Appellate Court reversed and ordered a new trial.

At the second trial, the defendant obstetrician testified that he was called at 6:35 a.m. on the day of delivery, at his home, and advised that plaintiff was having contractions. He gave certain orders. The infant partially delivered in the breech position 35 minutes later. Nurses were present but no doctors. When the infant became entrapped at the neck during delivery, he ordered the nurses not to deliver the infant unless it could be done easily because of the risk of decapitation. The nurses could not complete the delivery and the infant died before the obstetrician left his home. When he was told of the partial delivery, he first took a shower and then drove to the hospital and delivered the dead infant.

Plaintiff testified as to her emotional state from lying in the bed for the 1 hour and 10 minutes with the infant partially delivered. She stated she was depressed, and could not eat or sleep. She could only think about the 1 hour and 10 minutes. She ruminated over the incident and had suicidal thoughts. The infant's father and plaintiff's mother testified to the effect of the infant's death and circumstances of the delivery had on the plaintiff. No expert witness testimony was presented on plaintiff's claim for emotional distress. This jury awarded plaintiff \$700,000 in damages for negligent infliction of emotional distress.

On the second appeal, the defendant argued that, based on prior holdings, claims for negligent infliction of emotional distress must be supported by expert testimony to ensure that any verdict is supported by competent evidence. Defendant also argued that causation was at issue because plaintiff simultaneously lost her infant and suffered the traumatic event of the partial birth prior to defendant's arrival.

The Appellate Court affirmed the verdict, as did the Supreme Court. As to the first point, the Supreme Court determined that expert testimony is not required to establish a claim for emotional distress. "The absence of medical testimony does not preclude recovery for emotional distress. Rather, the existence or nonexistence of medical testimony goes to the weight of the evidence but does not prevent the issue from being submitted to the jury." As to the second point, the court noted that plaintiff had testified to periods of depression, of not being able to eat or sleep, of ruminating on the 1 hour and 10 minutes she waited for the physician to appear, and of her thoughts of suicide. Taken in the light most favorable to the plaintiff, the court held that this testimony established causation. From a defense perspective, this case seems to exemplify the old adage that "bad facts make bad law."

B. *Loman v. Freeman*, 229 Ill. 2d 104, 890 N.E.2d 446, 321 Ill. Dec. 724 (2008)

This case, in which a veterinarian was sued for malpractice, is one of first impression wherein the court determined that section 299A of the Restatement (Second) of Torts is an accurate statement of the common law of Illinois with respect to the duty of care owed by members of professions or trades.

Plaintiffs brought their race horse, Master David Lee, to the Large Animal Clinic at the University of Illinois College of Veterinary Medicine for evaluation and treatment. Plaintiffs alleged that they gave Dr. Freeman, a member of the faculty of the College of Veterinary Medicine, permission for two procedures: to perform surgery on the left carpal bone, and to drain fluid from the right stifle. The stifle joint in the horse's hind leg is the functional equivalent of the human knee. Plaintiffs alleged that they specifically instructed Dr. Freeman not to perform any other procedure on the right stifle. However, Dr. Freeman performed surgery on the right stifle and, according to plaintiffs, ruined Master David Lee for future racing.

Section 299A of the Restatement (Second) of Torts entitled "Undertaking in Profession or Trade" provides:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Comment (a) to section 299A notes that the word "skill" as used refers to a "special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience." Further, "[a]ll professions, and most trades, are necessarily skilled, and the word is used to refer to the special competence which they require." The court determined that it could not be disputed that a doctor of veterinary medicine is skilled and that the practice of veterinary medicine and surgery is a "profession or trade."

The court cited to several medical malpractice decisions in which it was the plaintiff's burden of proof to establish the "standard of care against which the defendant physician's alleged negligence is judged." In other words, any claim of negligence in the practice of a profession or trade requires expert testimony to establish the standard of care in that profession or trade, and a breach of that standard of care.

C. *Ford v. Grizzle*, No. 5-09-0185, 2010 WL 572527 (5th Dist. March 2, 2010)

This case from the Fifth District holds that the issues of whether to admit photographic evidence of damages to a vehicle, whether to allow evidence of prior injuries or preexisting conditions, and whether a sufficient foundation has been laid for expert testimony are all issues within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion.

