Roger Williams University Law Review

Volume 3 | Issue 2 Article 15

Spring 1998

1997 Survey of Rhode Island Law: Cases: Evidence

Karen M. Hagan
Roger Williams University School of Law

Judith M. Andrade

Evidence. *Buja v. Morningstar*, 688 A.2d 817 (R.I. 1997). In a malpractice action, a proposed expert witness need not be board certified nor have other training or experience in the same specialty as the defendant-physician, provided that the expert has knowledge, skill, experience, training or education in the field of the alleged malpractice.

In *Buja v. Morningstar*,[1] the Rhode Island Supreme Court reaffirmed its holding in *Marshall v. Medical Associates of Rhode Island, Inc.*[2] regarding the qualifications of an expert witness in a medical-malpractice case. The court held that a party proposing expert testimony to support its allegation of medical malpractice against a defendant-physician need not offer an expert who is board certified or otherwise trained in the same specialty as the defendant. A person may give testimony as long as that person has the "knowledge, skill, experience, training or education . . . in the field of the alleged malpractice."[3]

FACTS AND CASE TRAVEL

Brenda and Brian Buja enrolled in a clinic at Memorial Hospital in Providence, Rhode Island, where Brenda received prenatal treatment from Dr. Linda Lacerte, a resident in family practice.[4] Brenda went into labor on December 14, 1990. Dr. Lacerte, along with Dr. Howard Morningstar, also a family-practice resident, handled Brenda's labor.[5] The doctors were supervised by Dr. Lawrence Culpepper. Dr. Culpepper left the hospital prior to Brenda giving birth, but was relieved by another doctor.[6] Kayla Joy Buja (plaintiff) was eventually delivered by emergency vacuum extraction by the relieving doctor.[7] Both Dr. Lacerte and Dr. Morningstar were present with the relieving doctor during the delivery. At some point during delivery, Kayla was deprived of oxygen. She was later diagnosed with cerebral palsy, spastic

1. 688 A.2d 817 (R.I. 1997) (per curiam).
2. 677 A.2d 425 (R.I. 1996) (per curiam).
3. R.I. Gen. Laws § 9-19-41 (Supp. 1996).
4. *See Buja*, 688 A.2d at 818.
5. *See id.*
6. *See id.*
7. *See id.*

quadriplegia and mental retardation, all of which resulted from the oxygen deprivation.[8]

At trial in the Rhode Island Superior Court, the plaintiffs offered the testimony of an expert witness who was board certified in obstetrics and had extensive knowledge, skill, experience, training and education in obstetrics.[9] The defendants filed a motion in limine to preclude the expert from testifying. The defendants suggested that the expert was not qualified as a family practitioner and could not testify as to the standard of care of a family practitioner who, unlike obstetrical practitioners, only deliver children occasionally.[10] The trial judge granted the motion in limine on the grounds that an expert witness had to be an expert in family practice to testify against a defendant who was a family practitioner.[11] From this ruling, the plaintiffs appealed.[12]

BACKGROUND

Section 9-19-41 of the Rhode Island General Laws, currently governing the qualifications of an expert witness proffered to testify in a malpractice case, provides:

> In any legal action based upon a cause of action arising on or after January 1, 1987, for personal injury or wrongful death filed against a licensed physician, hospital, clinic, health maintenance organization, professional service corporation providing health care services, dentists or dental hygienist based on professional negligence, only those persons who by knowledge, skill, experience, training or education qualify as experts in the field of the alleged malpractice shall be permitted to give expert testimony as to the alleged malpractice.[13]

Section 9-19-41 was enacted for the purpose of statutorily prescribing the criteria necessary for a court to qualify a witness as an expert witness in medical-malpractice cases.[14] In *Marshall v. Medical Associates of Rhode Island*,[15] the Rhode Island Supreme Court held that section 9-19-41 should not be interpreted so narrowly as

8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. R.I. Gen. Laws § 9-19-41 (Supp. 1996).
14. *See* Owens v. Payless Cashways, Inc., 670 A.2d 1240, 1244 n.6 (R.I. 1996).
15. 677 A.2d 425 (R.I. 1996) (per curiam).

to allow only an expert who is either board certified or who has some other special training or knowledge in the specialty of the defendant-physician.[16]

In *Marshall*, the Rhode Island Supreme Court reversed a trial court's decision to exclude the testimony of the plaintiff's expert who was board certified in pediatrics and family medicine.[17] The defendant was an emergency-room physician and internist who treated the plaintiff for an animal bite. The plaintiff's expert's qualifications included routine treatment of hundreds of animal-bite wounds and lectures on the topic at various medical schools.[18] The court stated that it is not grounds for automatic disqualification if a proffered expert is not board certified or practicing in the same specialty as the defendant under section 9-19-41. The fact that the expert is not board certified or practicing in the same specialty as the defendant merely goes to the weight given by the fact finder to the opinion of the expert.[19]

