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1998 Survey of Rhode Island Law: Cases: Evidence

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Evidence. *Donovan v. Bowling*, 706 A.2d 937 (R.I. 1998). In a medical malpractice action, a treating physician's expert testimony is accessible to both the plaintiff and the defendant. The patient-physician privilege does not apply when a plaintiff brings a medical liability action against the health care provider and her treating physicians. Furthermore, a treating physician is distinguishable from an expert retained solely for litigation purposes; in that a physician is similar to an eyewitness, who will testify based upon his/her personal observations while treating the patient.

In *Donovan v. Bowling*,[1] the Rhode Island Supreme Court was faced with the question of whether plaintiff's counsel, in a malpractice action, could retain a treating physician as an expert where the defendant's counsel had previously retained as an expert witness.[2] There exists no superior court rule that would prohibit counsel from interviewing any prospective trial witness ex parte.[3] Therefore, both sides to a medical-malpractice action are entitled to the access of a treating physician's firsthand observations.[4] Furthermore, in cases where the plaintiff, who is also the patient, seeks to retain the same treating doctor as the defendants retained for an expert witness, the patient-physician privilege is not implicated.

FACTS AND TRAVEL

On April 25, 1990, Diane Donovan (Diane) gave birth to Nicole E. Donovan (Nicole) at Women and Infants Hospital in Providence, Rhode Island.[5] Nicole suffered from neurological complications at birth, which resulted in her eventual death on May 5, 1994.[6] Her parents believed the actions of the hospital and medical attendants were the proximate cause of Nicole's death.[7] They subsequently brought a medical-negligence malpractice action against Women

1. 706 A.2d 937 (R.I. 1998).
2. *Id.* at 940.
3. *See id.*
4. *See id.*
5. *See id.* at 938.
6. *See id.*
7. *See id.*

and Infants Hospital of Rhode Island and several treating physicians.[8]

On May 10, 1993, counsel for the defendants contacted Dr. Constance Bowe, a pediatric neurologist, who had been one of Nicole's treating physicians, and advised her that he would like to discuss the case with her.[9] A meeting did not take place at that time, but rather on June 8, 1993, a paralegal from defendant counsel's firm sent Dr. Bowe a copy of Nicole's records.[10] Subsequently, on June 24, 1993, defense counsel sent Dr. Bowe a copy of Diane's medical records following a telephone conversation.[11] Defense counsel allegedly included with the medical records a compilation of facts derived from the medical charts and records, the parties allegations and assertions, and defense counsel's research of the highlights of the case.[12] Dr. Bowe engaged in two half hour telephone conversations with the paralegal at defense counsel's firm, during which time, she expressed favorable opinions to the defendant's position.[13]

On August 3, 1994 and November 1, 1994, defense counsel sent letters to Dr. Bowe advising her of the upcoming trial dates in which he planned to present her testimony; however, Dr. Bowe later denied receiving both letters.[14] On April 17, 1996, plaintiff's counsel informed defense counsel that they had contacted Dr. Bowe for the purpose of presenting her testimony at trial.[15] Defense counsel informed plaintiff's counsel that he had previously engaged Dr. Bowe as an expert, was planning to present her as a defense witness, and in a subsequent letter, informed plaintiff's counsel that Dr. Bowe recalled her involvement with the defendants.[16]

Defense counsel sought to exclude Dr. Bowe's expert testimony on the grounds that she had already entered into a confidential

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8. *See id.*

9. *See id.* While the parties did not dispute that Dr. Bowe was one of the treating physicians, they did dispute the amount of care the doctor provided to Nicole following her birth. *See id.* at 939 n.1.

10. *See id.* at 939.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

relationship with him on behalf of several of the defendants.[17] However, Dr. Bowe denied having been retained by defense counsel, or receiving the August 3, 1994 letter.[18] Dr. Bowe could not recall exchanging any confidential information with the paralegal, or receiving any information other than what was contained in the medical records.[19]

The trial justice inferred a confidential relationship between defense counsel and Dr. Bowe, and as a result granted defense counsel's motion in limine to exclude Dr. Bowe's testimony.[20] The plaintiffs filed their appeal with the Rhode Island Supreme Court.[21]

