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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Corrections and the Courts...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

Wisconsin Economic Development Association Inc.

TO: Members, Assembly Committee on Corrections and the Courts

FROM: WEDA Board of Directors
Peter Thillman, President
Rob Kleman and Andy Lisak, Legislative Co-Chairs
Jim Hough, Legislative Director

DATE: May 18, 2005

RE: **Support for Assembly Bill 203**

The Wisconsin Economic Development Association (WEDA) is a statewide association of approximately 400 economic development professionals whose primary focus is the support of policies that create a climate conducive to the retention, expansion and attraction of businesses in and to Wisconsin.

A state's liability system has a significant impact on its economic development. Economic growth is greatly affected by the kind of legal environment in which businesses must operate. This factor is one of the top four factors that businesses look at regarding expansion and location decisions. (Wisconsin's national ranking for "litigation atmosphere" by the U.S. Chamber of Commerce fell from 10 in 2004 to 17 in 2005. Failure to join 33 other states and the entire federal system in upgrading our standards and principles for expert opinion evidence is one of the major reasons for the drop in ranking.)

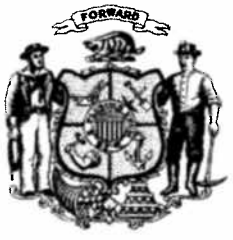
For those reasons, WEDA has long been an advocate of civil justice reform that establishes a framework for resolving disputes that is fair to all litigants and discourages frivolous and costly litigation that is aimed at "finding someone to pay" rather than fairly finding the truth.

Wisconsin is currently among a distinct minority of states which do not require expert testimony to be reliable. This has led to some high profile cases being brought in Wisconsin because of the increased likelihood of obtaining a favorable verdict through the use of "junk science" and/or questionable "expert" credentials. This does not help our desire to promote a positive legal environment.

Assembly Bill 203 would correct this problem by joining the majority of the states in this country and the federal system in ensuring that expert testimony is the product of a reliable and sound analytical method and offered by a genuine expert in his or her field.

WEDA strongly supports AB 203 and respectfully urges a recommendation for passage.

WISCONSIN STATE LEGISLATURE



The
Hamilton Consulting Group
Legislative, Regulatory & Information Services

May 24th, 2005

Representative Garey Bies, Chair, & Members
Assembly Committee on Corrections & the Courts
State Capitol
Madison, WI

Dear Representative Bies and Committee Members:

RE: AB 203

Attached is a copy of testimony delivered by Attorney Ric Gass in support of SB 70, Senate companion bill to AB 203, before the Senate Judiciary Committee on February 23, 2005. Mr. Gass had hoped to testify before your committee but a trial conflict prevented his attendance.

Please see pages 5, 6, 8, 9, and 10 relating to specific examples as requested by the committee.

Also cited in previous testimony:

- A woman used "expert" testimony to "demonstrate" that a CAT scan caused her loss of physic powers.
- A man used "expert" testimony to "prove" that a blow to his head caused his brain cancer.
- An "expert" testified that the progression of cancer was accelerated due to a regimen of lifting heavy cheese.

Also, in Wisconsin we do not have empirical data on just how much "junk science" gets to a jury under our loose standards and what the overall impact is on jury decisions.

As discussed at the committee hearing, AB 203 is more about the admissibility of expert testimony than it is about qualifying a person as an expert. Many "experts" are advocates of those who employ them and in some instances their theories of liability or damages are based on principles and methods that do not meet the tests of accuracy and legitimacy. AB 203 would eliminate "junk science" and require that testimony is admissible only if:

- Based on sufficient facts or data;
- A product of reliable principles and methods; and,
- The principles and methods can be properly applied to the facts of the case.

10 E. Doty St. • Suite 500 • Madison, WI 53703 • Phone: 608/258-9506 • Fax: 608/283-2589
www.hamilton-consulting.com • info@hamilton-consulting.com

When a person has been qualified as an expert and he or she utters "in my opinion" the impact on a jury can be enormous. AB 203 at least insures that the testimony has validity and that the courtroom is not used as a laboratory for new, unproven theories. We believe that this is common sense.

