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Oleksiw v. Weidener: Eliciting Expert Testimony from Defendant Doctor in a Malpreactice Suit

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NOTES

OLEKSIW v. WEIDENER: ELICITING EXPERT TESTIMONY FROM DEFENDANT DOCTOR IN A MALPRACTICE SUIT

Following the modern trend, the Ohio Supreme Court in *Oleksiw v. Weidener*[1] ruled that the plaintiff in a malpractice action may satisfy his need[2] for expert testimony by eliciting such testimony from the defendant physician under Ohio's "adverse witness statute."[3] The majority felt that the purpose of the statute would best be served by "*allowing the examing party to compel all testimony relevant to the issues in the case. . . .*"[4] Jurisdictions considering whether a party can compel the adverse party to render expert testimony under similar statutes,[5] are equally divided.[6] Those taking the view opposite to *Oleksiw* hold that examination under such statutes must be limited to the facts within the party's knowledge, and do not require the giving of expert testimony.[7]

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1. 2 Ohio St.2d 147, 207 N.E.2d 375 (1965) (two judges dissenting.)

2. It is well settled in all but the most blatant instances of malpractice that the determination whether the defendant physician has failed to exercise the degree of skill and competence normal to physicians in good standing in a like or similar community is beyond the competence of a lay jury. Thus, it is incumbent upon the plaintiff to come forward with expert testimony in support of his case. See, *e.g.*, Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941); Bierstein v. Whitman, 360 Pa. 537, 62 A.2d 843 (1949).

3. OHIO REV. CODE ANN. tit. 23, § 2317.07 (1958), provides in part:
> At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness. . . . The party calling for such examination shall not thereby be concluded but may rebut it by evidence.

4. Oleksiw v. Weidener, 2 Ohio St.2d 147, 150, 207 N.E.2d 375, 378. (original emphasis.)

5. *E.g.*, FED. R. CIV. PROC. 43(b); CAL. CIV. PROC. CODE § 2055 (1917); ILL. REV. STAT. ch. 110, § 60 (1956); MD. ANN. CODE art. 35, § 9 (1957); PA. STAT. ANN. tit. 28, § 381 (1963).

6. *Accord,* Lawless v. Calaway, 24 Cal. App.2d 81, 147 P.2d 604 (Supreme Ct. 1944); Snyder v. Pantaleo, 143 Conn. 290, 122 A.2d 21 (1956); State ex rel. Miles v. Brainin, 224 Md. 156, 167 A.2d 117 (1961); McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 203 N.E.2d 469 (1964). *Contra,* Osborne v. Carey, 24 Idaho 158, 132 Pac. 967 (1913); Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963); Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944).

7. See, *e.g.*, Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944).

This Note will examine the rationale underlying these conflicting decisions in light of the statutory purpose to determine the better view. Consideration will also be given to the Pennsylvania and the federal jurisdictions which have yet to pass upon this point.

Plaintiff Oleksiw alleged that the defendant physicians negligently, and without plaintiff's consent, performed a bilateral femoral arteriogram upon him which resulted in necrosis of the skin. Plaintiff was undergoing x-ray examinations. A chemical substance was injected into his bloodstream so that his arteries would appear as opaque when photographed upon the x-ray plates. The injection caused extensive discoloration and damage to plaintiff's skin. He joined a negligence action and technical assault and battery count. At the trial, defendants were called as for cross-examination[8] and asked questions which required expert testimony. Defendants' objections to this course of questioning were sustained by the trial court. As a consequence, plaintiff failed to sustain his burden of proving malpractice due to the absence of expert testimony showing improper medical practice. The jury found for the defendants upon the remaining issue of technical assault and battery. An intermediate appellate court affirmed.[9] The Ohio Supreme Court reversed holding that such testimony could properly be elicited.