Recently, the South Carolina Supreme Court ruled on a case in which a plaintiff was suing an anesthesiologist for medical malpractice.[20] The plaintiff alleged that the anesthesiologist chipped his two front teeth while intubating[21] him for surgery.[22] The plaintiff offered the testimony of an emergency medical technician (EMT) as an expert in intubation.[23] The trial court ruled that the EMT was not qualified to testify. The South Carolina Supreme Court reversed.[24] The supreme court ruled that the EMT had the requisite training and knowledge to testify as an expert in intubation, although he had less medical training and education than the defendant.[25]

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16. *See id.* at 426.

17. *Id.*

18. *See id.* at 426-27.

19. *See id.* at 427.

20. *See* Gooding v. St. Francis Xavier Hosp., 487 S.E.2d 596 (S.C. 1997).

21. *See id.* An intubation is the placing of an endotracheal tube into a patient's trachea to provide a clear airway and to prevent aspiration of foreign materials into the lungs. *See id.* at 597 n.1.

22. *See id.* at 597.

23. *See id.*

24. *See id.*

25. *See id.* The proffered evidence at trial included a videotape of the witness demonstrating the proper technique for intubation. He also testified that he had intubated hundreds of patients and instructs physicians on intubation. *See id.* at 596.

ANALYSIS AND HOLDING

In *Buja*, the Rhode Island Supreme Court followed its holding in *Marshall* and held that a proffered expert in a medical-malpractice case does not have to practice in the same specialty as the defendant. However, the expert must meet one of the criteria of section 9-19-41 of possessing the necessary "knowledge, skill, experience, training or education . . . in the field of the alleged malpractice."[26] According to the court, section 9-19-41 does not require that the witness be an expert in the field in which the malpractice occurred, nor does it require the witness to be practicing in the defendant's specialty.[27] The statute's language is plain and unambiguous and clearly expresses the view of the General Assembly. Because the Bujas' expert witness was qualified in the field of obstetrics, the field of the alleged malpractice, he was qualified to testify as an expert witness even though he did not practice in the same specialty as the defendant.[28]

CONCLUSION

The Rhode Island Supreme Court has established that section 9-19-41 should not be construed to require a plaintiff in a medical-malpractice case to search within the limited scope of the defendant's specialty to obtain expert testimony regarding the defendant's alleged malpractice. In doing so, the court remains true to the statute's clear and unambiguous language. The witness need only meet one of the enumerated criteria set forth in the statute to be qualified to testify as an expert witness.

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26. R.I. Gen. Laws § 9-19-41 (Supp. 1996).

27. *See Buja*, 688 A.2d at 819.

28. *See id.*

Evidence. *State v. Griffin*, 691 A.2d 556 (R.I. 1997). A proposed expert witness need not have possession of the murder weapon to testify concerning its characteristics, provided that the proponent of the evidence sets forth a sufficient factual foundation to remove the expert's opinion from the area of speculation. The proponent of expert testimony by a handwriting analyst need not demonstrate with absolute certainty that a handwriting sample is authentic, provided that the trial judge may conclude that it is reasonably probable that the evidence is what its offeror proclaims it to be.

In *State v. Griffin*,[1] the Rhode Island Supreme Court emphasized the wide discretion accorded to trial judges in the admission of expert testimony under Rhode Island Rules of Evidence 702 and 901. The court held that expert testimony regarding the characteristics of the alleged murder weapon is admissible under Rule 702 as long as a sufficient factual foundation exists to remove the testimony from the realm of mere speculation.[2] In addition, the court held that testimony by a handwriting analyst based on samples of the defendant's writing is admissible under Rule 901 if the trial judge concludes that it is reasonably probable that the proffered evidence is what its proponent purports it to be.[3]

FACTS AND TRAVEL

A house party in South Providence, Rhode Island resulted in one man's death and another man's conviction for murder.[4] The defendant, Miles Griffin, shot and killed a fellow partygoer with a .38 caliber revolver after a minor altercation.[5] One witness observed Griffin jam a .357 bullet into his .38 revolver.[6] Another witness saw Griffin prying a .357 shell from the same weapon.[7]

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1. 691 A.2d 556 (R.I. 1997).
2. *See id.* at 558.
3. *See id.*
4. *See id.* at 557.
5. *See id.* An eyewitness testified that the victim asked Griffin if he "had any static or whatever." Griffin replied in the negative, but proceeded to shoot the curious reveler in the eye. *Id.* at 557.
6. *See id.* at 558.
7. *See id.* at 557.

