EXPERTS ON SPEED

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The 2006 North Carolina General Assembly changed the law regarding whether an accident reconstruction expert can offer opinion testimony at trial to establish the speed of a vehicle that he or she did not personally observe in motion. By adding one short section to a lengthy bill that was intended to strengthen driving while impaired (DWI) laws, the General Assembly overturned a long line of North Carolina appellate decisions that had established as "black letter law" that no one, including experts, would be permitted to testify concerning the speed of a motor vehicle unless he or she had actually observed the vehicle in motion.

Is this a "good" change in the law? What are the implications for counsel for both plaintiffs and defendants involved in motor vehicle negligence cases? What is the history of the legal principle that has now been reversed by legislative action?

A Short History of the Common Law Rule

At least as early as 1946, the North Carolina Supreme Court held that unless a person personally witnessed a vehicle in motion, he would not be allowed to testify regarding the vehicle's speed. The case of *Tyndall v. Harvey C. Hines Co.*, 226 N.C. 620, 39 S.E.2d 828 (1946), involved a plaintiff who was injured when struck by an ice cream truck. The investigating officer testified about marks on the shoulder of the road and on the grass that were made by the truck, and the officer was allowed to testify that, in his opinion, the truck had been traveling at a speed of 50 to 60 miles per hour. The Supreme Court held that the trial judge committed reversible error by admitting the officer's opinion testimony about the truck's speed.

The Court stated that "[o]ne who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The 'opinion' must be a fact observed. The witness must speak of facts within his knowledge. He cannot, under the guise of an opinion, give his deductive conclusion from what he saw and knew." *Id*. at 623, 39 S.E.2d at 830.

For the next sixty years, the rule enunciated in *Tyndall* was scrupulously followed by North Carolina's courts, and it was applied to law enforcement officers as well as to members of the general public. A year after the *Tyndall* decision, the Supreme Court decided *Webb v. Hutchins*, 228 N.C. 1, 44 S.E.2d 350 (1947), and it held that the trial court properly refused to allow a patrolman, who was not present at the time of the accident, to opine regarding the defendant's speed. In the case of *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E.2d 351 (1960), the Court refused to allow a highway patrol officer to testify regarding his opinions as to the speed of a vehicle and as to who was operating the vehicle at the time of the accident. The Court stated that "[a] witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed." *Id.* at 180, 116 S.E.2d at 355.

The North Carolina Supreme Court has consistently upheld the exclusion of speed testimony by investigating officers who did not actually see the vehicle in motion. For example, such testimony was excluded, and the plaintiff's claim dismissed, in the case of *Farrow v. Baugham*, 266 N.C. 739, 147 S.E.2d 167 (1966). The Court affirmed the exclusion and stated that "plaintiff must offer evidence 'sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.'" *Id.* at 742, 147 S.E.2d at 170.

Recent History and the Lead-Up to a Change in the Rule

After the North Carolina Court of Appeals was established, its panels consistently applied the established legal principle regarding speed testimony in numerous decisions. *See, e.g., Hicks v. Reavis*, 78 N.C. App. 315, 337 S.E.2d 121 (1985), *cert. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986) (police officer may not opine on speed based solely on the physical evidence at the scene). The issue did not reach the North Carolina Supreme Court again until 2006, and then only briefly. The Supreme Court granted the plaintiff's petition for discretionary review with respect to the case of *Van Reypen Associates, Inc. v. Teeter*, 175 N.C. App. 535, 624 S.E. 2d 401 (2006), but it later dismissed the petition as "improvidently" granted after the General Assembly amended Rule 702. *Van Reypen Associates, Inc. v. Teeter*, 361 N.C. 107, 637 S.E. 2d 536 (2006).

The *Teeter* case involved a claim arising out of an intersection accident involving a dump truck being operated by Gerald Teeter and a Nissan automobile being operated by Laurie Fisher. As Teeter entered the intersection, his dump truck collided with Fisher's automobile, and as a result of the collision the dump truck struck and damaged a nearby building and a BMW automobile, both of which were owned by Van Reypen Associates. Van Reypen Associates filed suit against Teeter alleging that the damage was caused by his negligence. Teeter filed a motion for summary judgment and an affidavit in which he stated that at the time of the accident he was operating his dump truck within the posted speed limit (35 mph), that he entered the intersection on a "green light," and that he made every effort to avoid the collision.