Plaintiff, who was driving a truck with a hitch on the back, was rear-ended while stopped in traffic. He testified that he saw defendant's vehicle coming up behind him, let up on the brakes and ducked down in anticipation of the impact. He estimated that defendant was going 20-25 mph at the time of the collision. The plaintiff testified that his vehicle moved "about a foot" as a result of the collision. After the accident the parties looked over the vehicles for damage. Plaintiff's truck had none while defendant's had damage to the front grill, bumper, headlights, radiator and fan blade.

Plaintiff did not go to the ER but did visit his chiropractor. In fact, plaintiff had been at the chiropractor earlier on the day of the accident to obtain treatment for two prior auto accidents in which he had been involved. The accident in question occurred in July 2002; plaintiff's prior accidents occurred in 2000 and June 2002. He had been treating with chiropractors since 2000, a fact that he failed to disclose to subsequent medical care providers. Plaintiff's conservative treatment failed and he had surgery in October 2003.

The defendant had plaintiff examined by Dr. Karen Pentella, a neurologist and pain medicine specialist. She reviewed plaintiff's medical records, conducted an IME and reviewed the post-accident photographs. She testified that the photographs were relevant because the photograph of the plaintiff's vehicle showed no damage and that the general rule in automobile collisions is that the severity of the impact corresponds to the impact on the vehicle occupants. Based on her review of the records and diagnostics performed, she further opined that plaintiff was not a surgical candidate at the time of the surgery.

Plaintiff hired his own expert, Dr. Robert Margolis, also a neurologist. He reviewed the medical records and diagnostics and opined that the July 2002 accident was the direct cause of the exacerbation of the plaintiff's injury and that the need for the surgery was due to that accident.

The case was tried in Madison County and the jury returned a verdict for the defendant. Plaintiff appealed, arguing that the defendant failed to introduce evidence showing a causal connection between the prior accidents and injuries and the present case. He also argued that the introduction of prior accidents was highly prejudicial, that the introduction of photographs of plaintiff's vehicle was not only prejudicial but also lacked proper foundation without expert testimony, and that the testimony of Dr. Pentella regarding minimal impact should have been excluded because of lack of proper foundation (in that the doctor did not analyze the impact on the defendant's vehicle as a result of the collision) and should have been stricken. The Fifth District rejected each of these arguments.

With respect to prior injuries, the court referred to the Illinois Supreme Court's decision on *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 733 N.E.2d 1275, 248 Ill. Dec. 277 (2000) for the proposition that if a defendant wishes to introduce evidence of a prior injury, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence, unless the trial court determines that a layperson can readily appraise the relationship between those injuries. However, prior injuries can be

relevant to impeachment in that a plaintiff may be examined in respect to his failure to disclose to a physician that he had previously suffered an injury to the same body part. The Fifth District noted that both parties' expert witnesses along with several of his treating chiropractors testified to some degree that the prior injuries were relevant to the current injuries and that plaintiff had suffered from a preexisting chronic, pain-causing condition in his neck prior to the July 2002 accident. In addition, plaintiff had treated on the day of this accident for his prior injuries and had scheduled appointments for additional treatment. Also, at trial plaintiff tried to claim medical bills that were not solely related to the July accident and failed to inform some of his doctors of earlier accidents when he sought treatment for the July 2002 accident. Based on these factors, the Appellate Court held that the trial court had not abused its discretion in admitting the evidence of the plaintiff's prior accidents and injuries.

With respect to the photographs of the vehicles, the court declined to adopt a bright-line rule which would either provide that the photographs in themselves are always admissible or that expert testimony is always necessary to lay a foundation for the admissibility of photographs. The critical question is whether the jury could properly relate the vehicular damage depicted in the photos to the injury without the aid and assistance of an expert. The court ruled that, based upon a review of the photographs and the record of the proceedings *in this case*, a jury could properly assess the relationship between the damage to the vehicles and the plaintiff's injuries without the aid of an expert. Thus, the trial court did not abuse its discretion in admitting the photographs of the vehicles.

With respect to the testimony of Dr. Pentella, the Appellate Court noted that Dr. Pentella had testified concerning her qualifications, and had based her opinions concerning the plaintiff's injuries on her physical examination of the plaintiff, her review of medical records, and the lack of damage to the plaintiff's vehicle as depicted in the photographs. Since the expert was qualified and a proper foundation was laid, and the decision whether to admit expert testimony is within the sound discretion of the trial court, the Appellate Court found that there was no abuse of discretion.