Some Historical Considerations

A consideration of the history and problems involved in this area will be helpful in evaluating the cases on this point. Without any adverse witness statute, a party, when calling the adverse party as a witness, had no right to impeach or discredit that witness; nor could the witness be examined as though on cross-examination.[10]

Though one could not impeach his own witness,[11] he could, of course, diminish the effect of the testimony of his own witness by furnishing other evidence to the contrary.[12] In *State v. Cooper*,[13] a case *not* considering a witness called under an adverse witness statute, it was determined that the party calling a witness would not be permitted to impeach the witness's character, veracity, or truth. Nor could the calling party impugn the witness's credibility by general evidence tending to show the unreliability of such witness. No party was held to be precluded, however, from proving the truth of any particular fact by any other competent testimony,

8. Ohio Rev. Code Ann. tit. 23, § 2317.07 (1958).

9. Oleksiw v. Weidener, 94 Ohio L. Abs. 268, 195 N.E.2d 813 (Ohio App. 1964).

10. *E.g.*, White v. Southern Oil Stores, Inc., 198 S.C. 173, 17 S.E.2d 151 (1941). This case is representative of the traditional common law view. There have been occasional deviations.

11. Cavalier v. Bitner, 186 Misc. 848, 60 N.Y.S.2d 355 (Supreme Ct. 1946).

12. *E.g.*, Benbow v. Harvin, 92 S.C. 180, 75 S.E. 414 (1912).

13. 10 N.J. 532, 92 A.2d 786 (1952).

even though that testimony was in direct conflict with the witness's testimony.

Thus, one is usually prevented from discrediting or impeaching the adverse party when called as a witness, in the absence of a statute[14] so permitting. This restriction would limit any impeaching or discrediting to the cross-examination of what the adverse party said upon direct examination, if there was any direct examination. Considering the natural tendency of a party called as a witness to be partisan, and eliminating the protection of cross-examination, it is understandable that the common law rule worked considerable hardship. It often prevented one party from bringing to light such knowledge as was possessed by his adversary.

The hardship of the common law was recognized by the Supreme Court of California.[15] That court discussed the problems and hardships when construing California's adverse witness statute:[16]

> Prior to [the adverse witness statute's] enactment, a party might call an adverse party as a witness if he desired to do so, but he was bound by his testimony in the same manner and to the same extent as he was by other witnesses called by him. This rule often worked a hardship upon the litigants, and often prevented the true facts of the case from being brought out in the evidence. . . . [The adverse witness statute] is a statute remedial in character, and as such should receive a construction by the courts which will carry into effect and accomplish the intent and purpose of the legislature in enacting it.[17]

Such statutes have been held not to violate any right of a defendant to remain silent.[18] In a recent New York case the court said:

> [The defendant] must, if called as a witness, respond to virtually all questions aimed at eliciting information, he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff's case.[19]

A defendant in a civil action has a duty to testify; the fifth amendment relieves him of this duty to testify in a criminal action.[20]

The purpose of the trial is to elicit all relevant and admissible evidence possible, so that the cause can be justly determined upon the merits. Any rule of law which prevents this must possess a

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14. See note 5, *supra*.
15. Smellie v. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529 (1931).
16. CAL. CIV. PROC. CODE § 2055 (1917).
17. Smellie v. Southern Pac. Co., 212 Cal. 540, 555-56, 299 Pac. 529, 535.
18. See Oleksiw v. Weidener, 2 Ohio St.2d 147, 207 N.E.2d 375 (1965); McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 203 N.E. 2d 469 (1964).
19. 15 N.Y.2d at 28, 203 N.E.2d at 474.
20. See Oleksiw v. Weidener, 2 Ohio St.2d 147, 207 N.E.2d 375 (1965).

stronger policy consideration.[21] It remains to be seen whether the reasons for not requiring a party to give expert testimony outweigh the reasons underlying the requirement of complete disclosure of all pertinent information.

An Analysis of the Conflict

The cases refusing to allow a party to elicit expert testimony from the other party are singularly devoid of expressed reasons.[22] Perhaps an underlying reason is a feeling that it is "unfair" to require the defendant to furnish information which will aid the plaintiff in proving his case; the plaintiff should prove his own case.[23] Such a view has been called the "sporting aspect" of adversary proceedings.[24] This view overlooks the realities of the situation; the plaintiff *is* proving his own case by bringing before the court such knowledge concerning the litigation as the defendant may possess.