The principles and standards articulated in *Daubert* apply to both plaintiff and defense. In fact the *Daubert* opinion, and principles and standards adopted therein, was a plaintiff's case.

We respectfully urge a vote to recommend passage of AB 203. Wisconsin prides itself as a progressive state. Why are we behind 33 states and the entire federal system in this very important aspect of dispensing justice evenly and fairly?

Thank you for your time and consideration.

Respectfully,

James E. Hough
On behalf of
Civil Trial Counsel of Wisconsin
Wisconsin Coalition for Civil Justice
Wisconsin Economic Development Association

Encl.

2005 – 2006 Legislature

2005 Senate Bill 70

Evidence of Expert Witnesses

Hearing Before The Senate Judiciary Committee

Senator Dave Zien, Presiding

February 23, 2005

Testimony In Support of SB 70

by

J. Ric Gass
Gass Weber Mullins LLC
309 N. Water St.
Milwaukee, WI 53202
414-224-7697

Appearing as a private trial lawyer and also as Past President of The Lawyers For Civil Justice

I. Background of J. Ric Gass

A. Originally trained as a scientist in chemistry and math and as a teacher

1. The teaching background is particularly pertinent to jury trials since teaching is a good part of what trial lawyers do in jury trials

B. Trial lawyer for 35 years

1. 20 years exclusively trying cases in Wisconsin

2. For the past 15 years trying cases all over the country from Boston to Maui – has seen how Wisconsin compares to other states based on actual experience with expert witnesses in multiple jurisdictions

a. Wisconsin is unfortunately in the poor minority of jurisdictions in this regard

3. 250 jury trials

4. Fellow, American College of Trial Lawyers, Diplomate, International Society of Barristers, Diplomate, American Board of Trial Advocates

5. Taught expert witness testimony rules as a professor of evidence for 10 years at Marquette University Law School

6. Practice includes functioning not just as trial counsel but also supervisory counsel and as a consultant on jury trials

C. As a president of two national legal organizations is familiar with the laws and practices concerning expert witnesses across the country and how Wisconsin compares with other states

D. Represents plaintiff's 20-25% of the time and defendants 75% of the time

E. Secured the largest verdict in favor of a plaintiff in Wisconsin

F. Has been retained and testified as an expert witness in 10 states

G. Testimony in support of SB 70 is an "octagonal view" from 8 sides of the litigation prism as a:

1. Plaintiff's lawyer
2. Defense lawyer
3. Evidence professor
4. Scientist and teacher
5. Expert -- the very persona this bill is concerned with
6. A lawyer supervising litigation nationally
7. A jury consultant on how to present cases
8. Lawyer familiar with the local and national ways of dealing with expert witnesses

II. Threshold questions and conclusions

A. If the Wisconsin rule for admissibility of expert witness testimony is as good as the opponents of this bill claim:

1. Why didn't the U.S. Supreme Court adopt it rather than the rule in Daubert?
2. Why didn't the 33 states which have adopted Daubert recognize how good it was and adopt the Wisconsin rule?
3. Why hasn't one other single state of the 17 remaining states adopted the Daubert rule?

B. If there was no need for this type of a rule, because of the type of evidence being offered -- **science** -- because of who listens to it and uses it -- **jurors** -- and because of the persons delivering it -- **witnesses** – then:

1. Why would the U.S. Supreme Court have taken up the topic?
2. Why would 33 state Supreme Court's and legislatures have taken up the topic and adopted special rules for "expert" testimony?

