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7th Circuit Holds Expert Testimony Based on Aspirational Industry Guidelines Admissible

This week we return to the issue of expert testimony that we previously discussed in our November post *So You Think You're an Expert*. Whereas our previous discussion was meant to provide a basic overview of the standards for expert testimony at trial, this week we shall look at a more nuanced aspect of expert testimony through the lens of this week's Seventh Circuit decision *Lees v. Carthage College*. In *Lees* the court was asked to review the trial court's decision to deny admission of Miss Lees' expert witness and thereby resulting in the dismissal of her case – because Wisconsin law required expert testimony to establish a duty in a premises-security case. The appellate court reversed and aloud most of the expert testimony to be admitted. In so doing, the court permitted expert testimony premised in large part upon aspirational industry guidelines that are not the "community standards."

My frequent readers may well have recognized by now that I prefer not to delve into the specific facts of cases in our weekly discussion. I stand by this assertion despite last week's post – Indiana Court of Appeals Upholds $14.5 Million Defamation Verdict – being almost entirely driven by the facts of the case. Miss

Lees' case is one in which I sincerely wish I could avoid delving into the facts altogether. This is not because I have any personal antipathy toward writing of the facts but because of the rather graphic and horrendous reality that underlies the case.

Regrettably, as there is no escaping a discussion of the facts of Miss Lees' case, let us delve into the circumstances that led to the ultimate decision from the Seventh Circuit.

Miss Lees, a native of California, began her freshman year at the Wisconsin based private Carthage College in the fall of 2008. Miss Lees "is hearing impaired and primarily communicates through sign language and lip reading[.]" She lived on campus, as did half of the three thousand students attending Carthage College. Her residence was an all female dormitory named Tarble Hall.

> All [Carthage] residence halls are locked 24 hours a day. Between 8 a.m. and 2 a.m. on Fridays and Saturdays (and 8 a.m. and midnight on other nights) students may use their student ID to access any hall. Outside of those hours, students may access only their own residence hall. Between 9 p.m. and midnight on weekends, resident assistants ("RAs") monitor the lobby of Tarble Hall. The RAs do not staff the lobby's front table between midnight and 2 a.m., but they patrol the hall's corridors and stairways until 2:30 a.m., along with regular security staff. Tarble Hall also has a basement door that is locked from the outside and inaccessible by swiping a student ID. This door lacks a prop alarm, meaning that it can be propped open indefinitely without alerting security. The individual rooms in Tarble Hall use key-in-knob locks. Tarble Hall RAs encouraged students to follow an "open door policy" in which they would leave their doors propped open while other residents were around to encourage socializing.

In the early hours of Sunday September 21, 2008, Miss Lees was in her room with the door propped open. While in her room, shortly after midnight, two men – based on their attire they were presumptively fellow students – entered her room and said something to her. She indicated that she was deaf and the two men laughed and left. Tragically, not long after the two men returned. One of the men then held Miss Lees down on her bed while the other forced himself upon her. Eventually she was able to strike the man holding her causing the two to flee. Nevertheless, the incomprehensible damage had been done. Shortly thereafter, Miss Lees withdrew from school.

Miss Lees brought suit against the school and its insurer under a theory of

negligence. In order to establish the standard of care that Carthage College was alleged to have fallen below/breached, Miss Lees sought to admit the testimony of Dr. Daniel Kennedy – "a premises-security expert who has long served as a professor of criminal justice and security administration at the University of Detroit." After reviewing the circumstances facilitating the sexual assault perpetrated upon Miss Lees, Dr. Kennedy concluded that there were several security deficiencies and that the attack was foreseeable.

> Specifically, Dr. Kennedy pointed to the lack of a prop alarm on the basement door; the failure to staff the lobby between midnight and 2 a.m. on weekends; Tarble's open-door policy; the lack of a policy requiring guests to be escorted to the rooms of students they were visiting; and the lack of security cameras. Dr. Kennedy also stated that Carthage in many respects fell short of the recommended practices published by the International Association of Campus Law Enforcement Administrators ("IACLEA").
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> Regarding incidents of rape in particular, Dr. Kennedy noted that according to Carthage's crime-reporting statistics . . . there had been eight forcible sexual offenses in the five years leading up to 2008: one each in 2003, 2005, and 2006, and five in 2007. Dr. Kennedy also referenced social-science data on rape, including studies showing that women with disabilities, like Lees, were four times more likely to be raped than other women.

The trial court opted to exclude Dr. Kennedy's testimony finding it lacking sufficient indicia of reliability. The trial court rejected the use of the IACLEA standards because they "were merely recommended and aspirational and did not necessarily account for variation among different types of academic environments." Further, the trial court found fault with Dr. Kennedy's methods "for not analyzing security measures at colleges similarly situated to Carthage in terms of size and location." The trial court also rejected Dr. Kennedy's reliance upon the rape statistics distinguishing the prior instances as "acquaintance rape" from Miss Lees assault as a "stranger rape." Lastly, the court noted that the comparatively greater risk of rape for women with disabilities said nothing about the foreseeability of a student being raped by a stranger in her residence hall."