An analysis of the cases will help in determining whether there is any "unfairness" involved in requiring the defendant to testify. Assuming that the purpose of a trial is to secure a speedy, just and inexpensive termination of the litigation, one might ask what purpose is served by requiring an additional witness to be brought in to testify. A party already present can supply the same information. This should be kept in mind when considering the reasons against compelling a party to render expert testimony.

A reason given by some courts for not allowing a party to elicit expert testimony from the opposing party is that it would deprive that party of a property right.[25] They argue that one who has acquired expertise, *e.g.*, physicians, lawyers, engineers, has a property in his opinions. Such a person should not be required to render an expert opinion unless he has voluntarily contracted to do so.[26]

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21. The lawyer-client privilege, doctor-patient privilege, etc. The preservation of the sanctity of these relationships is deemed more important than the quest for the whole truth.

22. *E.g.*, Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963).

23. See Osborne v. Carey, 24 Idaho 158, 132 Pac. 967 (1913). This feeling of "unfairness" is articulated in Note, 5 So. Cal. L. Rev. 448, 450 (1932).

24. Oleksiw v. Weidener, 2 Ohio St.2d at 150, 207 N.E.2d at 377. See also McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d at 28, 203 N.E.2d at 474.

25. This is apparently the holding in Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944). In that case the court said that when a party is called as a witness for another party, the witness shall be subject to the same rules governing cross-examination and examination as other witnesses. The court further said that one of the established rules as to examination and cross-examination was that one could not be called and compelled to give expert testimony, unless he had voluntarily contracted to do so.

26. Stanton v. Rushmore, 112 N.J.L. 115, 169 Atl. 721 (Ct. Err. & App. 1934); Pennsylvania Co. for Ins. on Lives & Granting of Annuities v. Phil-

Under this concept one may distinguish between a party and a non-party. When one is hired to give an expert opinion, he is selling services for which he deserves compensation. On the other hand, a litigant testifying in a civil trial has a duty[27] to reveal all relevant information which he possesses. Certain "absolute" property rights must yield to the state's police power. Further, in the case of a party, there is no need for him to make a study in order to familiarize himself with the facts, and no valid objection[28] can be made upon this ground. His actions or experience are the *subject* of the litigation. Thus, in a malpractice action the defendant doctor need make no study to render an expert opinion; he has thoroughly familiarized himself, or should have, when he treated the patient. All the physician need do is testify whether his treatment deviated from the standards of accepted medical practice.

> If a defendant in a malpractice action may truthfully testify that his conduct conformed to the standard required, his case is, of course, substantially strengthened and, if he cannot, so testify, the plaintiff's chances of recovery are unquestionably increased. In either case, the objective of the court in doing justice is achieved.[29]

New York recognizes that it is a violation of a property right to compel a non-party to render expert testimony.[30] This did not preclude the court in *McDermott v. Manhattan Eye, Ear & Throat Hosp.* from compelling a *party* to render expert testimony. It is submitted that this distinction is sound.

The property right argument is further weakened when one considers that nearly half of the jurisdictions in the United States hold that one can be compelled to give expert testimony without having contracted to do so.[31] They do not recognize any property

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adelphia, 216 Pa. 439, 105 Atl. 630 (1918). This latter case distinguishes between a private litigant compelling expert testimony without compensation, and the state so compelling. Dicta of that case says that the state does not have to compensate the expert for his services. Neither case considers an adverse witness statute, and the nuances of this latter distinction are beyond the scope of this note.

27. Oleksiw v. Weidener, 2 Ohio St.2d at 149, 207 N.E.2d at 377.

28. See, *e.g., Ex parte* Dement, 53 Ala. 389, 397, 25 Am. Rep. 611 (1875); Flinn v. Prarie County, 60 Ark., 204, 207, 29 S.W. 459, 460 (1895).

29. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d at 28, 203 N.E.2d at 474.