ANALYSIS AND HOLDING

Patient-Physician Privilege

The trial justice concluded that a confidential relationship between Dr. Bowe and defense counsel could be inferred.[22] The supreme court held that the trial justice's decision to disqualify Dr. Bowe was in error, based upon the court's prior holding in *Lewis v. Roderick*.[23] The *Lewis* court permitted defense counsel to engage in ex parte communications with the plaintiff's treating physician even though the plaintiff had previously retained the physician to testify as her expert.[24] The court, in *Lewis*, acknowledged the existence of a patient-physician privilege found in the Health Care Information Act, codified in the Rhode Island General Laws, but pointed to an exception for medical malpractice actions.[25] Since the *Lewis* plaintiff had brought a medical malpractice action against the health care provider and her treating physician, the

17. *See id.*
18. *See id.*
19. *See id.* at 940.
20. *See id.* at 939-40. The trial justice concluded that regardless of her well-meaning intentions, Dr. Bowe "'compromised her integrity to testify as an expert,'" and as a result she was disqualified. *Id.*
21. *See id.* at 940.
22. *See id.*
23. 617 A.2d 119 (R.I. 1992).
24. *See Donovan*, 706 A.2d at 940.
25. *See id.* (citing *Lewis*, 617 A.2d at 121 (quoting R.I. Gen. Laws § 5-37.3-4(b)(8) (1956) (1995 Reenactment))). The statute provides an exception to the protections afforded by the patient-physician privilege in a "'medical liability action against a health care provider.'" *Id.*

court concluded that she was not entitled to invoke the patient-physician privilege.[26]

Unlike the situation in *Lewis*, the issue in *Dononvan* was not whether the defendant could speak ex prate to a treating physician, but whether the plaintiffs could retain, as an expert, a treating physician, who defendants allegedly had previously retained as an expert.[27] The court held that this case did not implicate the privilege, because it only existed between Nicole and Diane—also the plaintiffs—and the treating physician.[28] The court also noted that Dr. Bowe submitted an affidavit, in which she indicated that she did not consider herself retained by defense counsel as an expert witness, but rather that he had requested that she review the medical records of Nicole in the capacity of a "treating physician."[29] Therefore, pursuant to *Lewis*, there was nothing to prohibit the plaintiffs from calling Dr. Bowe as their witness.[30]

Expert Opinions

The supreme court has acknowledged that there are times when an expert opinion may be protected from pretrial disclosure; however these instances are distinguishable from those in which a party seeks disclosure of facts that a witness to an occurrence has observed.[31] While an expert retained for litigation purposes may sometimes be considered part of the "litigation team," a treating physician is more akin to an eyewitness who has observed a situation while treating the patient.[32] The court observed that no Superior Court rule exists that would prohibit ex parte communications between counsel and prospective trial witnesses, or that would set forth sole methods of pretrial discovery in order to obtain pertinent information.[33] Hence, the court stressed that a witness' first hand observations are discoverable by both parties, and distinguished

26. *See id.* at 940.
27. *Id.*
28. *See id.*
29. *See id.* at 940 n.2.
30. *See id.* at 940.
31. *See id.* at 941 (citing Cooper v. Housing Auth. of Newport, 249 A.2d 904, 907 (R.I. 1969)).
32. *See id.*; *see also* Irvine v. Inn at Castle Hill, Inc., 670 A.2d 1263, 1263 (R.I. 1996) (stating that the search for facts and truth do not permit the monopoly of a witness). *See Donovan*, 706 A.2d at 941 n.3.
33. *See id.* at 940 (citing Lewis v. Roderick, 617 A.2d 119, 122 (R.I. 1992)).

such testimony from that which espouses a theory of the case developed by a litigation expert.[34]

The court further held that to bar another party from access to the physician's first-hand perspective would be unfair to the litigants.[35] Citing a prior decision, the court distinguished the opinions and conclusions of an expert, which are in essence evidence necessary to establish the material facts of a case, from the attorney's impressions or conclusions protected by the work-product doctrine.[36] The court reasoned that any contradictory statements that Dr. Bowe may have made to defense counsel's paralegal may be brought to light by effective methods of impeachment during cross-examination.[37]

CONCLUSION

The Rhode Island Supreme Court applied its precedents in determining that a plaintiff may retain a treating physician to testify as an expert on their behalf, regardless of whether the defendant had previously consulted with the physician. The court also determined that such a scenario did not invoke the patient-physician privilege, because the privilege could only exist between the patients, not defendants, and the treating physician. Even where the privilege could be invoked, it did not apply within the context of medical liability actions against a health care provider. Thus, the court concluded that a treating physician is more akin to an eyewitness, whose first-hand observations are discoverable by both parties to the litigation.

