

## Definitive Answers

# Wynn expert testimony and hearsay collide

by W. Brian McCann

Can an expert testify to hearsay opinions on direct examination? What about hearsay facts? Is there a difference between the two? These are important questions, the answers to which may help you in preparing for your next trial, and certainly will prevent you from being caught off guard by defense counsel's objections.

### The Starting Point: Virginia Code §8.01-401.1

In answering these questions, the starting point begins with Virginia Code §8.01-401.1, entitled "Opinion testimony by experts; hearsay exception," which states, in part:

In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

The expert may testify in terms of opinion or inference and give his reasons thereof without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

According to the Code, an expert may "render an opinion." The expert's opinion can be derived from "facts, circumstances or data" made known to him. It is not required that these "facts, circumstances or data" be admissible in order for the expert to rely upon them in forming his opinion. But can the expert *testify* to the "facts, circumstances or data" upon which he relies in forming his opinion?

### Hearsay "opinions": *McMunn v. Tatum*

In *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989), the Court dealt with the issue of whether an expert witness could testify about the hearsay opinions of other persons in explaining the basis of his opinion. The Court, looking to §8.01-401.1 for guidance, held that this statute "does not authorize the admission in evidence, upon the direct examination of an expert witness, of *hearsay matters of opinion* upon which the expert relied in reaching his own opinion." *Id.* at 566, 379 S.E. 2d at 912 (emphasis added); *see also CSX Transportation, Inc. v. Casale*, 247 Va. 180, 182, 441 S.E.2d 212, 214 (1994) (holding that "a medical expert's recital of the confirming opinion of an absent physician is inadmissible hearsay.") The Court stated that "[n]o litigant in our judicial system is required to contend with the opinions of absent 'experts' whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination." *Id.*

The Court in *McMunn* could have held, but did not, that an expert witness cannot testify as to any hearsay matters on direct examination unless it falls under an exception to the hearsay rule. In fact, the Court recognized that §8.01.401.1 was "silent...with respect to the admissibility of the *otherwise inadmissible information* upon which the expert's opinion is based, at least upon the expert's direct examination." *Id.* at 565, 379 S.E.2d at 912 (emphasis added). The ruling of the Court confined the issue to an expert testifying on "hearsay matters of *opinion*." The Court's limited holding evolved into a view by most that "factual hearsay" could be testified to by an expert. It would seem that hearsay is hearsay regardless of the content, and, thus, it is inadmissible unless it falls within an exception. *See Teleguz v. Commonwealth*, 272 Va. 458, 481,

643 S.E.2d 708, 723 (2007) (“In the absence of any applicable exception to the hearsay rule which would have rendered the testimony admissible, we hold that the trial court erred in admitting the testimony.”) But, the Court’s language in *McMunn* allowed counsel to posit such a distinction—often successfully. The Virginia Supreme Court put an end to that argument.

### Hearsay “facts”: *Commonwealth v. Wynn*

On January 16, 2009, the Virginia Supreme Court made clear that an expert cannot testify to “factual” hearsay unless an exception applies. In *Commonwealth v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009), the Commonwealth, on direct examination, attempted to elicit testimony from its expert regarding allegations of sexual misconduct that were made against the defendant by children other than the victim involved in the defendant’s current convictions of aggravated sexual battery. The Commonwealth’s expert learned of the prior allegations in reviewing a file maintained by the Commonwealth’s Attorney. When the Commonwealth asked its expert about these prior allegations, defense counsel objected “stating that the allegations were ‘hearsay upon hearsay’ and he could not cross-examine either the accuser, the person who prepared the documents detailing the allegations, or the individual who created the file. In response, the Commonwealth asserted the allegations constituted information [the expert] relied upon in arriving at his conclusions and the jury could decide what weight to give his opinions based on those allegations.” *Id.* at 46. The Commonwealth further argued that the Court’s holding in *McMunn* “should be limited to ‘hearsay matters of opinion’ upon which an expert relied.” *Id.* at 100.