30. People *ex rel.* Kraushaar Bros. & Co. v. Thorpe, 296 N.Y. 233, 72 N.E.2d 165 (1947).

31. See, *e.g., Ex parte* Dement, 53 Ala. 389, 25 Am. Rep. 611 (1875); Larimer County v. Lee, 3 Colo. App., 32 Pac. 841 (1873); Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897). See generally Annot., 77 A.L.R.2d 1182 (1961). Most cases on this point, as illustrated by *Dement*, differentiate between instances where the expert either knows of the facts or is posed a hypothetical question, and when the expert must make a study of the problem involved in order to answer the question posed. In the latter instance, the courts are agreed that they cannot compel an expert to make any study, or perform any operation so as to be able to render an expert opinion.

right. In *Ex parte Dement*[32] the defendant doctor had examined a murder victim. At the trial of one Barnard, the purported murderer, Dr. Dement was called as a witness for the state. The doctor gave testimony that he had examined the victim; he refused to give his expert opinion as to the nature, character, and effect of the wound, however, because he had not been remunerated for giving his professional opinion. He was found guilty of contempt of court and this was sustained upon appeal. The court imposed a duty to give all relevant knowledge and made no distinction between fact or expert opinion.

Such cases draw no distinction between an expert and an ordinary witness, holding that all witnesses have a duty to inform the court of all relevant knowledge, be it fact or opinion, which they possess.[33] Other cases have refused to grant any compensation above the statutory witness fee to an expert witness rendering expert testimony.[34] From the preceding discussion, it can be seen that many jurisdictions provide no special treatment for expert witnesses. The expert witness is required to give *all* knowledge which he possesses concerning a lawsuit when called upon to do so by the court. These jurisdictions refuse to recognize any property right which overrides the public duty to testify. There is even less reason to protect an expert who is a party. Because of this split of authority, the property right reason for refusing to compel an adverse party to render expert testimony is open to serious question. As will later be seen, there are jurisdictions which refuse to recognize any property right when a party is seeking to *discover* expert opinion from the opposing party.

Any claim of unfairness in allowing the plaintiff to establish his case by means of the defendant's expert testimony has been answered by those cases which allow the eliciting of expert testimony from a party. "If his [the expert party's] testimony will provide facts which will aid the court in arriving at a just decision, he has the duty to testify. Any loss to the sporting aspect of adversary proceeding would be outweighed by the benefit to the judicial system."[35] Again we return to the premise that all relevant information should be revealed, barring some superior policy consideration to the contrary.

No jurisdiction construing an adverse witness statute has ever held that it is unfair to compel a party in a civil trial to reveal all

32. *Ex parte* Dement, 53 Ala. 389, 25 Am. Rep. 611 (1875).

33. See, *e.g.*, *Ex parte* Dement, *supra* note 32; Flinn v. Prarie County, 60 Ark. 204, 29 S.W. 459 (1895). This is the reasoning advanced by most cases so holding. It must be emphasized that not every expert may be compelled to come to court and testify; like any other witness, he must have some relationship with the case at bar.

34. See, *e.g.*, Mount v. Welsh, 118 Or. 568, 247 Pac. 815 (1926).

35. Oleksiw v. Weidener, 2 Ohio St.2d at 150, 207 N.E.2d at 377. The New York court in *McDermott* expressed virtually the same thought, 15 N.Y.2d at 28, 203 N.E.2d at 474.

of the *facts* within his knowledge concerning the matter at issue.[36] All jurisdictions agree that such statutes allow at least this much.[37] It has been held that the plaintiff can make out his case upon the facts to which the defendant testifies.[38] Decisions which have allowed an adverse party to elicit expert testimony do not draw a distinction between fact and opinion. They allow the plaintiff to prove his case by means of defendant's expert testimony.