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34. *See id.* at 940-41.
35. *See id.* at 941.
36. *See id.* at 941 n.4 (citing Town of North Kingstown v. Ashley, 374 A.2d 1033, 1037 (R.I. 1977)).
37. *See id.* at 941-42.

Evidence. *Sheeley v. Memorial Hospital*, 710 A.2d 161 (R.I. 1998). In a medical malpractice case, any medical expert with the proper knowledge and familiarity with the alleged malpractice can testify as to the relevant standard of care.

In *Sheeley v. Memorial Hospital*,[1] the Rhode Island Supreme Court was faced with the question of what the appropriate standard of care is in medical malpractice cases.[2] The court abandoned the "similar locality" rule in favor of a national standard.[3] A medical doctor, with the proper knowledge or familiarity with the procedure, acquired through experience, observation or education, is competent to testify regarding the proper standard of care.[4] The doctor need not be situated in the "same or similar" locality with the alleged malpractice.[5]

FACTS AND TRAVEL

Joanne Sheeley (Sheeley) delivered a healthy child at Memorial Hospital on May 19, 1987.[6] In conjunction with the delivery, Dr. Mary Ryder, a second-year family practice resident, performed an episiotomy on her.[7] This procedure is designed to prevent tearing during the delivery, and requires a cut into the perineum of the patient.[8] After the delivery was over, Dr. Ryder repaired the episiotomy by stitching the cut previously made in the perineum.[9] Mrs. Sheeley was discharged from the hospital soon afterward.[10]

Shortly after her discharge, Sheeley began to have complications from this procedure.[11] She developed a rectovaginal fistula, which consists of an opening between the vagina and the rectum.[12] This required correctional surgery, which was performed.[13] How-

1. 710 A.2d 161 (R.I. 1998).
2. *Id.* at 163.
3. *See id.* at 167.
4. *See id.* at 166.
5. *See id.*
6. *See id.* at 163.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*

ever, Sheeley continued to suffer from pain following the surgery.[14] Sheeley then filed suit for medical malpractice against the hospital, Dr. Ryder and Dr. Brian Jack, the faculty member responsible for the supervision of Dr. Ryder.[15]

At trial, Sheeley attempted to introduce the testimony of a medical expert, Dr. Stanley D. Leslie, a board certified obstetrician/gynecologist.[16] Dr. Leslie intended to testify regarding the proper standard of care in performing an episiotomy.[17] The defendants filed a motion in limine to exclude Dr. Leslie from testifying, saying that he was not qualified to testify under section 9-19-41 of the Rhode Island General Laws.[18] The trial justice granted this motion.[19] Sheeley did not have another expert witness, and was unable to obtain one within the two days that the trial justice provided.[20] The defendants then filed a motion for a directed verdict, which was also granted.[21] Sheeley appealed, claiming that the trial justice committed error by excluding Dr. Leslie from testifying, since he was a qualified witness.[22]

BACKGROUND

In Rhode Island, the traditional test that has been used in determining whether a medical expert can testify regarding the proper standard of care has been the "same or similar locality" rule.[23] According to the court, "[t]his rule requires that experts be from similarly situated communities as the defendant in order to testify regarding the proper standard of care."[24] This rule came from the old "strict locality" rule, which requires that the expert be from the same community as the defendant.[25] The rationale be-

14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*; *see also* R.I. Gen. Laws § 9-19-41 (1956) (1994 Reenactment) (specifying the requirements necessary for expert testimony in the area of malpractice).
19. *See id.* at 164.
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 166 (citing Wilkinson v. Vesey, 295 A.2d 676, 682 n.5 (R.I. 1972)).
24. *Id.*
25. *See id.* at 165 (citing Shilkret v. Annapolis Emergency Hosp. Assoc., 349 A.2d 245, 248 (Md. 1975)).

hind this rule was that opportunities, experiences, and conditions differ between heavily populated areas and lightly populated areas.[26]

However, this rule was criticized because it provides a lower standard of care in smaller communities and because it does not consider the conspiracy of silence among members of the plaintiff's community that would preclude obtaining expert testimony.[27] Therefore, many jurisdictions abandoned this rule, and adopted the "same or similar locality" rule.[28]