The Court, however, agreed with the defense counsel that an expert cannot testify on direct examination to so-called factual hearsay. In support of its ruling, the Court relied upon and reiterated its reasoning stated in *McMunn*. Specifically, the Court held that §8.01-401.1 does not allow “for the introduction of otherwise inadmissible hearsay evidence during the direct examination of an expert witness merely because the expert relied on the hearsay information in formulating an opinion.” *Id.* The Court further stated that it would not be fair for a litigant “to contend with such hearsay information because the trier of fact cannot observe the demeanor of the speaker and the statements cannot be tested by cross-examination.” *Id.* Simply put, the *Wynn* Court held that hearsay is hearsay, whether it be factual or opinion in nature, and, thus, inadmissible on an expert’s direct examination.

Based upon the holdings in *McMunn* and *Wynn*, it is now clear that an expert’s testimony that contains predicate hearsay is inadmissible on direct examination unless an exception to the hearsay rule applies.

### Effect of *Wynn*: Is it good or bad for plaintiff’s counsel?

Under Code §8.01-401.1, it is clear that experts can rely upon hearsay in forming their opinions if the

hearsay is of a type normally relied upon by experts in the field involved. *Wynn*, of course, left unchanged that statutory provision. The statute, however, does not provide that the expert can testify as to the hearsay itself. Prior to *Wynn*, one could argue that a distinction existed between “opinion hearsay” and hearsay that can be described as factual in nature. *Wynn* addressed this distinction and held that the prohibition against an expert testifying to the underlying predicate for his opinion on direct examination extends to all kinds of hearsay and that hearsay is thus inadmissible on such direct examination unless it has been brought within an exception to the hearsay rule.

The significance of *Wynn* is thus not so much that it substantially changes the law, but that it makes clear what probably already had been the law for some time—hearsay is hearsay and is inadmissible unless an exception to the rule applies. So, does this change anything?

To some attorneys, the Court’s holding in *Wynn* is no surprise because they have always operated under the belief that an expert can rely upon inadmissible hearsay in forming his opinions, but cannot testify to such hearsay on direct examination. These are the attorneys who broadly interpreted *McMunn* and whose practice will not be affected by the ruling in *Wynn*.

To the attorneys who interpreted *McMunn* to apply only to an expert’s testimony on hearsay matters of opinion, the *Wynn* holding raises some issues. Does this mean that the expert can only take the stand on direct examination and state his opinion? By not allowing the expert to testify to the basis of his opinion, won’t this cause confusion among the jury? Doesn’t this hurt the credibility of the expert? Is it fair for opposing counsel on cross-examination to be able to bring out only the “bad” facts that the expert did or did not rely upon under the last sentence of Code §8.01-401.1 that provides that “[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination”?

If you are an attorney who routinely succeeded in having your expert testify to “factual” hearsay, the holding in *Wynn* should not drastically alter how you present expert testimony at trial. You can still try to have your expert testify to such hearsay matters and put the burden on opposing counsel to object. However, it is not advisable to rely on the hope that opposing counsel is asleep at the wheel. You must be prepared for this objection. Therefore, other ways exist in which to eliminate or substantively ameliorate the effect of *Wynn*.

First and foremost, determine if any exception to the hearsay rule applies. For instance, a party’s own statement is an exception to the hearsay rule. *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114 (1996). Furthermore, Virginia case law admits in evidence statements of presently existing physical condition. *O’Boyle v. Commonwealth*, 100 Va. 785, 40 S.E. 121 (1901). To be admissible, such declaration must refer to a condition existing at the time that the declara-

tion is made. *Id.* Another exception to the hearsay rule includes statements about past symptoms made to medical personnel for the purpose of establishing “the basis of the physician’s opinion as to the nature of the injuries or illness.” *Cartera v. Commonwealth*, 219 Va. 516, 518, 248 S.E.2d 784, 786 (1978). While many other exclusions exist that go beyond the scope of this article, the forgoing are the ones most common to personal injury and medical malpractice cases.