Furthermore, several friends overheard Griffin bragging about the killing.[8]

At trial, the judge allowed the prosecution to present testimony by two expert witnesses—a firearms expert and a handwriting analyst. The firearms expert testified that certain .38 caliber revolvers may be modified to fire .357 bullets.[9] The handwriting analyst opined that Griffin was the author of a threatening letter that had been sent to a key prosecution witness before the trial began.[10] The analyst arrived at his conclusion by comparing the letter to two other documents allegedly penned by Griffin.[11] The jury subsequently convicted Griffin of second-degree murder and possession of a firearm while committing a violent crime.[12]

The defendant challenged the admission of the experts' testimony. First, Griffin contended that the failure of the police to locate the murder weapon rendered the firearm expert's opinion regarding the gun's characteristics mere guesswork.[13] Second, Griffin challenged the admission of the handwriting analyst's expert opinion.[14] He contended that the prosecution failed to authenticate the documents used by the analyst to arrive at his opinion.[15]

BACKGROUND

Rhode Island Rule of Evidence 702 provides:

> Testimony by Experts—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 quali-

8. *See id.* Witnesses testified that Griffin boasted about having "shot this cat at a party," and embellished the gory tale by adding that "his eye came out, too." *Id.* at 558.

9. *See id.* at 557. The firearms expert explained that .38 Specials can be modified to fire .357 bullets, while .38 Smith & Wessons may not be. *See id.*

10. *See id.*

11. *See id.* at 558. The two sets of documents were (1) several waiver-of-rights forms signed by Griffin and (2) a letter allegedly sent by Griffin to the warden. *See id.*

12. *See id.* at 557-58.

13. *See id.* at 558. Griffin pointed out that, since the police had not located the murder weapon, they could not conclusively state whether it was a .38 Special or a .38 Smith & Wesson. *See id.*

14. *See id.*

15. *See id.*

> fied as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.[16]

The language of Rule 702 emphasizes the value of expert testimony in assisting the trier of fact to understand the evidence or to determine a fact in issue.[17] Decisions regarding the qualifications of a witness to express an opinion are within the discretion of the trial judge and are reviewed under an abuse of discretion standard.[18] Testimony by an expert must be based on facts which are legally sufficient to form a basis for the expert's conclusion.[19]

In *State v. Boucher*, the Rhode Island Supreme Court upheld the trial judge's decision to exclude expert testimony by a defense witness.[20] The witness was to provide testimony about the shrinkage characteristics of the jacket found on the body of the victim.[21] The expert witness did not have the requisite familiarity with the fabric of the jacket to testify that the garment would not shrink as a result of immersion.[22] Therefore, the court found the trial judge did not abuse his discretion.[23]

Rhode Island Rule of Evidence 901 provides:

> Requirement of Authentication or Identification—(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[24]

Rule 901 requires that the proponent of evidence to authenticate the evidence with facts sufficient to support a finding that the evidence is what it is claimed to be.[25] In *State v. Ducharme*,[26] the

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16. R.I. R. Evid. 702.

17. *See* State v. Bryant, 670 A.2d 776, 781 (R.I. 1996).

18. *See* State v. Boucher, 542 A.2d 236, 239 (R.I. 1988).

19. *See id.* at 239-40; *see, e.g.*, Greco v. Mancini, 476 A.2d 522, 525 (R.I. 1984); State v. Fogarty, 433 A.2d 972, 977 (R.I. 1981).

20. *Boucher,* 542 A.2d at 239.

21. *See id.* The victim was found wearing a jacket which purportedly belonged to the defendant. The defendant argued that the jacket was too small to fit him, and denied the prosecution's assertion that it had shrunk as a result of being immersed in water. *See id.*

22. *See id.* at 240. The trial judge determined that the expert witness, a textile finisher, was qualified to give a general opinion about the shrinkage of completed garments. *See id.*

23. *See id.*

24. R.I. R. Evid. 901(a).

25. *Id.*

26. 601 A.2d 937 (R.I. 1991).