ANALYSIS AND HOLDING

Initially, the Rhode Island Supreme Court stated that the determination of the competency of a witness is within the trial justices discretion, and that the decision of the trial justice will not be disturbed on appeal in the absence of clear error or abuse.[29] The court held that the trial justice did abuse her discretion and committed reversible error by excluding Dr. Leslie from testifying.[30]

In making this determination, the court looked at *Marshall v. Medical Associates of Rhode Island*.[31] In *Marshall*, the court was faced with the question of whether section 9-19-41 of the Rhode Island General Laws requires that a medical expert be board certified or otherwise have training or experience in the same medical specialty as the defendant.[32] The court said that there is nothing in the statute that suggests that in order to qualify as an expert, the doctor must be board certified or otherwise have the training or experience in the same specialty as the defendant.[33] As long as the expert has the knowledge, skill, expertise, or education in the same field as the alleged malpractice, the expert should be allowed to testify.[34] The court also limited the decision in *Soares v. Vestal*,[35] by saying that *Soares* only stands for the proposition that an ex-

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26. *See id.*
27. *See id.* at 165-66 (citing *Shilkret*, 349 A.2d at 249).
28. *See supra* note 23.
29. *See Sheeley*, 710 A.2d at 164 (citing Richardson v. Fuchs, 523 A.2d 445, 448 (R.I. 1987)).
30. *See id.* at 164.
31. 677 A.2d 425 (R.I. 1996).
32. *Id.*
33. *See id.* at 426.
34. *See id.* at 426-27.
35. 632 A.2d 647 (R.I. 1993).

pert with board certification in one area of medicine is not automatically qualified to testify at trial.[36] The expert must still have the requisite knowledge, skill, training, or experience in the same field of the alleged malpractice.[37]

The *Sheeley* court agreed with this reasoning by saying that the appropriate standard of care "should not be compartmentalized by a physician's area of professional specialization or certification."[38] The focus should be on the procedure performed and whether or not it was performed by the relevant standard of care.[39] A physician with the proper knowledge with the procedure acquired through experience, observation, skill, or education is competent to testify regarding the appropriate standard of care.[40] The court also said that except in extreme cases, an expert who is board certified in a particular specialty related to the procedure in question, should be presumptively qualified to testify.[41]

The court further ruled that the traditional locality rule is no longer applicable "in view of the present-day realities of the medical profession."[42] Factors such as vastly superior training, the proliferation of medical publications and the growing availability of modern clinical facilities have combined to produce higher standards that are much higher than before, and are also national in scope.[43] Therefore, the traditional "same or similar locality" rule is no longer applicable.

Finally, the court said that in enacting section 9-19-41 of the Rhode Island General Laws, the Legislature did not include any language regarding the "similar locality" rule.[44] The court concluded that "this omission amounted to a recognition of a national scope to the delivery of medical services."[45]

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36. *See Marshall*, 677 A.2d at 427.

37. *See id.*

38. *Sheeley*, 710 A.2d at 166.

39. *See id.*

40. *See id.*

41. *See id.*

42. *Id.*

43. *See id.* (quoting Shilkret v. Annapolis Emergency Hosp. Assoc., 349 A.2d 245, 252 (Md. 1975)).

44. *See Sheeley*, 710 A.2d at 166-67.

45. *Id.* at 167.

CONCLUSION

In a medical malpractice case, an expert witness with the proper knowledge or familiarity with the medical procedure, may testify at trail regarding the appropriate standard of care. The traditional "same or similar locality" rule, which limited expert testimony to those physicians who are from similarly situated communities, has been abandoned in favor of a national standard. A physician is under a duty to use the degree of care that is expected of a reasonably competent physician in the same class, acting in the same or similar circumstances.

Ryan M. Borges

Evidence. *State v. Sharp,* 708 A.2d 1328 (R.I. 1998). In criminal actions, the prosecution and defense counsel are entitled to a meaningful cross examination of any witness presented throughout the course of criminal proceedings. Under Rule 804 of the Rhode Island Rules of Evidence, former testimony is admissible if the party against whom it is now being offered had an opportunity to pursue such testimony by direct or cross-examination.