C. The answer to those questions is clear:

1. A rule such as SB 70 is needed because of:

    a. The nature of the evidence being offered: alleged scientific evidence with its inherent

        i. Difficulty of understanding science and technology

        ii. The trustworthiness associated with true science & the deference given it by lay people

    b. The lack of scientific expertise of the average juror

    c. The problems inherent in giving a witness, especially one talking about topics beyond the normal understanding of jurors, carte blanche to give conclusory opinions

D. Wisconsin is out of sync with the vast majority of legal systems in the treatment of expert witness testimony

1. Wisconsin was once one of the leaders in this field as one of the first adopters of the federal rules but today is one of the few laggards which hasn't adopted the Daubert rules

2. There really is no standard for the admissibility of expert evidence in Wisconsin: in essence it all comes in as soon as the purported "expert" self qualifies theirself and utters the magic formulation "it is my opinion to a reasonable degree of probability"

3. Here is how Wisconsin appellate decisions describe the admissibility of expert testimony in Wisconsin

    a. *Tanner v Shoupe*: "whether a witness is qualified is a discretionary determination for the trial judge"

    b. *Green v Smith*: "unlike in the federal system where the trial court has a significant gatekeeper function the trial court's gatekeepers role in Wisconsin is extremely limited" – "is not stringent"

    c. *Anderson v. Combustion Engineering*: "a fairly low threshold for admissibility: The jury is entitled to draw reasonable inferences from expert testimony even if at first blush it may appear that the jury's conclusions based on those inferences require proof by specialized testimony"

4. And when this fast food science comes into evidence two things happen

a. A burden is placed on the opponent to respond

b. It lengthens proceedings

c. It burdens the trial

d. It burdens the jury

e. And, if it is "garbage in" we run the risk of "garbage out" in the verdict

5. That is what the U.S. Supreme Court and the other 33 states have recognized -- all of those risks and the usual let it all in and let the jury weigh credibility doesn't cut it with scientific evidence --

III. A quick example of how the current rule allowing easy admissibility of expert opinions hurts Wisconsin business

1. My client manufactured a metal ring that was used with a large wrench for securing transmissions in assembly of an engine and transmission

   a. A employee applying pressure to tighten the ring falls and injuries himself -- Question is did the ring have anything to do with it or did he slip or did the wrenching device come loose

   b. The ring is discarded

2. Now the Wisconsin manufacturer is sued with the claim of metallurgical defect of porosity in the ring

   a. The plaintiff's expert who has never seen the ring, only blurry photos of it, gives an opinion that the cause was a defective ring due to porosity basing the opinion on a statement of a shop supervisor that he saw an area of porosity before the ring was thrown away.

   b. No testing, no examination of the product, nothing and that opinion was enough to cause the judge to say she couldn't dismiss the claim on summary judgment.

3. If the manufacturer would have been from outside Wisconsin the case could have been removed to Federal Court and Daubert would have been applied and the claim dismissed.

   a. No expert would ever in a scientific journal or meeting be allowed to give such an opinion.

   b. But in a Wisconsin court that opinion is admissible and will cost that

company much expense to defend itself and end up having a jury making the decision on a scientific issue where it will not have the actual product or any testing or x-rays or magnafluxing or any other standard metallurgical testing available to it either.

IV. The nub of the problem and the solution comes down to three basic issues: When expert testimony is being considered there are three things you need to think about: Who's doing the listening? Who's doing the talking? What's being talked about and listened to?

A. **Who's listening to the testimony of experts -- Juries -- and why that is an important factor for adopting this bill**

1. National Science Foundation annual science test results

a. Few people -- less than 15% -- describe themselves as well informed about science & tech -- 30% described themselves as poorly informed on S&T

i. Well founded because the average score on the basic science concepts & terms test is barely 63% (13 T-F questions, 3 multiple choice & 2 open ended questions)