D. *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 902 N.E.2d 709, 327 Ill. Dec. 588 (4th Dist. 2008)

Generally, in order for an expert witness to testify with respect to the standard of care owed by a healthcare practitioner, the expert must be licensed in the same school of medicine as the practitioner. *See, Dolan v. Galluzzo*, 77 Ill. 2d 279, 396 N.E.2d 13, 32 Ill. Dec. 900 (1979) (physician expert cannot testify about the standard of care owed by a podiatrist unless that physician expert is a licensed podiatrist); *see also, Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 806 N.E.2d 645, 282 Ill. Dec. 348 (2004) (a physician expert was not qualified to testify about the standard of care owed by a nurse). This is known as the "licensing requirement" rule. The rule is designed to prevent the imposition of a different standard of care on a practitioner by another medical professional who may not be familiar with or trained in that particular discipline, i.e. to ensure that the proposed expert has similar experience and training in dealing with the medical problem and treatment at issue.

The case of *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 902 N.E.2d 709, 327 Ill. Dec. 588 (4th Dist. 2008) discusses an exception to the licensing requirement rule. In that case the plaintiff sued a defendant obstetrician after a portion of an intrauterine pressure catheter (IUPC) was left in the plaintiff's uterine cavity after a cesarean-section. The defendant obstetrician was trying to point the finger toward the nurses on his surgical team by using a physician expert to establish that "(1) in preparing a patient for the C-section, the IUPC is normally removed by nurses, (2) the IUPC had not been removed when [plaintiff's] C-section began, (3) the nurses' postoperative responsibilities include (a) performing a 'sponge and instrument count' and (b) inspecting the instruments used during the C-section to ensure they remained intact, and (4) if the nurses had seen that the IUPC was not intact, it would have been within their standard of care to communicate their inspection results to [the defendant obstetrician]." The expert witness was a board-certified physician in obstetrics and gynecology with 33 years of experience. The plaintiff argued that the physician expert's testimony regarding the nurses' standard of care was inadmissible because the expert was not licensed in the same school of medicine as were the nurses. Plaintiff's arguments were overruled, the testimony was admitted, the jury found in favor of the defendant obstetrician, and the plaintiff appealed.

The Appellate Court affirmed the jury verdict, ruling that the defendant obstetrician's proffered expert testimony did not directly involve the "specialized nature of the medical care" being provided by the nurses, but rather involved the "intrinsically intertwined interaction between a physician and nurse when they are members of the same surgical team." Consequently, the concerns underlying the licensing requirement rule were not implicated under these circumstances. In other words, if a physician expert is not testifying with regard to a particular nursing procedure *per se*, but is instead testifying about communications or actions undertaken during a surgical team effort that the physician ordinarily relies upon to render care, the licensing requirement will not apply and a physician expert will be able to testify to the standard of care notwithstanding the fact that he or she is not licensed as a nurse.

IV. THE USE OF *DAUBERT* AND THE GATEKEEPING FUNCTION IN FEDERAL COURT

In *Gayton v McCoy*, 593 F.3d 610, (7th Cir. 2010), the Seventh Circuit Court of Appeals provided a discussion of the district court's gatekeeping function as required by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)

India Taylor was a 34-year-old woman who entered the Peoria County Jail complaining of chest pain. Despite the jail's knowledge that she had a serious heart condition and elevated blood pressure, she was never provided with any medication and, contrary to the jail's written protocols, a doctor was never contacted to examine her. Less than three days after she entered the jail, she died. Her autopsy result attributed her death to non-specific heart failure and an elevated pulse.

Taylor's estate sued the correctional facility officials and nurses, alleging that they violated Taylor's due process rights by failing to provide adequate medical care. The district court

excluded the plaintiff's expert, Dr. Corey Weinstein, finding that he was unqualified and that his opinions were unreliable. Summary judgment was entered for the defendants and plaintiff appealed. The issue on appeal was the exclusion of Dr. Weinstein's opinions that: 1) if Taylor had been given her cardiac medications while in jail, she might still be alive; 2) that her vomiting and diuretic medications may have caused an electrolyte imbalance resulting in the elevated heart rate and heart failure; and 3) that jail officials departed from accepted standards of care for jails in their treatment, or lack thereof, of Taylor. After a defense expert refuted the opinions of Dr. Weinstein, the court excluded Dr. Weinstein's opinions and summary judgment was entered for the defendants.