In *State v. Sharp*,[1] the Rhode Island Supreme Court was faced with the question whether the defendants' counsel were given adequate opportunity to cross-examine a now-unavailable witness, who gave prior testimony at a bail hearing.[2] If adequate opportunity to cross-examine the witness was denied, the trial court must rule that the prior sworn testimony of the witness is admissible at trial.[3]

FACTS AND TRAVEL

The defendants, Carl Sharp (Sharp) and Che Gallman (Gallman), were accused of the murder of Levert Hill (Hill).[4] In the early morning of April 1, 1996, Michael Franks (Franks) was driven to his home by Hill.[5] Franks heard gunfire as he exited the vehicle, and as he turned to the shot's direction, he witnessed a blue Corsica with two passengers leaning out of the opened windows brandishing weapons.[6] Franks later identified the defendants as the two men in the blue Corsica that evening.[7]

The defendants were arrested and charged with murder.[8] A bail hearing was held in Providence County Superior Court at which Franks testified.[9] After the bail hearing and prior to the

1. 708 A.2d 1328 (R.I. 1998).
2. *Id.* at 1329.
3. *See id.* at 1331.
4. *See id.* at 1329. The defendants were also charged with conspiracy to commit murder, assault with a dangerous weapon, unlawfully discharging a firearm from a motor vehicle, carrying a pistol in a vehicle without a license, and possession of a firearm after having been previously convicted of a crime of violence. *Id.* at 1329 n.1.
5. *See id.* at 1328-29.
6. *See id.* at 1329.
7. *See id.*
8. *See id.*
9. *See id.*

defendants' trial, Franks was shot and killed.[10] In response to Franks' death, each defendants counsel individually filed motions in limine to exclude Franks' testimony at the defendants' bail hearing from being introduced at trial.[11]

Counsel for both defendants argued that they were denied an adequate opportunity for meaningful cross-examination because they lacked some specific information that would have altered the way they had conducted their examination of Franks at the bail hearing.[12] The trial justice granted the defendants' motion in limine.[13]

In granting defendants' motion in limine, the trial justice found that Franks was not subjected to adequate cross-examination during the bail hearing because defense counsel lacked certain relevant impeachment materials.[14] The defense attorneys claimed that information of Frank's history of drug use and his failure to comply with court-ordered drug treatment were not made available prior to the defendants' bail hearing.[15] Defense counsel also contended that the prosecution refused to admit that they had made a deal with Franks not to pursue a prior violation in exchange for testimony against the defendants.[16]

The trial judge held that the absence of this information denied defendants their right to a meaningful cross-examination of Franks and, furthermore, he ruled that the bail hearing testimony was inadmissible at trial.[17] After the exclusion order was issued by the trial judge, the state appealed to the Rhode Island Supreme

10. *See id.*

11. *See id.*

12. *See id.* at 1330.

13. *See id.*

14. *See id.* Specifically, the trial judge noted that defense counsel were not made aware of the full extent of Franks' criminal history, or with the fact that Franks had previously used aliases. Franks was convicted in the State of Ohio of several crimes, including drug trafficking, criminal trespass, and receiving stolen property. *See id.* at 1330 n.3.

15. *See id.* at 1330.

16. *See id.*

17. *See id.*

Court.[18] The supreme court held that the defendants were not denied an adequate opportunity for meaningful cross-examination.[19]

BACKGROUND

The Sixth Amendment to the United States Constitution expressly affords a defendant the right of confrontation.[20] This right of confrontation has been read to guarantee an accused the right to effective cross-examination of any witness.[21] "[T]he opportunity for adequate cross-examination forms the cornerstone of the defendant's right to confront his or her accusers, a defendant's right to confrontation is not offended by the admission at trial of prior testimony of an unavailable witness if that defendant was afforded the opportunity for adequate cross-examination during the prior hearing."[22] Article I, section 10 of the Rhode Island Constitution also guarantees the right to effective cross-examination.[23]

Furthermore, Rule 804 of the Rhode Island Rules of Evidence provides a hearsay exception for former testimony.[24] Rule 804(b)(1) states that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . [r]ecorded testimony given as a witness at a another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity to develop the testimony by direct, cross, or redirect examination."[25] This prior sworn testimony may be admissible if the unavailable witness' testimony can be shown to have been evoked "in the course of a prior judicial proceeding in which the [defendants were] present, represented by counsel, and in the course thereof provided with an opportunity to

18. *See id.* at 1329. "This case came before the Supreme Court on March 2, 1998, pursuant to an order directing all parties to appear and show cause why the issues raised by this appeal should not be summarily decided." *Id.* at 1329. The court ruled that cause had not been shown and all issues would be summarily decided. *See id.*

19. *See id.* at 1329.