(a) Less than 50% know that the earth orbits the sun yearly

(b) Only 9% know what a molecule is

(c) Only 21% can define DNA

(d) Only 5% can explain acid rain

(e) Only 27% can pass more than 9 questions on the test: that's a mere 70% grade

(f) Unchanged since the 1990s

ii. Only 33% surveyed can provide a good explanation of the scientific method, how experiments are conducted and probability -- 50% are unsure of what "margin of error" means even though 40% of all respondents say margin of error is useful

iii. Beliefs in various forms of pseudoscience is common with 60% believing in ESP and 41% believing astrology is at least somewhat scientific

iv. What makes this particularly dangerous is the level of confidence in

science -- favorable attitudes toward science is 72%

b. The anecdote which humorously describes this is an episode in the HBO Penn & Teller series "B...S..."

i. A young woman signs up citizens to ban a chemical compound -- she explains that this compound is found in lakes and rivers, it remains on fruits and vegetables after they're washed, it makes you sweat

ii. The compound is dihydrogen monoxide

iii. Of course dihydrogen monoxide is simply water

B. **What is being talked about -- science -- the substance of expert testimony**

1. Science is Inherently changeable

2. Science predictions and studies

a. Coffee: 1986 linked to heart disease -- 1990 study found no relationship

b. Aspirin: 1988 one study says reduces risk of heart disease -- another says increases risk of heart disease and kidney cancer

c. Bacon and hot dogs and the new car smell: allegedly carcinogenic because of nitrosamines -- then exonerated

d. Oat bran -- Wilford Brimley as spokesman -- reduces cholesterol levels -- two competing studies: one yes and one no

e. Spinach -- the healthiest food in the world -- Popeye ate it because it made you strong -- all based on a scientific error -- the decimal point was in the wrong place for iron -- 10 times more iron that actually is in spinach -- honest mistake but generations have believed it -- because in poll after poll scientists are trusted more than any other profession

f. I can give you examples all day including formal retractions of studies

i. The retractions of course never receive the prominence of the original publicity

3. Part of this is the nature of science and learning more

4. Part of it is Fast Food Science vs Good Science

    a. Fast food science is what this bill keeps away from juries

    b. Good science is what this bill gives to juries

    c. It's the same as food in terms of nutritional *value*

5. One example you do need to know about that was formally retracted by the authors publicly saying their work "was never corroborated by subsequent studies" was part of the evidence relied on by a jury in Ohio awarding $5.1mm against Ortho Pharmaceutical

    a. The study suggested that spermicides might cause birth defects

    b. The authors in their retraction years later said:

        i. "The study's definition of exposure to spermicide near the time of conception was grossly inaccurate"

        ii. "Our article never should have been published"

        iii. "In our present litigious environment, the reservations and qualifications written into a published report are often ignored, and the article is cited as "proof" of a causal relationship"

6. Need the best science not the lowest common denominator science for juries

C. **Who's doing the talking -- "Experts" -- are there warning signs about experts that are a good reason for adopting this bill**

1. Problems with scientific accuracy have always been with us

    a. Estimates in scientific circles suggest that data massage and research fabrication could exist in as much as 90% of all studies either negligently or intentionally -- see Deception in Scientific Research, Woolf, 29 jurimetrics Journal, 67 and *Abbs v. Sullivan* (7th Cir. 1992)

2. Fellowship applications

    a. University of Pittsburgh Medical school applications for fellowships

        i. 20% lied about research publications

        ii. 30% claimed false publications -- articles not published -- in non-

existent journals

iii. Also found 12% of all yellow page ads misrepresent board certification status

3. When it comes to the magic words that every expert has to say "it is my opinion to a reasonable degree of probability and certainty" the New Eng. Journal of Medicine found that

   a. 67-70% of medical professionals equated probable to likely
   b. Only 70% said probable had a distinct meaning

V. Conclusion

A. Whether you look at who's talking, who's listening or what's being said you can see the dangers of lax restrictions on the admissibility of expert witness testimony

B. John Stoessel said it well at the beginning and the end of a special he did a few years back on junk science

1. "Junk science. It's not always the scientist's fault. Sometimes activists twist science to fit their agenda. Lawyers twist it to win cases. Bureaucrats to protect their turf. And we in the media well we're part of the problem too. We often take a grain of truth and run with it.