Rhode Island Supreme Court lent a flexible interpretation to Rule 901.[27] The trial judge allowed the prosecution to admit two handwritten notes which were allegedly authored by the defendant.[28] During his taped statement to the police, the defendant stated that he had left two notes, one on a car and another at a bank.[29] The defendant argued that the notes were not properly authenticated under Rule 901.[30] The court rejected this argument, holding that the trial judge did not abuse his discretion by concluding that it was reasonably probable "that the evidence was what the prosecution purported it to be: the notes defendant had referred to in his taped statement."[31] In *Ducharme*, the supreme court held that Rule 901 is satisfied as long as the evidence in the record supports a conclusion that it is reasonably probable that the evidence is what it is purported to be.[32]

While questions of authentication and admissibility are solely within the discretion of the trial judge, the finder of fact is free to accord any amount of weight it chooses to expert testimony.[33] "It is the jury's function to decide the weight to give to the evidence."[34]

ANALYSIS AND HOLDING

In *Griffin*, the Rhode Island Supreme Court emphasized the wide discretion the Rhode Island Rules of Evidence grant to trial judges.[35] The court upheld the trial judge's decision to admit the testimony of the firearms expert, despite the State's failure to locate the actual weapon used in the slaying.[36] The court reasoned that the testimony of the eyewitnesses provided a sufficient factual

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27. *See id.* at 944.

28. *See id.* at 943. (stating that one of the anonymous notes was found at an automated-bank-teller machine, and the other was found under the windshield wiper of an automobile).

29. *See id.*

30. *See id.* at 944. The defendant argued that the handwriting in the documents must be attributed to him with scientific certainty in order for them to be authenticated. The prosecution relied on a taped statement the defendant made to police in which he referred to the notes in question. *See id.* at 943-44.

31. *Id.* at 944.

32. *Id.*

33. *See* State v. Bertram, 591 A.2d 14, 25 (R.I. 1991) (citing State v. Vargus, 373 A.2d 150, 157 (R.I. 1977)).

34. *Ducharme*, 601 A.2d at 944.

35. *Griffin*, 691 A.2d at 558 (stating that "[t]rial justices have wide discretion in connection with the admission of expert testimony").

36. *See id.*

foundation upon which the expert witness could form a conclusion.[37]

Unlike the proposed expert witness in *State v. Boucher*, the firearms expert had knowledge of concrete facts which removed his opinion from the realm of mere speculation.[38] Testimony by fellow partygoers who saw Griffin jamming a .357 bullet into his .38 revolver, and by others who saw him prying a .357 shell from that same revolver, provided a sufficient factual basis upon which the firearms expert could base his opinion.[39] The court concluded that the trial judge did not abuse his discretion in allowing the firearms expert to testify.[40]

The court also upheld the trial judge's decision to admit the testimony of the handwriting analyst.[41] The fact that Griffin denied authorship of one of the handwriting samples went to the weight, rather than the admissibility, of the expert testimony.[42] The court rejected the defendant's argument that the documents used by the handwriting analyst to form his conclusion were not properly authenticated. Relying on the flexible interpretation of Rule 901 set forth in *Ducharme*, the court held that the trial judge did not abuse his discretion.[43] The handwriting analyst was able to pinpoint similarities between the handwriting on the waiver-of-rights forms, which were admittedly signed by the defendant, and a letter which the defendant denied writing.[44] The court held that the trial judge acted within his discretion when he concluded it was reasonably probable that the samples were what the State purported them to be.[45]

The court explained that it remains the function of the jury to assess the utility of the evidence presented by the prosecution. In order to determine the value of the firearms expert's testimony, the jury had to weigh the credibility of the partygoers.[46] In order to assess the value of the handwriting analyst's testimony, the jury

37. *See id.*
38. *See id.*
39. *See id.* at 557-58.
40. *See id.* at 558.
41. *See id.*
42. *See id.* at 558-59.
43. *See id.* at 558.
44. *See id.*
45. *See id.*
46. *See id.*

had to determine whether it believed that the defendant had written the letter to the warden.[47] The court recognized that the determination of admissibility by the trial judge does not diminish the ability of the jury to decide what weight to give to the evidence.

CONCLUSION

The Rhode Island Supreme Court has long recognized the wide discretion accorded trial judges in the admission of expert testimony. The court will overturn such a decision only upon a finding of an abuse of discretion.[48] Once admitted into evidence, the trier of fact possesses the ability to weigh the credibility of the evidence which is presented.[49] The court's decision in *State v. Griffin* is consistent with the spirit of assistance of the finder of fact found in the Rhode Island Rules of Evidence.[50]

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47. *See id.*

48. *See* State v. Bryant, 670 A.2d 776 (R.I. 1996); State v. Capalbo, 433 A.2d 242, 246 (R.I. 1981); Leahey v. State, 397 A.2d 509, 510 (R.I. 1979).

49. *See* State v. Bertram, 591 A.2d 14 (R.I. 1991).

50. *See Bryant*, 670 A.2d at 782. The language of Rule 702 and the advisory note point out that helpfulness to the trier of fact is a crucial issue. *See id.*