2017 Convention
Champions for Justice

17. Judges Panel
Effective Pre-Trial Motions: The How, When, and Why of Motions in *Limine*

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The Honorable Lisa B. Kemler
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Pretrial Motions Aimed at Expert Admissibility

A. The Law

1. Rule 2:702 TESTIMONY BY EXPERTS
   (a) *Use of Expert Testimony*

   (i) In a civil proceeding, 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 an opinion or otherwise. [Va. Code § 8.01-401.3(A)]

   (b) *Form of opinion*. Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

2. Rule 2:703 BASIS OF EXPERT TESTIMONY

   (a) *Civil cases*. In a civil action an 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 the witness 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. [Va. Code § 8.01-401.1]

3. Rule 2:705 FACTS OR DATA USED IN TESTIMONY

   (a) *Civil cases*. In civil cases, an expert may testify in terms of opinion or inference and give reasons therefor 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. [Va. Code § 8.01-401.1]

B. Exclusion of Undesignated Opinions

1. Rule 4:1(b)(4)(A)(i) – "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

2. Uniform Pretrial Scheduling Order – "If requested, all information discoverable under Rule 4:1(b)(4)(A)(i) of the Rules of Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any nondisclosed opinions at trial."

3. *Mikhaylov v. Sales*, 291 Va. 349 (2016)

    a. Assault and battery civil case where extent of injuries was in dispute.

    b. Defendant objected to evidence from medical expert regarding the need for future medical treatment because it was not disclosed.

    c. Plaintiff conceded that "the expert designation required by the pretrial scheduling order did not disclose any opinion on this subject and neither party had addressed the subject during the deposition of the expert" but contended that the Defendant "nonetheless should have anticipated Dr. Lippman's opinions on future medical treatment."

    d. Trial court overruled the objection "on the ground that it 'would not be fair to [Plaintiff] for [Defendant] to wait until trial to object to Dr. Lippman's previously undisclosed opinion" and that "perhaps on a motion in limine or some pretrial motion, the defendant may have been successful" but that since they were now at trial, that changed the fairness and prejudice analysis.

    e. Supreme Court (Kelsey, J.) reverses.

f. "The Uniform Pretrial Scheduling Order warns that experts 'will not *ordinarily* be permitted to express any nondisclosed opinions at trial.'. This warning reinforces the trial court's presumptive authority to prohibit a party in material breach of an order regulating discovery from 'introducing designated matters in evidence.' In using this authority, however, the trial court must distinguish between the ordinary case (in which the nondisclosed opinion should be excluded) and the extraordinary case (in which it should not). We have never adopted an inflexible list of factors governing this discretionary judgment call, and we do not do so now. That said, we can identify in this case a variable that clearly does not belong on that list of discretionary factors." (emphasis in original, internal citations omitted).

g. "The court's rationale [that the Defendant's failed to file a pretrial motion to exclude testimony] implied that Mikhaylov had forfeited his objection to the testimony by not filing a pretrial motion. . . We know of no such rule, and despite the wide boundaries of a trial court's discretion on such matters, it would not extend far enough to create such a rule. It was Sales, not Mikhaylov, who violated the court's pretrial scheduling order and the expert discovery rules. Thus, it was Sales, not Mikhaylov, who had the duty to attempt to cure the violation prior to trial."

h. Rejects argument that based upon other general discovery responses and allegations, Defendant should have known that the Plaintiff sought damages for future medical care, would thus need an expert to provide that evidence, and so should have known that there would be expert testimony on the issue: "We hold this series of suppositions to be insufficient as a matter of law to relieve Sales from her obligation under Rule 4:1(b)(4)(A)(i), Rule 4:1(e), and the pretrial scheduling order to provide a timely and specific disclosure of her anticipated expert testimony. To hold otherwise would reduce the expert disclosure obligation to the status of a mere recommendation or, worse, a juristic bluff — obeyed faithfully by conscientious litigants but ignored at will by those willing to run the risk of unpredictable enforcement."

i. *Mikhaylov* explicitly holds that evidentiary objections do not have to be asserted pretrial in a motion in limine. 291 Va. at 360 n.9.

j. *Mikhaylov* also recognizes a litigant's ability to cure an expert disclosure violation.