2. Science is not a one study endeavor. It rarely comes in a blinding flash of revelation. We learn about our worlds slowly. Bit by bit. Scientists offer theories and most are eventually proven wrong. By weeding out those theories not supported by the evidence, we eventually build a more accurate picture of our world. It's a never ending process. The best we can do is look for what the consensus of scientists is. It might not always be right. But it's much less likely to be junk."

3. This bill goes a long way toward giving us assurance of that in the litigation and in the courtroom.

C. The best example is a Wisconsin case: The Puhl Case decided at a time when Wisconsin took a rigorous position on the admissibility of expert evidence

1. Teresa Puhl was 12 weeks pregnant with Mary Ann when she was in a simple auto accident in 1955

2. All the injuries were minor

3. Mary Ann however was born with Downs Syndrome

4. The claim was asserted that Mary Ann's Downs Syndrome was due to the trauma of the auto accident

5. That claim was tried to a jury in 1958

    a. A doctor for the plaintiff gave the opinion to a reasonable degree of medical probability that the Downs Syndrome was caused by the trauma of the auto accident loosening the placenta and interrupting oxygen flow to the fetus -- he also tied in the stress of the accident and likely upset of hormonal levels due to the accident for good measure -- and he was cross examined effectively

    b. A doctor for the defense said he doubted that the trauma was the cause and rather that it was more likely due to a defective or immature sperm and that opinions as to cause were speculative because at the time the exact cause of Down's Syndrome was unknown

    c. In fact in the medical literature to that time no less than 39 causes of DS had been suggested

    d. The Wis. SC in 1959 overturned the verdict holding that there was not sufficient scientific knowledge of the cause of DS

    e. The court got lucky -- the same year -- 1959 -- happened to be the year that the cause of DS was found to be genetic in origin and trauma cannot and does not cause Downs Syndrome in any way -- the court never knew of the discovery having issued it's decision before the publication of the discovery

    f. A historian of Downs Syndrome writes this about such cases and provides good guidance to you for passage of this bill:

        i. "There were legal implications too when accidents during the pregnancy were adjudged to be the cause of the anomaly and awards were paid as compensation for injuries which had nothing to do with the child's DS."

        ii. "The public celebrates the harvest, but pays little attention to ploughing, sowing, and tending the growing plant. It is understandable that the public is impatient until the final goal is achieved. They are inclined to listen to those who promise quick solutions and shortcuts. We cannot blame them for that. But the serious investigators cannot give in to premature claims; they have to be critical and appear as spoilsports who stand in the way of rapid progress. Refutation of unjustified claims is a tedious job but it

is necessary."

iii. So too you would do well for our legal system to demand good science and not fast food science for our trials.

VI. Miscellany

A. Wisconsin ranks 11th in US Chamber rankings due to products liability concerns and the lack of a Daubert rule at state level

Now 17th

B. Opponents arguments

1. Assertion: We don't have a problem -- don't need this bill

   a. Answer: They are wrong as my quick example above demonstrates. That kind of case happens every day in Wisconsin

   b. The current rules are broke and do need fixing

   c. There is nothing in the current Wisconsin rules that demands that an expert use valid scientific data, valid scientific principles and apply the principles to the data

   d. Rather the rule is simply a look to see if the "expert" has qualifications and if the opinion will be of some assistance to the jury – the scientific validity of the opinion is not a required subject for an admissibility determination by the trial judge

2. Assertion: Credibility can be challenged by cross and leave weight to up to the jury

   a. Answer: That's expensive and chancy

   b. Jury attention, understanding and retention (especially in a big long case) is problematic -- NSF survey/test

3. Assertion: Causes delays in lawsuits

   a. Answer: To the contrary it makes lawsuits more efficient by getting rid of lawsuits without sufficient scientific basis and avoids jury trial time for the same reason

   b. While some Daubert hearings are involved, most can and are handled inside the normal motion docket of a trial court