The Court of Appeals noted preliminarily that Federal Rule of Evidence 702 allows an expert witness to testify about a relevant scientific issue in contention if his testimony is based on sufficient data and is the product of a reliable methodology correctly applied to the facts of the case. Under the *Daubert* framework, the district court is tasked with determining whether a given expert is qualified to testify in the case in question and whether his testimony is scientifically reliable. *Daubert* at 509 U.S. 592-93. Whether the witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony. In determining reliability, *Daubert* sets forth the following non-exhaustive list of guideposts:

- 1) Whether the scientific theory can be or has been tested;
- 2) Whether the theory has been subjected to peer review and publication; and
- 3) Whether the theory has been generally accepted in the scientific community.

Daubert, 509 U.S. 593-94.

Applying that test, the Seventh Circuit concluded that: as to Dr. Weinstein's first opinion (that Taylor would not have died if she had been given her heart medication), that opinion was properly barred because Dr. Weinstein had a lack of specific knowledge of cardiology and pharmacology nor did he give any basis for this opinion; as to the second opinion, the Seventh Circuit disagreed with the district court, holding that specialized knowledge was not required to express an opinion as to the effects of vomiting on electrolytes in that, ". . . it [was] knowledge that any competent physician would typically possess;" and that as to the final opinion (that the jail did not meet the acceptable standards of medicine that applied to jails and that the standard level of care may have prevented her death), the district court erred in barring that opinion since it was undisputed that Dr. Weinstein was an expert in the area of prison healthcare and his opinions regarding the jails, or that an individual defendant's failure to provide adequate care resulted in Taylor's injuries and death, could "assist the trier of fact to understand the evidence or to determine a fact in issue." Accordingly, the case was remanded to district court with instructions allowing Dr. Weinstein to testify on the issues in which he was found to be qualified.

V. THE USE OF *FRYE* IN ILLINOIS STATE COURTS

A recent Illinois Supreme Court decision, *People v. McKown*, No. 102372, 2010 WL 572082 (Feb. 19, 2010), considered whether the horizontal gaze nystagmus (HGN) test used by law enforcement to indicate if a person is impaired by the consumption of alcohol meets the reliability requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The so-called "*Frye* test" governs the admissibility and reliability of expert testimony in Illinois state courts, and thus the analysis in this case provides an excellent comparison to the use of *Daubert* in the federal courts (discussed in section IV above).

Following a bench trial in the circuit court of Peoria County, McKown was convicted of two counts of aggravated driving under the influence of alcohol (DUI). The conviction was obtained on the basis of police officer testimony that McKown had failed field-sobriety testing. A part of the field-sobriety testing involved what is called an HGN test in which the officer looks for evidence of nystagmus, which is "an involuntary, rapid, rhythmic movement of the eyeball, which may be horizontal, vertical, rotatory, or mixed, i.e., of two varieties." *Dorland's Illustrated Medical Dictionary* 1296 (30th ed. 2003). With the HGN test, the officer looks for three "clues," assessing each eye separately. The three clues are lack of smooth pursuit, distinct nystagmus at maximum deviation, and the onset of nystagmus at an angle less than 45 degrees. One point is assigned for each clue that is present in either eye. Thus, the maximum score is six, which would indicate all three clues present in both eyes. A score of four or more is considered "failing" and indicative of alcohol impairment. *McKown I*, 226 Ill. 2d at 249-50. McKown allegedly failed the HGN test.

Under the *Frye* test, scientific evidence is admissible at trial only "if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004), quoting *Frye*, 293 F. at 1014. The *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is "new" or "novel." See, *People v. Basler*, 193 Ill. 2d 545, 550-51 (2000).