3. *Condominium Services v. First Owners' Ass'n of Forty Six Hundred Condominium, Inc.*, 281 Va. 561 (2011)

   a. Expert disclosure stated that the expert would testify that the party would incur interest and penalties, but did not state the amounts of the interests and penalties, how they were calculated, etc.

   b. Supreme Court ruled not an abuse of discretion to nevertheless permit expert to testify about specific dollar figures because the disclosure was sufficient to "'allow the litigants to discover the expert witnesses' opinions in preparation for trial.'" (quoting *Woodbury v. Courtney*, 239 Va. 651, 654 (1990)).

4. *John Crane, Inc. v. Jones*, 274 Va. 581 (2007)

   a. Asbestos case where Defendant's expert disclosure gave no indication that the expert "might testify about asbestos in the ambient air."

   b. The Court formulated the question as being "whether the opinion at issue was disclosed in any form."

   c. Supreme Court ruled that it was not an abuse of discretion to preclude the expert testimony because the opinion in question was not disclosed in any form.

C. Exclusion of Expert Testimony for Inadequate Foundation

1. *Holiday Motor Corp. v. Walters*, 790 S.E.2d 447 (Va. 2016)

    a. Product liability case where Plaintiff's expert testified that the convertible's roof latches were defective and failed to hold in a rollover

    b. Trial court permitted the expert to testify.

    c. Supreme Court reversed.

    d. "Expert opinion may be admitted to assist the fact finder if such opinion satisfies certain requirements, including the requirement of an adequate factual foundation. . . . Expert opinion that is founded upon assumptions having no basis in fact is inadmissible."

    e. The Court found an abuse of discretion because, in the Court's opinion, the expert's opinion was "premised upon at least two unfounded assumptions."

    f. First, the Court found no factual basis for the conclusion that the latches would have held if designed differently – "he was not able to say under what circumstances vibration would cause the latches to part, and indeed, did not even calculate the vibrations the vehicle underwent during the crash or the forces and weight to which the vehicle was subjected. . . . he performed no testing or analysis of the Mazda latching system. Furthermore, though Mundo compared the design of the Mazda latching system to that of the Ford Mustang, he performed no testing or analysis of the Ford latching system and could not say that the Ford latches would have remained connected in this crash."

    g. Second, the Court found no factual basis for the conclusion "that the front end of the roof structure would not have collapsed if the latches had remained connected" – "he did not know how much weight the Mazda latching system (to create the continuous third load path he

described) would support when the latches were connected. He confirmed that he had done no calculations to determine the weight bearing capacity of any aspect of the Mazda Miata. Mundo agreed that while one would need to run physical tests or computer analyses to makes such determinations, he had not done so."

h. The Court relied heavily upon its decision from the prior year, *Hyundai Motor Co. v. Duncan*.

2. *Hyundai Motor Co. v. Duncan*, 289 Va. 147 (2015)

a. Products liability case about the failure of a side airbag to deploy

b. Defendants moved to exclude the plaintiff's expert on defect and causation – that the airbag should have been in a different place and would have deployed had the sensor been in that different place

c. Trial court permitted the expert to testify and the jury returned a verdict for the plaintiff

d. On appeal, even under abuse of discretion review, the Supreme Court reversed

e. "Mahon's opinion that the 2008 Tiburon was unreasonably dangerous was premised upon his <u>assumption</u> that the side airbag would have deployed if the sensor had been located on the vehicle's B-pillar."

f. "Yet, as Mahon readily conceded, he did not perform any <u>analysis</u> or <u>calculations</u> to support this assumption."

g. "In fact, Mahon admitted that the crash sensing system depends upon a combination of the structure of the vehicle, the sensors themselves, and any algorithm, but he did not perform any <u>tests</u> to determine whether a different sensor location, structure, or algorithm would have caused the side airbag to deploy in Gage's crash."