4. Assertion: Judges don't have the expertise to make the determination

    a. Answer: If judges can't make the determination as to what is legitimate science how are jurors going to do it!!

    b. Plenty of materials from Federal Judicial Center to educate judges and seminars

5. Assertion: Stifles new theories

    a. Answer: No way -- new theories will develop nicely in science and when they are ready they can then be applied in the courtroom

    b. The courtroom isn't a laboratory

    c. Culls out the chaff and doesn't require rebuttal of unfounded science

6. Assertion: Will be applied in child custody and other non-accident cases

    a. Answer: May be even more of a need there for strict scientific evidence

    b. If there is a need to make a special rule for those cases then exempt them

    c. Assertion: This should be handled within the rule making process in the judiciary

    d. Answer: the judiciary is for whatever reason not motivated to address and solve the problem

    e. The legislature is an appropriate forum to address the problem since the judiciary has not seen fit to do so and because the legislature has an appropriately broader vision of the entire problem.

7. Assertion: good Wisconsin judges follow the principles of Daubert

    a. Then there should be no problem in formalizing a rule that they are already applying

C. The Daubert criteria for admissibility cannot be logically attacked

1. Based on scientific facts or data

2. Product of reliable principles and methods

3. Based on the application of those principles and methods to the facts of

the case

D. Will this effect encouraging business?

1. Yes -- US Chamber survey table 2

2. Yes -- 50 state surveys we routinely do for litigation shows same result

E. Disparate treatment

1. Take two manufacturers of the same product

   a. A Wisconsin business

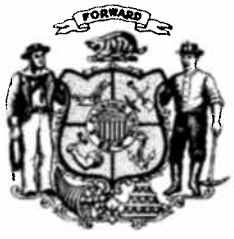
   b. An Illinois business

   c. Same accident

   d. Case brought in Wisconsin: expert testimony comes in without restriction -- let the jury decide

   e. Case brought or removed to Federal court because of diversity for the Illinois business -- Daubert applies and the evidence has to get by the gatekeeper

WISCONSIN STATE LEGISLATURE



Assembly Republican Majority
Bill Summary

AB 203: Junk Science
Relating to: evidence of lay and expert witnesses.

Introduced by Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich, Lamb, Towns, Krawczyk, Ainsworth, Vos, Kestell and Musser, cosponsored by Senators Kanavas, Stepp, Olsen and Brown.

Date: November 1, 2005

BACKGROUND

Under current law, if a witness is not testifying as an expert, the witness's testimony is limited to those opinions that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or of a fact at issue in the case.

Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case.

Also under current law, the facts or data in a particular case on which an expert witness bases his or her opinion may be made known to the expert at or before the case hearing, but if those facts or data are reasonably relied upon by experts in the field in forming opinions about the subject, they do not need to be admissible into evidence in the case.

SUMMARY OF AB 203

Assembly Bill 203 stipulates that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness. Also, the bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principals and methods, and that is based on the witness applying those principals and methods to the facts of the case. The bill also prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case.

Lastly, this bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect.

AMENDMENTS

There were no amendments.

FISCAL EFFECT

There was no fiscal estimate prepared for Assembly Bill 203.

PROS

1. Assembly Bill 203 has the potential to prevent "frivolous" lawsuits as dubious experts would be prevented from testifying using unproven statements.

2. Changes Wisconsin law to reflect the decision of a Supreme Court case relating to expert testimony.

3. Will enhance Wisconsin's business climate by improving the legal environment in which they must operate.

CONS

1. Wisconsin's current rules of evidence are sufficient in that Wisconsin courts my exclude relevant evidence on the grounds of prejudice, confusion or waste of time.

2. Potential to increase court costs and time, as the court must hold preliminary hearings to determine if a witness qualifies as an expert witness.