20. *See* State v. Anthony, 422 A.2d 921 (R.I. 1980) (stating that the United States Constitution's Sixth Amendment right of confrontation guarantees an accused the right to an effective cross-examination).

21. *See id.*

22. *Sharp*, 708 A.2d 1328, 1329-30 (quoting State v. Ouimette, 298 A.2d 124, 131 (R.I. 1972)).

23. R.I. Const. art. I, § 10.

24. R.I. R. Evid. 804(b)(1) (1994).

25. *Id.*

adequately cross-examine the witness."[26] The adequacy of the prior cross-examination depends on the identification of the issues and parties by the parties to the proceeding.[27]

ANALYSIS AND HOLDING

The defendants did not claim the trial judge severely limited their cross-examination, but claimed that the lack of information at the bail hearing deprived them of their opportunity to cross examine Franks adequately.[28] The court acknowledged that previous testimony may be inadmissible under Rule 804(b)(1) if it was limited by defense counsel's lack of information; however there was no finding of that here.[29]

The Rhode Island Supreme Court stated that "[t]he linchpin of any cross-examination is the presentation of competent evidence that either contradicts the witness' account or impeaches the witness' credibility."[30] The court found that the record reflects that there was sufficient information for defense counsels to conduct an adequate cross-examination.[31]

The court addressed each of defense counsels' assertions.[32] First, the assertion that the prosecution negligently withheld information of Franks' criminal record was rebutted by Franks' own admission during the bail hearing that he was a convicted felon.[33] The admission was given by Franks but no further inquiry was made by defense counsels during the bail hearing.[34] This failure of further inquiry was not the negligence of the prosecution but was simply a failure to inquire by defense counsels.[35]

Second, defense counsels claimed that they were misled by the prosecution in reference to any "inducements or rewards that the Attorney General may have provided to Franks in exchange for his

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26. *Sharp*, 708 A.2d at 1329 (quoting *Ouimette*, 298 A.2d at 130).
27. *See id.* at 1330. The *Ouimette* court explained that the rule to follow is "the so-called liberal rule, which requires only a substantial identity of issues and parties in order to permit the introduction of prior testimony of the unavailable witness at the subsequent proceedings." *Id.* (quoting *Ouimette*, 298 A.2d at 131).
28. *See id.* at 1330.
29. *See id.*
30. *Id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*

testimony against the defendants."[36] The prosecution denied the existence of a deal with Franks in exchange for his testimony, and the trial court was unwilling to decide this issue.[37] Whether such a deal with Franks was in place or not in no way affected the ability of the defense attorneys to confront Franks on the issue at the bail hearing.[38]

CONCLUSION

Based on the facts presented, the Rhode Island Supreme Court determined that the trial judge abused his discretion in excluding Franks' bail hearing testimony.[39] The court sustained the state's appeal and vacated the order to exclude Franks' testimony from the defendants' trial.[40] The court did state that the defendants were free to attack Franks' credibility at trial, by the use of evidence of Franks' convictions in Ohio and his use of and treatment for drugs. In essence, that fact that defense counsel did not fully cross-examine the witness was of no fault of the prosecution, but was simply from insufficient inquiry on the part of defense counsels.

Tyler J. Savage

36. *Id.*
37. *See id.* at 1331. The existence of a quid pro quo arrangement is circumstantial and insufficient to render the bail hearing testimony inadmissible. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*

Evidence. *State v. Webber*, 716 A.2d 738 (R.I. 1998). Under Rhode Island Rule of Evidence 702, even though expert testimony may be helpful to the trier of fact, such testimony still requires a foundation in order to be admissible.

In *State v. Webber*,[1] the Rhode Island Supreme Court was faced with determining the necessary foundation for the admissibility of testimony from an arson detecting dog, the state's expert at trial. The court held that adequate foundation for testimony concerning the dog's arson-detecting abilities required the state to establish the expertise of the dog's curator, produce evidence regarding the dog's background and training, and testimony regarding the dog's accuracy during investigations.[2]

FACTS AND TRAVEL

On September 13, 1990, at approximately 1:30 p.m., Christine Webber (Webber) returned to her home in Coventry, Rhode Island from a business meeting she attended in Massachusetts that morning.[3] After attending to some personal matters, she left her residence and proceeded to drive to her place of business, C. Webber Chevrolet.[4] Webber, while a short distance away from her home, encountered her son, Frederick Webber (Frederick) and his friend, Jeffrey Raymond (Raymond).[5] After a brief conversation, the parties continued on their respective ways.[6]