> There is nothing unfair about such a practice. Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect upon his case. Rather, he must, if called as a witness, respond to virtually all questions aimed at eliciting information, he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff's case. We cannot agree with the suggestion that it is somehow neither sporting nor consistent with the adversary system to allow a party to prove his case through his opponent's own testimony. . . .[39]

The cases which imply that it is "unfair" to require the defendant to give testimony which might tend to prove the plaintiff's case do not say why it is so. Apparently these courts would rather protect the defendant and litigate the case upon an incomplete set of facts. In light of the recent liberal interpretations of the adverse witness statutes, it is submitted that the "unfairness" argument should fail. When the previously discussed property right argument is dismissed, the restrictive cases give no reason why a party should be privileged to remain silent and allow a judgment not warranted by the complete facts. Is it not more unfair to have a judgment unwarranted by the whole truth, than to compel a party to tell the whole truth, however damaging? The liberal cases recognize this, and hold that justice is best served by allowing a party to elicit both fact and expert opinion from his adversary.[40]

Although not considered in any of the decided cases, it might be argued that it is prejudicial to require a party to aid in proving his adversary's case. In legal usage, prejudice or prejudicial are rather imprecise terms embodying several different meanings. Strictly speaking, it means a preconceived opinion or a leaning toward one side of a cause for some reason other than its justice.[41]

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36. *E.g.*, Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944).

37. *E.g.*, Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963).

38. *E.g.*, Hall v. Horak, 329 Mich. 16, 44 N.W.2d 848 (1950); Waller v. Sloan, 225 Mich. 600, 196 N.W. 347 (1923); Langford v. Isenhuth, 28 S.D. 451, 134 N.W. 889 (1912). This is undoubtedly true in most jurisdictions.

39. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d at 28, 203 N.E.2d at 473.

40. *Id.* at 20, 203 N.E.2d at 469.

41. Willis v. State, 12 Ga. 444, 449 (1852); Taylor v. F.W. Woolworth Co., 146 Kan. 841, 844, 73 P.2d 1102, 1103 (1937).

It is manifest that we are not here faced with this sort of prejudice.

Prejudicial could also mean adverse, unfavorable, or disadvantageous to a party's cause. It is equally obvious that evidence should not be excluded upon this ground.

> If such evidence were excluded because it had a prejudicial tendency against the defendant (that is, if it tended to influence the jury to render a verdict in favor of the plaintiff), then plaintiff could never make out a case. [A] court cannot be convicted of error because of that circumstance.[42]

It is suggested that for purposes of present discussion, a ruling should be considered prejudicial if it would naturally and probably bring about a wrong result[43] or if it would erroneously affect the jury in reaching its verdict.[44] A defendant doctor's expert testimony as to the propriety of his professional conduct is not prejudicial by this standard. A liberal interpretation of an adverse witness statute would help to prevent an erroneous result by allowing *all* relevant information to be brought before the trier of fact. A wrong decision would be less likely to occur since all available testimony would be put before the jury.

A further reason which favors the allowing of a party to elicit expert testimony as in Oleksiw was brought out by the New York court in *McDermott*:

> The importance of enabling the plaintiff to take the testimony of the defendant doctor as to both 'fact' and 'opinion' is accentuated by recognition of the difficulty inherent in securing 'independent' expert witnesses. It is not always a simple matter to have an expert, a doctor in this case, condemn in open court the practice of another, particularly if the latter is a leader in his field. In consequence, the plaintiff's only recourse in many cases may be to question the defendant doctor as an expert in the hope that he will thereby be able to establish his malpractice claim.[45]

This is an express judicial recognition of the problem of securing expert testimony in a malpractice case. Thus, the practicalities of the situation also urge a liberal interpretation of adverse witness statutes.[46]

A collateral reason why one should not be compelled to give

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42. Ingram v. Prarie Block Coal Co., 319 Mo. 644, 658, 5 S.W.2d 413, 418 (1928).

43. State v. Farrar, 103 Kan. 774, 776, 176 Pac. 987, 988 (1919).

44. Sonken-Galamba Corp. v. Hillman, 111 S.W.2d 853, 856 (Tex. Civ. App. 1938).

45. 15 N.Y.2d at 27, 28, 203 N.E.2d at 474.

46. For a controversial treatment of the problem of securing expert medical testimony in general, see Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

expert testimony is given in *Ex parte Roelker*[47] wherein the court said:

> When a person has knowledge of any *fact* pertinent to an issue to be tried, he may be compelled to attend as a witness. In this all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon, in every cause in which his department of knowledge is to be solved.[48]

This is the "inconvenience" argument. The case goes on to discuss the hardship of compelling an eminent expert to expose himself to the rigors of travel and to expend his time merely for ordinary witness fees.

