Personal Injury Litigation And The Role Of Expert Testimony

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State's Appellate Division Rules on the Inclusion of Surprise Expert Testimony in Slip and Fall Trial

If a personal injury matter goes to trial, it is common practice for the lawyers to present expert testimony and reports that evaluate aspects of the case. A credible and logical expert can offer information that is critical for a jury to know when deliberating toward a verdict. Depending on the type of case, a written report from a medical, biomechanical, engineering, economic or other expert will be provided to the other side before trial. The report, and the expert's testimony at trial, can serve to assess the injuries sustained, the resulting economic damages, or the causation of the accident and the ensuing injuries. For the purpose of fairness, the substance of an expert's testimony must be disclosed to the opposing party before the trial begins.

Slip and Fall Case Introduces New Expert Testimony at Trial

A recent case raised the question of whether expert testimony can be included if it causes surprise to the other party. In McBride vs. Fair- Willoughby (A-5610-17T4) the state's appellate court considered this issue as it related to a trial about liability for a slip and fall that occurred on an icy sidewalk in Jersey City, allegedly caused by a downspout, where the plaintiff fractured her ankle. The plaintiff said the ice formed from water runoff from the defendant's gutter drainpipe.

During the trial, and over the plaintiff's objection, the defendant's expert was allowed to offer testimony about the downspouts of other homes in the defendant's neighborhood that he did not inspect or fully investigate, and that he did not provide in any written report. This surprise expert testimony put the plaintiff at a disadvantage, without the opportunity to prepare an adequate response

or appropriately cross-examine the expert regarding the new information.

The defendant's surprise testimony was offered to suggest that the defendant was not negligent "because everyone does it." The trial court allowed the testimony, but the plaintiff appealed that decision arguing that the surprise testimony produced an unjust result.

Court Rules Expert Testimony Cannot Surprise Opposing Party

On appeal, the court deemed that the defendant went too far, and that "the defense that 'everyone does it' is not an acceptable ground to absolve a defendant from liability in the absence of a reasonable justification for defendant's conduct or for the conduct of similarly-situated persons."

Since a jury can heavily rely on expert testimony, it is critical that the expert's report fully contain all opinions that will be presented to the jury. In McBride, the Appellate Division ruled that the defendant's expert's testimony went beyond the permissible bounds and led to an unfair outcome. A new trial was ordered.

If you have questions about injuries sustained in a slip and fall situation, please contact Christopher Musmanno at 973-586-4929 or cmusmanno@einhornlawyers.com.