In opposition to the motion, the plaintiff's counsel filed the affidavit of David Brown, a professional engineer, in which Brown stated that he had performed forensic mapping and surveys of the damage, that based upon his professional experience it was his opinion that Teeter's truck was traveling "at least forty eight (48) miles per hour" at the time of the collision, and that the negligence of Mr. Teeter "was the direct cause of the accident."

The trial judge granted Teeter's motion for summary judgment, and the plaintiff appealed. The Court of Appeals reluctantly affirmed the summary judgment, and it suggested that the Supreme Court overturn the *Tyndall* rule. Subsequently, the Supreme Court did grant discretionary review, but later dismissed the case after legislative action rendered the issue moot.

The New (and Improved?) Rule 702

The 2006 amendment added subsection (i) to Rule 702 of the North Carolina Rules of Evidence. The new subsection reads as follows:

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Issues and Potential Problems with the New Rule

House Bill 1048, as enacted, says that the amendment to Rule 702 "applies to offenses committed on or after" December 1, 2006. The legislation was enacted in the context of efforts to strengthen the DWI laws, which are criminal in nature. Should the change only apply to criminal trials, and not to civil actions? Since the Rules of Evidence do not differentiate between criminal and civil trials, it appears likely that the new rule will apply equally to both criminal and civil trials.

Will the change be applied retroactively? That question was apparently answered last year when the Court of Appeals rendered its decision in *Hoffman v. Oakley*, 184 N.C. App. ___, 647 S.E.2d 117, *petition for discretionary review denied*, 361 N.C. 692, 652 S.E.2d 264 (2007). The Court referred to the recent amendment to Rule 702, and noted that "the amendment applies only to 'offenses' committed on or after 1 December 2006," and it stated that the amended rule was not applicable to the March 13, 2003, accident that was the subject of the appeal under consideration by the Court. (Interestingly, the Court affirmed the trial judge's decision to allow an accident reconstruction expert's testimony regarding "stopping distances," despite the plaintiff's contention that the expert's testimony was simply a back door effort to offer testimony regarding the third-party defendant driver's speed by a witness who had not observed the vehicle in motion.)

The new rule appears to set the bar rather low for the introduction of expert testimony on speed. Hopefully, trial judges will carefully scrutinize such proffered testimony. First of all, the witness must be "qualified as an expert in accident reconstruction." However, accident reconstruction is an ill-defined area of expertise. To the best of my knowledge, there are no academic degrees in "accident reconstruction" and no "board certified accident reconstructionists." Assuming the witness can convince the judge that he or she is a qualified accident reconstructionist, the second requirement is that the witness must have "performed a reconstruction of [the] crash" or "reviewed the report of investigation." Although the term "report of investigation" is not defined, it apparently refers to the crash reports that are typically filled out by law enforcement officers who are called to the scene of accidents. Does this mean that an engineer can review a crash report filed by a State Highway Patrolman, and then opine on the speed of the vehicles based solely on the length of the defendant's (or the plaintiff's) skid marks, as recorded on the crash report? Can an engineer opine as to speed based solely on crush damage to the vehicles? The only saving grace in the language of the rule change is the phrase "with proper foundation." The engineer must convince the trial judge that the proffered testimony concerning the speed of the unseen vehicle is reliable and relevant before the trial judge will allow the jury to hear the engineer's opinion testimony. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 497 S.E.2d 674 (2004).

If you try motor vehicle accident cases (whether on the plaintiff's side or the defendant's side), you are going to see many more engineers (a/k/a "accident reconstruction experts") in the courtroom. Do not forget, this rule change cuts both ways. While it will help personal injury attorneys establish negligence on the part of defendants, it may well be equally potent in establishing that plaintiffs were contributorily negligent, and therefore barred from recovering damages. Violation of the established speed limits on the state's highways is, after all, negligence *per se*.

Was the amendment to Rule 702 a salutary change that modernized North Carolina's Rules of Evidence to allow expert testimony concerning the speed of unseen vehicles? Or, was it a change that uprooted and overturned a well-established rule of law that had proven its worth over a period of sixty years?

The jury is still out.

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