Second, elicit all necessary testimony from other witnesses who take the stand before your expert testifies. For instance, if an operative note is going to be relied upon by your expert and that operative note is dictated by another physician, then you may have to call that physician who dictated the note. Also, you can simply elicit information from your client on direct.<sup>1</sup> For instance, if your client made statements to a third party and your expert is going to rely on those statements, then have your client testify to what he said to that third party. Similarly, if your expert relies upon the “negative” – e.g., the fact that a certain diagnostic test was not performed on your client – then be sure to have your client testify to what he did not feel, procedures he did not undergo, treatment and tests he did not receive. Overall, *Wynn* means that you likely need to call more witnesses for trial such as human resources personnel, treating healthcare physicians and observational lay witnesses to provide the predicate fact or facts being relied upon by your expert. Therefore, when the expert takes the stand, these facts and matters will already be in evidence and the expert can discuss them openly with his opinions.

Third, you can serve requests for admissions that can be introduced into evidence prior to the expert testifying. Fourth, see if opposing counsel will stipulate to certain facts. Fifth, have your expert fully prepared for cross-examination. The *Wynn* prohibition on hearsay does not necessarily preclude the expert from defending his opinions on cross-examination by citing the specific matters that he relied upon which are otherwise hearsay. Otherwise, it would be an impossible Catch-22 where the expert can be crossed on facts that are problematic for a party but not use facts to defend himself. Be sure your expert is prepared to fully explain himself during cross-examination and not allow defense counsel to distort the facts upon which the expert relied in forming his opinion.<sup>2</sup> An expert so prepared and “loaded for bear” can significantly advance your case in his cross-examination.

At first blush, it would appear that the holding in *Wynn* is bad for plaintiffs. The so-called “factual hearsay” under the preponderant view pre-*Wynn* is generally seen as favoring the plaintiff, if for no other reason than the plaintiff bears the burden of proof in a case. As result, the pre-*Wynn* view seemed to permit the plaintiff to admit more into the case through his expert. But just as defense counsel will use *Wynn* to their advantage, so too can plaintiffs’

counsel. What is good for the goose is good for the gander. *Wynn* can be used to keep defense experts upon direct from being a massive conduit for free flowing hearsay into the case and from presenting such information in a misleading and inaccurate way. Therefore, *Wynn* need not hurt plaintiffs more than it hurts the defense. Ultimately, the biggest effect of *Wynn* may simply be an increase in pre-trial motions to determine what exception to the hearsay rule may or may not apply to certain facts relied upon and sought to be testified to by an expert.

### Suggestion for improvement: Amending Code §8.01-404.1

In due course, we will know whether the trial bar wishes that *Wynn* had been decided differently, or, put another way, whether *Wynn* turns out to be more of a bonanza for the defense bar than the plaintiffs’ bar. As stated above, *Wynn* probably did not really change the law on this point. What should be done, however, to change the law regarding an expert’s direct testimony is to have the General Assembly amend §8.01-401.1 to mirror Federal Rule of Evidence 703 that states, in part, “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference *unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.*” Fed. R. Ev. 703 (emphasis added). Indeed, the Court in *Wynn* makes reference to Rule 703. This change would certainly increase judicial efficiency by lessening the need for so many witnesses that may need to testify to introduce facts upon which the expert relies and would also allow the jury a better understanding of the basis of an expert’s opinions. Until then, though, keep *McMunn* and *Wynn* in your trial notebook, commit them to memory, and use them to your advantage.

### Endnotes

1. Unfortunately, defense counsel has the pleasure of using the hearsay exception of “admission by a party-opponent” for statements made by a plaintiff to third parties and, thus, can (and do) use this exception to their advantage. Plaintiff counsel, on the other hand, must be prepared to elicit any such testimony directly from the plaintiff.
2. If you are going to take a video taped deposition of your expert for trial, then you certainly do not want to be caught off guard with this objection. Therefore, be sure to know if the facts that your expert will testify to fall under a hearsay exception, that you have served and received answers to your requests for admissions, and that all necessary stipulations have been agreed upon. It would not be a good scenario where your expert relies upon facts that you intend to elicit through other witnesses at trial, opposing counsel notes his objection and then is successful at trial in keeping out those facts. Now you have an expert opinion that may be on tape, but that will not be admitted into evidence.



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