



A View from the Bench

Experts: Admissibility and Effective Presentation

Judge William Walker

Cincinnati, OH

Experts: Admissibility and Effective Presentation

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Ohio Evidence Rule 104 Preliminary Questions

- (A) Preliminary questions concerning the qualification of a person to be a witness Shall be determined by the court . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Ohio Evidence Rule 702 Testimony by Experts

- A witness may testify as an expert ***if all of the following apply:***
 - (A) The witnesses' testimony ***EITHER*** relates to matters beyond the knowledge or experience possessed by lay persons ***OR*** dispels a misconception common among lay persons;

Rule 702, cont.

- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

Rule 702, cont.

- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

Rule 702, cont.

- (C)
- ***To the extent*** that testimony reports the result of a ***procedure, test, or experiment***, the testimony is reliable only if ***all*** of the following apply:
- (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

Rule 702, cont.

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test or experiment was conducted in a way that will yield an accurate result.

Herzner v. Fischer Attached Homes

- Clermont County Common Pleas case 2004 cvc 564; CA 2007-08-09, 2008-Ohio-2261, affirmed on appeal (12th Dist.); 119 OS 3d 1476, 2008-Ohio-4911, cert denied.

Ohio Evidence Rule 701

Opinion Testimony by Lay Witnesses

- If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witnesses testimony or the determination of a fact in issue

Effective Presentation of Experts

- What is the Theory of your case?
- How will this expert enhance your story telling?
- Choose your expert wisely!

• Research your potential expert's background:

- Internet
- Publications
- Other counsel

• Meet face to face if at all possible before retaining and evaluate:

- Expert's rapport with counsel
- Effective communicator?
- Personality
- Language barriers
- Demeanor and appearance
- Does expert have sufficient available time for case involvement?

• After retention, after the expert's case evaluation is complete, review and re-evaluate, including:

- Expert's "commitment" to case; how strong is his/her belief that position is righteous: The issue of expert sincerity

View from the Bench

"The thing to fear is not the law but the Judge"

- Russian proverb

The single most important attribute of expert witness is the ability to communicate in words the jury can understand.

- Dealing with oral communication barriers
- Using demonstrative evidence prepared well in advance: get it admitted in evidence whenever possible
- Experts as teachers
- Prepare, prepare, prepare

- What your expert MUST do:
 - Stay in field of expertise
 - Look at the jury when testifying
 - Be familiar with facts of your case
 - Admit the undeniable
 - Be concise, use terms laymen understand

- Use demonstrative evidence whenever possible (It's ALWAYS possible!!)
- Be patient with counsel and the court
- Never volunteer unnecessary information
- Never be evasive or spar with opposing counsel

- What should you do as counsel?
 - Don't try to out-expert the expert: Let the expert be the witness
 - Use your expert in advance to develop cross examination for opposing expert
 - Be sure expert takes NOTHING to witness stand you don't want opposing counsel to see

Ohio Evidence Rule 803(18)
Learned Treatises

- The following are not excluded by the hearsay rule, even though the is available as a witness:
- (18) ***To the extent called to the attention of an expert witness, upon cross-examination or relied upon by the expert witness*** in direct examination, statements contained in published ***treatises, periodicals, or pamphlets*** on the subject of history, medicine or other science or art, ***established as a reliable authority*** by the ***testimony or admission of the witness or by other expert testimony or by judicial notice.*** If admitted, the statements may be read into evidence, but may not be received as exhibits.

Ohio Evidence Rule 106
Known as rule of completeness:
“When a writing . . . or part thereof is introduced by a party, an adverse party may require the introduction ***at that time*** of any other part . . . Which is otherwise admissible ***and*** which ought in fairness to be considered contemporaneously with it.

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

HEATHER HERZNER, et al.,	:	CASE NO. 2004CVC00564
Plaintiff,	:	
	:	
v.	:	<u>DECISION</u>
	:	
FISCHER ATTACHED HOMES, LTD.,	:	
et al.,	:	
Defendants.	:	

Robert N. Trainor, Attorney for Plaintiffs, The Carroll House, 216 East Fourth Street, Covington, Kentucky 41011-1759.

David A. Futscher and Amy L. Hunt, Attorneys for Defendant Fischer Attached Homes, Ltd., Parry Deering Futscher & Sparks, PSC, 411 Garrard Street, P.O. Box 2618, Covington, Kentucky 41012-2618.

This matter is before the Court upon Defendant Fischer Attached Homes, Ltd.'s ("Fischer") motion to exclude the testimony of Ritchie C. Shoemaker, M.D.. The parties filed extensive briefs with attachments on this matter. Both parties were afforded an opportunity to present evidence by way of exhibits or testimony of witnesses at the hearing. Other than a portion of the materials attached to briefs and admitted at the hearing by agreement, no other evidence was offered by either party. At the hearing, plaintiff's attorney acknowledged that the content of Dr. Shoemaker's planned testimony at trial was entirely contained within Dr. Shoemaker's Report, the filed transcript of Dr. Shoemaker's deposition held in March 2006, and the filed transcript of Dr. Shoemaker's deposition held in July 2006. Following oral argument the court took the matter under advisement.

Thereafter Herzner moved for leave of court to supplement the record with additional scientific articles. This motion is denied. These materials, which were