It is patent that this argument has no application to an expert who is a party.[49] There are sound reasons for distinguishing between a *nonparty* who is compelled to render expert testimony and a *party* who is compelled to render such testimony.[50] No inconvenience is involved. The expert party is already present and involved in the litigation.[51]

McDermott noted a possible abuse of the right to examine the opposing party as an expert.[52] It is possible that a plaintiff, acting in bad faith, might name an expert as a defendant merely to obtain an expert witness. This possibility did not preclude the New York court from adopting the liberal view, and it is submitted that this result is sound. To deny a right to everyone merely because there is opportunity for abuse would imply that the law is incapable of coping with those who abuse their rights. Tort remedies such as abuse of process,[53] judicial remedies such as contempt, and sanctions by the bar associations could be quite effective to stem any perversion of the statute.

The Hypothetical Question

At least one jurisdiction distinguishes between an expert opinion based on a hypothetical question[54] and one based upon a factual question.[55] In *Hunder v. Rindlaub*[56] the court refused to allow the plaintiff to pose a hypothetical question concerning what the

47. 20 Fed. Cas. 1092 (D. Mass. 1854).
48. *Id.* at 1092-93. (Emphasis added.)
49. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 29, 203 N.E.2d 469, 474-75.
50. *Ibid.*
51. *Ibid.*
52. *Id.* at 30, n.5, 203 N.E.2d at 475, n.5.
53. See Prosser, Torts 876 (3d ed. 1964). Note the distinction between, as well as the overlapping of, this tort and malicious prosecution.
54. Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931).
55. Harden v. Mischel, 63 N.D. 122, 246 N.W. 646 (1933); Sax Motor Co. v. Belfield Farmers' Union Elev. Co., 62 N.D. 727, 245 N.W. 488 (1932).
56. 61 N.D. 389, 237 N.W. 915 (1931).

defendant would do if he encountered a puncture injury to an eye; there had already been testimony to the effect that the eye had been pierced. Yet in *Sax Motor Co. v. Belfield Farmers' Union Elevator Co.*,[57] the same court held that it was proper for the plaintiff to ask the defendant's elevator manager what the value of the grain at issue was; this question involved the rendering of an expert opinion. Likewise in *Harden v. Mischel*,[58] the same bench permitted the plaintiff to inquire of the defendant as to the value of certain cars involved in the action, again a question requiring an expert opinion. The court in *Sax Motor Co.* expressly stated that their holding in *Hunder* was limited to the asking of hypothetical questions.[59]

The type of hypothetical question which the North Dakota court objected to was a hypothetical question based upon *testimony heard* and not a question based upon an *assumed state of facts*.[60] "Questions calling for expert opinions should be framed so as not to call upon the witness to pass upon the credibility of witnesses, the preponderance of evidence, or [to?] determine controverted questions of fact."[61] This is objectionable since the jury alone are to determine what facts are proved.[62] It is submitted that the North Dakota court would allow the eliciting of expert testimony from a defendant physician based on a properly phrased hypothetical question.

Most of the opinions which do not permit one to elicit expert testimony from the adverse party do not mention the nature of the question by which the testimony is sought to be elicited. Therefore, it is impossible to determine whether the North Dakota view represents a general rule.[63]

The Pennsylvania and Federal Cases

The question presented in *Oleksiw v. Weidener* has never arisen in Pennsylvania, although Pennsylvania does have an adverse witness statute.[64] A federal case[65] has expressly declined to rule whether or not Federal Rule 43(b) may be used to compel a party to render expert testimony. Both Pennsylvania[66] and the federal

57. 62 N.D. 727, 245 N.W. 488 (1932).
58. 63 N.D. 122, 246 N.W. 646 (1933).
59. Sax Motor Co. v. Belfield Farmers' Union Elev. Co., 62 N.D. 727, 731, 245 N.W. 488, 489-90.
60. Hunder v. Rindlaub, 61 N.D. 389, 417, 237 N.W. 915, 927.
61. *Ibid.*
62. McKelvey, Evidence 357 (5th ed. 1944). See generally McCormick, Evidence 29-34 (1954) (detailed analysis of the problems and policies involved in this area).
63. See Annot., 88 A.L.R.2d 1187, 1188 (1963).
64. Pa. Stat. Ann. tit. 28, § 381 (1963).
65. Thompson v. Lillehei, 273 F.2d 376 (8th Cir. 1959).
66. Decker v. Pohlidal, 22 Pa. D.&C.2d 631 (C.P. 1960).