h. "Mahon's opinion that the 2008 Tiburon was unreasonably dangerous was without sufficient evidentiary support because it was premised upon his assumption that the side airbag would have deployed if the sensor was at his proposed location — an assumption that clearly lacked a sufficient factual basis and disregarded the variables he acknowledged as bearing upon the sensor location determination."

i. "Mahon's opinion that the vehicle was unreasonably dangerous was based on his *ipse dixit* assumption that the side airbag would have deployed in Gage's crash if the sensor had been located on the B-pillar."

3. Takeaway – Both *Holiday* and *Hyundai* find an inadequate factual basis due in large part to the expert's failure to perform testing or calculations to prove causation.

    a. *But see Bussey v. E.S.C. Restaurants Inc.*, 270 Va. 531 (2005) - "we have never required positive proof by scientific testing to establish a factual basis for" expert causation opinion.

Pretrial Motions and Making Your Record

1. Virginia Code § 8.01-384(A) – "Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via **written pleading, memorandum**, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." (emphasis added).

2. Rule 5:25 – "No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Materially identical to Rule 5A:18.

3. *Brandon v. Cox*, 284 Va. 251 (2012) – "The statute and rule have been interpreted to mean that a party must state the grounds for an objection so that the trial judge may understand the precise question or questions he is called upon to decide. To satisfy the rule, an objection must be made at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error. Rule 5:25 exists to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and

mistrials. Recognizing that the purpose of the rule is not to obstruct petitioners in their efforts to secure writs of error, or appeals, this Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the assigned error. The purpose of the rule is to put the record in such shape that the case may be heard in this Court upon the same record upon which it was heard in the trial court." (internal quotations, citations, and formatting omitted).

4. The even scarier case law: "Under this rule, a specific argument must be made to the trial court at the appropriate time, or the allegation of error will not be considered on appeal. *See Mounce v. Commonwealth*, 4 Va. App. 433, 435 (1987). A general argument or an abstract reference to the law is not sufficient to preserve an issue. *Buck v. Commonwealth*, 247 Va. 449, 452-53 (1994); *Scott v. Commonwealth*, 31 Va. App. 461, 464-65 (2000). Making one specific argument on an issue does not preserve a separate legal point on the same issue for review. *See Clark v. Commonwealth*, 30 Va. App. 406, 411-12 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions). Thus, we will not consider this issue for the first time on appeal. *See* Rule 5A:18; *West Alexandria Prop., Inc. v. First Virginia Mortgage and Real Estate Inv. Trust*, 221 Va. 134, 138 (1980) ("On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court."); *Floyd v. Commonwealth*, 219 Va. 575, 584 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court, even if it relates to the same general issue)."

Defending Against the "Wolf in Sheep's Clothing" Pre-trial Motion

1. Virginia Code § 8.01-420(A) - "Except as provided in subsection B [relating to claims for punitive damages], no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used."

2. Rule 3:20 – "No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used . . . ."

3. *Lloyd v. Kime*, 275 Va. 98 (2008)

    a. notes that, regardless of the label, a motion that is the functional equivalent of a motion for summary judgment, such a motion to dismiss for lack of subject matter jurisdiction, is subject to Rule 3:20 and § 8.01-420(A)

    b. "We have held that Rule 3:20 and Code § 8.01-420 apply when a defendant files a motion in limine seeking the exclusion of the plaintiff's expert testimony, and the court's ruling excluding the testimony is followed by the defendant's motion for summary judgment predicated upon the exclusion. *Parker v. Elco Elevator Corp.*, 250 Va. 278, 281 n.2 (1995). In such a case, the motion in limine is functionally a motion for summary judgment."

    c. Failure to object to the use of depositions in support of the motion in limine waives objection to the use of the motion in limine ruling as a basis for a summary judgment ruling.

    d. But, "the Rule and statute do not apply to the use of depositions to oppose a motion for summary judgment."