Frederick and Raymond, as they approached the house, noticed smoke rising from the roof.[7] A neighbor informed them that the fire department had already been notified.[8] Apparently, someone also placed a call to Webber, informing her of the situation at her home.[9] After receiving this phone call, she turned her car around and arrived at her home just moments after the fire trucks.[10]

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1. 716 A.2d 738 (R.I. 1998).
2. *See id.* at 741 (citing State v. Buller, 517 N.W.2d 711, 714 (Iowa 1994)).
3. *See id.* at 739.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

It was later concluded by those investigating the incident that "the fire had been caused by a deliberate human act."[11] Further investigation also revealed the presence a flammable substance, apparently used to ignite the fire in two separate locations within the home.[12] Investigators also noticed that the home's fire-detection system had been manually deactivated.[13]

Subsequently, Webber was indicted by a grand jury, charging her with one count of first-degree arson.[14] At trial, the state presented two expert witnesses in the field of fire cause and origin, John B. Fiore (Fiore) and Thomas Haynes (Haynes).[15] Fiore testified that, on the day following the fire, a member of the Connecticut State Police, along with his dog, Matty, assisted in the investigation.[16] Fiore further testified that Matty "was trained to detect the presence of flammable substances used as fire accelerants."[17] Neither the dog's trainer, nor the Connecticut State Police officer testified at trial.[18]

Webber never contested the investigator's conclusion that the fire was deliberately set through the use of accelerants.[19] Instead, she argued that the presence of these accelerants had no direct relevance without first establishing a connection between her and the fire.[20] Therefore, the decisive moment in the trial occurred when the state attempted to link Webber with the accelerants.[21]

That decisive moment occurred when Fiore testified about an incident he witnessed approximately twenty hours after the fire originated.[22] According to Fiore, the following day the investigators asked Webber to consent to a search of her automobile, which

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11. *Id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.* At the time of trial, Fiore was an investigator for the Rhode Island State Fire Marshall's office, while Haynes was a certified fire marshal and a chief on the Coventry Fire Department. *See id.* Webber stipulated that both individuals were qualified as experts in the field of fire cause and origin. *See id.*
16. *See id.* This testimony went without objection from Webber. *See id.*
17. *Id.* Fiore testified that upon detecting flammable accelerants, Matty would alert his handler by sitting down and scratching the area where the accelerants were. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.* at 739-40.

she did.[23] Shortly thereafter, Fiore testified that Matty, upon entering the automobile, alerted his handler to the presence of accelerant on the driver-side front floor mat in Webber's vehicle.[24] It was at this point that counsel for Webber strenuously objected to the introduction of any evidence concerning the dog's reaction to the floor mat.[25]

The trial justice permitted Fiore to further testify concerning Matty's reaction, determining that the probative value outweighed its potentially prejudicial effect.[26] Furthermore, the trial justice permitted Fiore to testify that "after Webber observed Matty's alert to the floor mat she became emotional and cried."[27]

After trial, the jury deliberated and found Webber guilty of first-degree arson.[28] Webber was sentence by the trial justice to fifteen years at the Adult Correctional Institutions, five years to serve and ten years suspended, and ten years probation upon her release.[29] Webber filed a timely appeal to the Rhode Island Supreme Court.

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23. *See id.* at 740.

24. *See id.* Fiore recalled how Matty stopped, sat, and scratched the front floor mat, thereby alerting his handler of the presence of fire accelerant. *See id.*

25. *See id.* In part, Webber's counsel stated:

> It's a twofold problem involved with Mr. Fiore. This is not his dog. It's a dog brought in by [Trooper Lancellotti]. My argument concerning Mr. Fiore concerns the fact not only is this request not proffered by him or initiated as a result of his investigation, he merely happens to be just a bystander to this fact. So insofar as Mr. Fiore is concerned, I would assert that particular point. And restricting him from testifying as to what this dog may or may not have done—keep in mind that we're getting the connection now to the automobile and the house. What happened in the house, and whatever accelerants were discovered, to me has no direct relevance insofar as Christine Webber is concerned, except for the fact that there may be a nexus to the car and the mats.
>
> That brings us to the second part of the problem that I discussed at the outset of this case—contamination of the evidence. That is the general difficulty I have with allowing this witness . . . to testify that on September 14 . . . 22 hours after individuals had arrived at the scene and [had access to Webber's car, including Fiore] some period of time after the fire, bearing witness not as the handler of the dog, not as the expert, but someone who bore witness as to what the dog did, and what the dog may have disclosed. I think it's too remote for this particular witness on [sic] this context to be able to testify.