courts[67] will allow a party to elicit expert opinion from an opposing party *during the discovery process.*

In *Decker v. Pohlidal,*[68] a malpractice action, the plaintiff sought to discover[69] an expert opinion from defendant physician. The defendant objected claiming that the plaintiff could not ask the defendant doctor to express his expert opinion on any matter. It was further urged that no private litigant could ask a doctor for an expert opinion unless a bargain was reached whereby the doctor agreed to do so. *Pennsylvania Co. for the Ins. on Lives and Granting of Annuities v. Philadelphia,*[70] was cited as authority for this. This contention was rejected by the *Decker* court.

> We cannot sustain the defendant's objections on this ground. The foregoing expert witness rule is inapplicable where defendant-doctor, himself an expert, is on trial for malpractice. In such a situation no sound distinction can be drawn between questioning him concerning his opinion, since fact and opinion are inextricably intermingled on the fundamental issue as to whether defendant-doctor departed from accepted standards in diagnosing and treating plaintiff's injuries.[71]

The New York court in *McDermott* also expressed this thought:

> It is at least arguable that the doctor's knowledge of the proper medical practice and his possible awareness of his deviation from that standard in the particular case are, in a real sense, as much matters of 'fact' as are the diagnosis and examination he made or the treatment upon which he settled.[72]

This is another possible reason why a party in a malpractice action should be required to give an expert opinion.

Federal cases have allowed discovery of expert opinion.[73] A distinction is made between discovery of the opinion of an expert employed by a party to make a study of the controversy, and discovery of the expert opinion of one of the parties or a managing agent of one of the parties.[74] This distinction is based upon the conclusion that obtaining the opinion of an expert employed by a party to make a study for the purpose of the litigation would be an

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67. See, *e.g.*, Bugen v. Friedman, 10 F.R.D. 231 (E.D. Pa. 1951); cf. Russo v. Merck & Co., 21 F.R.D. 237 (D.R.I. 1957) (eliciting expert testimony from managing agent of defendant.)

68. 22 Pa. D.&C.2d 631 (C.P. 1960).

69. This was done pursuant to PA. R. CIV. PROC. 4007.

70. 216 Pa. 439, 105 Atl. 630 (1918).

71. Decker v. Pohlidal, 22 Pa. D.&C.2d at 639-40. PA. R. CIV. PROC. § 4020 provides that depositions taken under § 4007, so far as admissible under the rules of evidence, may be used against a party who was duly notified of the taking of depositions.

72. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d at 27, 203 N.E.2d at 473.

73. *E.g.*, Russo v. Merck & Co., 21 F.R.D. 237 (D.R.I. 1957).

74. Moran v. Pittsburgh-Des Moines Steel Co., 6 F.R.D. 594, 596 (W.D. Pa. 1947); Russo v. Merck & Co., 21 F.R.D. 237, 239 (D.R.I. 1957).

unfair taking of property.[75] Obviously, this reasoning does not prevent the discovery of an expert opinion from a *party*.

Some Statutory Considerations

Rule 1 of the Federal Rules of Civil Procedure provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." It is submitted that a court determining whether Rule 43(b) allows the eliciting of expert testimony from a party, might give this mandate of construction great weight. If the defendant, while under oath, admits that he had departed from the accepted standard of practice, speed of trial is increased, expense is reduced, and justice served. Thus construing Rule 43(b) to permit eliciting of expert testimony from an adverse party would comply with the mandate of Rule 1.

As previously mentioned, Pennsylvania has an adverse witness statute.[76] No cases, however, involving the expert *testimony* of a party have been found. The Statutory Construction Act[77] seems to require a strict construction of Pennsylvania's adverse witness statute. Section 557(8) provides:

> All provisions of a law of the classes hereafter enumerated shall be strictly construed: . . .
>
> (8) Provisions enacted prior to the effective date of this law which are in derrogation of the common law.