Fortunately, Miss Lees appealed this decision. On appeal, the court first looked to Federal Evidence Rule 702, which governs admission of expert testimony. Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience,

> training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In determining whether an expert's testimony may satisfy the requirements of Rule 702, a trial court must determine: (1) whether expert is qualified on the subject matter; (2) whether the testimony will help the jury make its determination; (3) that the testimony is "based on sufficient facts or data and reliable principles and methods;" and (4) whether the application of the methods was sound.

In rejecting the trial court's conclusion, the court of appeals first determined that the trial court erred in focusing its analysis of the expert's testimony on the foreseeability of the harm. Looking to Wisconsin law, the court of appeals found that the expert testimony was a pre-requisite to establishing the standard of care, but that foreseeability was not a determination of whether there was a duty of care to prevent the harm but rather whether that duty was breached.

Advancing to the specifics of Dr. Kennedy's testimony, the court found that he had extensive knowledge in the field of premises-security and has testified in many previous cases. Thus, the primary issue was not his qualification, but rather, his methodology and its application. If you are following along, this means that the court has acknowledge that the first step in the analysis is satisfied – i.e. Dr. Kennedy is qualified as an expert. The issue then is the third and fourth steps. If you are wondering what happened to the second step, the answer is that since this testimony is required under Wisconsin law to even bring a claim, by definition it is inherently helpful to the jury's determination.

Dr. Kennedy's method was to review witness statements, inspect Tarble Hall, review the security protocols, review statistics and police reports, compare the practices/protocols to the IACLEA guidelines, and survey the relevant professional literature. Based upon this background research and his experience he came to his conclusion. The court of appeals noted that while this may not have been a "scientific" method it fit within the confines of Rule 702 because it was "technical" and "specialized."

The court of appeals examined the specific objections of the trial court to the use of the IACLEA guidelines and the use of the prior rape instances. In responding to the trial court's concerns of the IACLEA being merely an aspirational industry

guideline, the court stated:

> there is no question that these guidelines, standing alone, do not establish the standard of care. As the district court noted, they are only aspirational practices, not a formal industry standard; even formal industry standards are not dispositive as to negligence liability. But the relevant question for admissibility purposes is not whether the IACLEA guidelines are controlling in the sense of an industry code, or even how persuasive they are. It is only whether consulting them is a methodologically sound practice on which to base an expert opinion in the context of this case. For a claim of this nature, we are convinced that it is. The IACLEA guidelines are an authoritative set of recommended practices specific to the field of campus security and are regularly consulted by campus- security professionals. The extent of Carthage's deviations from these practices may surely inform an expert opinion as to whether Carthage met its standard of care. Carthage may argue, of course, that the IACLEA guidelines are only advisory, or outdated, or overly general, and for those reasons should not be taken as persuasive on the standard of care. But that argument goes to the weight of the expert's testimony, not its admissibility. The district court abused its discretion in excluding this part of Dr. Kennedy's testimony.

In short, the court treated this argument with the classic argument on evidentiary issues – "it goes to weight and not to admissibility." That means, the issue of determining whether evidence can be heard is an admissibility issue to be decided by the court. The value and weight given to that evidence is to be assigned by the jury. Thus, a "weight" issue does not determine whether the evidence is admissible.

The second issue of concern for the trial court – failure to distinguish acquaintance rape from stranger rape – was a source of concern for the appeals court as well. The court found that the failure to distinguish these two different scenarios struck at the heart of the reliability of the testimony and thus was properly excluded by the trial court.

Thus, the court of appeals found that the testimony of Dr. Kennedy should have been admitted with the lone exception being his testimony based upon the prior rape occurrences at Carthage College. Because the expert testimony could be admitted, Miss Lees had met the requirement of providing expert testimony to bring her premises-security negligence claim under Wisconsin law. The decision provides hope for the ability to obtain the financial recovery necessary to aid this young woman in trying to get her life back on course. Where there was once little or

no hope, there is now a very real prospect that Miss Lees' case may be able to succeed.

Join us again next time for further discussion of developments in the law.

Sources

- *Lees v. Carthage Coll.*, ___ F.3d ___, No. 11-3061, 2013 WL 1590038 (7th Cir. Apr. 16, 2013).
- *Lees v. Carthage Coll.*, No. 10-C-86, 2011 WL 3844115 (E.D. Wis. Aug. 29, 2011), *vacated and remanded*, ___ F.3d ___, No. 11-3061, 2013 WL 1590038 (7th Cir. Apr. 16, 2013).
- Federal Rule of Evidence 702.

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