Id. at 740.

26. *See id.*

27. *Id.*

28. *See id.*

29. *See id.*

ANALYSIS AND HOLDING

On appeal, Webber contends that the trial justice erred in allowing Fiore to testify concerning Matty's actions, and defendant's reaction, to the dog's alerting it's handler to the presence of fire accelerant.[30] According to the Court, the issues presented by Webber on appeal require an interpretation of Rule of Evidence 702.[31]

The problem with the testimony regarding Matty's reactions rests upon the foundation the State provided.[32] Under Rule of Evidence 702, a foundation is required in order to qualify any witness as an expert, thereby allowing them to provide their opinion regarding the matter at issue.[33] Both Fiore and Haynes were qualified as experts by the state in the field of fire cause and origin; however, according to the court, both "exceeded their area of expertise" when they testified regarding Matty's reactions.[34]

In order for the State to present evidence concerning Matty's activities, the court determined that it was necessary to "establish the expertise of Matty's curator, Matty's background and training, and Matty's general accuracy during investigations."[35] Only Matty's trainer or curator could provide such testimony, therefore, the state's failure to call Trooper Lancellotti precluded any such testimony.[36] Therefore, according to the court, "[t]he state's failure to establish this foundation constitutes prejudicial error and provides a sufficient basis" for a reversal of Webber's conviction.[37]

While the state's failure to provide foundational basis for Matty's activities was sufficient within itself to warrant a reversal of Webber's conviction, the court also raised two related issues it deemed important.[38] The first related issue concerns Fiore's testi-

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30. *See id.*

31. *See id.* at 741. Rhode Island Rule of Evidence 702 states:

> 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 fact or opinion.

Id.

32. *See Webber*, 716 A.2d at 741.

33. *See id.* (citing Rodriquez v. Kennedy, 706 A.2d 922, 924 (R.I. 1998); State v. Wheeler, 496 A.2d 1382, 1388 (R.I. 1985)).

34. *Id.*

35. *Id.* (citing State v. Buller, 517 N.W.2d 711, 714 (Iowa 1994)).

36. *See id.*

37. *Id.*

38. *See id.*

mony regarding Webber's emotional outburst upon witnessing Matty detect accelerant on the floor mat in her automobile.[39] According to both the trial justice and the supreme court, whether to allow such testimony under Rule of Evidence 403, was "a close call."[40] This ruling is difficult due to the inferences created by the outburst.[41] Although the state contended it introduced the testimony to demonstrate Webber's state of mind, the court was of the opinion that "this testimony also had the effect of establishing the fact that a flammable accelerant was present on the driver's floor mat and, furthermore, that Webber was responsible for its presence."[42] Thus, concluded the court, when considering all the circumstances of this case, the probative value of such testimony was outweighed by the inference theory the state attempted to prove.[43]

The second related issue the court chose to discuss before remanding the case to the superior court was Webber's claim that Haynes had bolstered testimony regarding the dog.[44] At trial, Haynes testified that "the dog was more sensitive than the gas chromatograph" that was later used at the University of Rhode Island crime lab and failed to detect the presence of any accelerant.[45] This, according to Webber, constitutes a bolstering of Matty's actions, and encroaches on the finder of fact's exclusive territory of determining a witness' credibility.[46] The court agreed with Webber's contention that such testimony amounted to impermissible bolstering.[47]

CONCLUSION

As a result of *State v. Webber*, in order to present testimony of any arson-detecting dog, a proper foundation must be laid pursuant to Rhode Island Rule of Evidence 702. In order to lay such a proper foundation, it is necessary for the dog's curator or handler

39. *See id.*
40. *Id.*
41. *See id.*
42. *Id.*
43. *See id.* Of particular importance to the court was that when the driver's floor mat was sent to the University of Rhode Island crime lab, it tested negative for fire accelerant. *See id.* at 742.
44. *See id.*
45. *Id.*
46. *See id.*
47. *See id.*

to testify concerning their own expertise in the field, as well as the dog's background, training and general accuracy during investigations.

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