Pennsylvania's adverse witness statute was enacted prior to the effective date of the Statutory Construction Act and is in derrogation of the common law.[78]

Sections 531 and 551 may limit the effect of section 557. Section 531 provides:

> In the construction of the laws of this Commonwealth, the rules set forth in this article shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the legislature.

Section 551 provides:

> When the words of the law are not explicit, the intention of the legislature may be ascertained by considering, among other matters (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law . . . ; (6) the consequences of a

75. *Ibid.*, see also, Lewis v. United Airlines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940).

76. Pa. Stat. Ann. tit. 28, § 381 (1963). This was enacted in May 23, 1887, and amended by the Act of March 30, 1911. As will later be seen, these dates could have great significance due section 557(8) of the Statutory Construction Act.

77. Pa. Stat. Ann. tit. 46, §§ 501-601 (1963), Act of May 28, 1937. Note this date; it was enacted subsequent to the adverse witness statute.

78. *E.g.*, White v. Southern Oil Stores, Inc., 198 S.C. 173, 17 S.E.2d 151 (1941).

particular interpretation. . . .

In light of the above, it is submitted that section 557 (8) would not preclude a Pennsylvania court from adopting the liberal view as embodied in *Oleksiw* and *McDermott*. Since the adverse witness statutes are remedial in character,[79] the Pennsylvania courts might construe their statute liberally, holding that the legislature so intended.

None of the so-called adverse witness statutes expressly prohibit the eliciting of expert testimony; indeed, they are silent on the subject.[80] The Maryland court in *State ex rel. Miles v. Brainin*[81] stated that a possible reason for the differing interpretations, was the minor differences in wording.[82] At least, the Maryland court held that the broad language in the Maryland statute[83] was a reason for not following cases which deny the right to elicit expert testimony from an adverse party.[84] Despite the differences in wording, the language of the statutes does not prohibit the eliciting of expert opinion. The Maryland statute which allows one to interrogate, contradict and impeach a witness grants no more than do the statutes which allow the interrogation of a party to proceed as if on cross-examination. It is submitted that the different results which the courts have reached are attributable more to court attitudes than to any differences in wording.

CONCLUSION

It is suggested that the result reached by the Ohio court in *Oleksiw* is sound. While it may be quite optimistic for the plaintiff to call the defendant doctor as an expert,[85] the better reasoned cases allow him to do so. The obvious purpose of adverse witness statutes is to produce all the pertinent and relevant evidence that is available.[86] By allowing expert testimony to be elicited from a party, the statutory purpose is best served. The property right and "inconvenience" arguments are weak when it is remembered that it is a *party* who is involved. Furthermore, the restrictive cases have given no reason why it is less "unfair" to allow a party to remain

79. Smellie v. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529 (1931).

80. See the comprehensive citations in 3 WIGMORE, EVIDENCE § 916 (3d ed. 1940) as well as the cumulative supplement contained therein.

81. 224 Md. 156, 167 A.2d 117 (1961).

82. *Id.* at 156 n.2, 167 A.2d at 117 n.2.

83. MD. ANN. CODE art. 35, § 9 provides in part that one calling an adverse party may "interrogate . . . contradict and impeach [him]." Other statutes such as N.J. STAT. ANN. tit. 2A, § 81-11 provide for examination in the nature of a cross-examination. Since one can impeach and contradict a witness upon cross-examination, it is submitted that there is no difference in the effect of the statutes.

84. State *ex rel.* Miles v. Brainin, 224 Md. 156, 160-61, 167 A.2d 117, 119 (1961).

85. McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 30 N.E.2d 469, 475.

86. State *ex rel.* Miles v. Brainin, 224 Md. 156, 161, 167 A.2d 117, 119.

silent and withhold important information from the trier of fact. No overriding reason why a party should be privileged to remain silent under these circumstances is given. The doctrine of *Oleksiw* should soon prevail in the Pennsylvania and federal courts.

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