In *People v. McKown*, No. 3-04-0433 (2006) (unpublished order under Supreme Court Rule 23), the Appellate Court affirmed and the Supreme Court then granted the defendant's petition for leave to appeal on the issue of whether the defendant was entitled to a *Frye* hearing or not. The Illinois Supreme Court held (in *McKown I*) that "[b]ecause the results of an HGN test require expert interpretation" by a trained police officer, "the results of HGN testing are scientific evidence." The court further held that, despite its use by police officers for many years, "the methodology of HGN testing is novel for purposes of *Frye*." Thus, a *Frye* hearing was necessary "to determine if the HGN test has achieved general acceptance as a reliable indicator of alcohol impairment." Finally, although the court noted that it was appropriate in some circumstances for a trial court to resolve the question of general acceptance via judicial notice, this particular issue could not be resolved "on judicial notice alone." Thus, the Supreme Court concluded that the trial court and the Appellate Court erred in taking judicial notice that the HGN test is generally accepted as an indicator of alcohol impairment and remanded the case to the trial court with instructions to conduct a *Frye* hearing to determine whether HGN testing is generally accepted

in the particular scientific field to which it belongs as an indicator of alcohol impairment and to make findings of fact and conclusions of law as to this question. The Supreme Court also held that it retained jurisdiction to review the *Frye* analysis which was to be conducted in the trial court.

Subsequently, the *Frye* hearing in the trial court was held over the course of four dates between March 2007 and April 2008. A number of expert witnesses testified on each side. In addition, each party submitted numerous journal articles and other writings in support of its position. Finally, each party submitted a trial brief arguing for certain findings of fact and conclusions of law. Due to the length of the summary of the evidence, it will not be reviewed in detail here, but the bottom-line conclusion of the trial court was that "ophthalmology and optometry generally accept the principle that the HGN test may be an indicator of alcohol consumption." In addition, the trial court concluded that the use of HGN test results at trial "should be limited to the conclusion that a 'failed' test suggests that the subject may have consumed alcohol and may [have] be[en] under the influence. There should be no attempt to correlate the test results with any particular blood-alcohol level or range or level of intoxication." The Supreme Court agreed, adopting the trial court's finding that HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired.



Douglas R. Heise

- Partner

Doug joined the Edwardsville office of Heyl Royster in 2004 and became a partner in 2008. With more than 25 years of litigation experience, Doug has defended a broad range of clients from individuals involved in auto accidents to major corporations in product liability claims.

At Heyl Royster, Doug has an active practice defending health care professionals who provide medical services to the prison population in Illinois. These professionals are often sued by prisoners for alleged civil rights violations in state and federal courts. His representation of professionals also includes veterinarians who have been sued for malpractice.

In addition to defending professionals, he also defends municipalities in civil rights claims and employers defending their employment decisions in federal court. His employment practice includes charges brought before the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. This variety of experience assists Doug in understanding our clients' needs and helping them to understand the litigation process.

Significant Cases

- *City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998) Whether same sex harassment is actionable under Title 7.
- *Longstreet v. Cottrell*, 374 Ill. App. 3d 549 (5th Dist. 2007) The estate of a deceased party cannot introduce the discovery deposition of the deceased party at trial as an exception to the hearsay rule.
- *Steelman v. City of Collinsville*, 319 Ill. App. 3d 1131 (5th Dist. 2001) The IRS's seizure of funds being held by a municipal police department did not constitute a conversion of those funds by the department.
- *T.H.E. Insurance v. City of Alton*, 277 F.3d 802 (7th Cir. 2000) Whether a certificate of insurance can modify the language contained in the policy of insurance.
- *City of East St. Louis v. Circuit Court*, for the 20th Judicial Circuit, St. Clair County, IL 986 F. 2d 1142 (7th Cir. 1998) The Federal District Court properly entered Rule 11 sanctions against Plaintiff's counsel for bringing suit against a judicial circuit.

Public Speaking

- "Casualty and Property Seminar - Premises Liability Update"
Heyl Royster 2008
- "Current Issue in Illinois Law"
United States Arbitration and Mediation, Midwest, Inc. 2007
- "Claims Against Governmental Agencies / Tort Immunity"
Illinois State Bar Association 2006

Professional Associations

- Illinois State Bar Association
- St. Clair County Bar Association
- Bar Association for the Central and Southern Federal Districts of Illinois
- East St. Louis Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Southern and Central Districts of Illinois (Trial Bar)
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

Education

- Juris Doctor, John Marshall Law School, 1983
- Bachelor of Science-Political Science, Eastern Illinois University, 1980