3. Provisions do not apply for criminal proceedings.

SUPPORTERS

Rep. Scott Suder, author; Sen. Ted Kanavas, lead co-sponsor; Wisconsin Manufacturers and Commerce; National Federation of Independent Businesses; Civil Trial Council of Wisconsin; WI Coalition for Civil Justice; WI Economic Development Association; Wisconsin Federation of Cooperatives; Wisconsin Electric Cooperative Association.

OPPOSITION

State Bar of WI; WI Academy of Trial Lawyers; Director of State Courts; WI Department of Financial Institutions; WI Department of Regulation and Licensing; Association of State Prosecutors; WI Division of Hearings and Appeals.

HISTORY

Assembly Bill 203 was introduced on March 14, 2005, and referred to the Assembly Committee on Corrections and the Courts. A public hearing was held on May 18, 2005. On June 1, 2005, the Committee voted 6-4 [Reps. Pope-Roberts, Wasserman, Seidel and Parisi voting No] to recommend passage of Assembly Bill 203.

CONTACT: Andrew Nowlan, Office of Rep. Garey Bies

Assembly Republican Majority
Bill Summary

2003SB49

SB 49: Junk Science
Relating to: evidence of lay and expert witnesses.

Introduced by Senators Welch, Stepp and Kanavas; cosponsored by Representatives Gundrum, Olsen, Hines, Albers, Townsend, McCormick, Krawczyk, Nass, Vukmir, Musser, Van Roy, Gunderson and Ladwig.

Date: March 9, 2004

BACKGROUND

Under current law, if a witness is not testifying as an expert, the witness's testimony is limited to those opinions that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or of a fact at issue in the case.

Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case.

Also under current law, the facts or data in a particular case on which an expert witness bases his or her opinion may be made known to the expert at or before the case hearing, but if those facts or data are reasonably relied upon by experts in the field in forming opinions about the subject, they do not need to be admissible into evidence in the case.

SUMMARY OF SB 49 AS AMENDED BY COMMITTEE

Senate Bill 49 stipulates that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness. Also, the bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principals and methods, and that is based on the witness applying those principals and methods to the facts of the case. The bill also prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case.

Lastly, this bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect

AMENDMENTS

Assembly Amendment 1 extends application of the standards for evidence of lay and expert witnesses created in the bill to all administrative hearings, except in a county zoning adjustment board appeal under s. 59.694, and in a city zoning board of appeals under s. 62.23 (7) (e).

FISCAL EFFECT

There was no fiscal estimate prepared for Senate Bill 49.

PROS

1. Senate Bill 49 has the potential to prevent "frivolous" lawsuits as dubious experts would be prevented from testifying using unproven statements.

2. Changes Wisconsin law to reflect the decision of a Supreme Court case relating to expert testimony.

3. Will enhance Wisconsin's business climate by improving the legal environment in which they must operate.

CONS

1. Wisconsin's current rules of evidence are sufficient in that Wisconsin courts my exclude relevant evidence on the grounds of prejudice, confusion or waste of time.

2. Potential to increase court costs and time, as the court must hold preliminary hearings to determine if a witness qualifies as an expert witness.

3. Provisions do not apply for criminal proceedings.

SUPPORTERS

Sen. Bob Welch, author; Rep. Mark Gundrum, lead co-sponsor; Wisconsin Manufacturers and Commerce; Paul Benson; WI Insurance Alliance; American Family Insurance; National Federation of Independent Businesses; Petroleum Marketers Association of WI; Civil Trial Council of Wisconsin; WI Utilities Association; WI Coalition for Civil Justice; WI Economic Development Association.

OPPOSITION

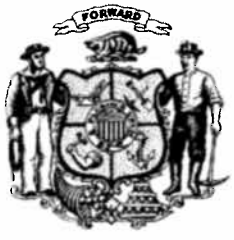
Legislative Committee of WI Judicial Council; State Bar of WI; WI Academy of Trial Lawyers; Director of State Courts.

HISTORY

Senate Bill 49 was introduced on February 26, 2003, and referred to the Senate Committee on Judiciary, Corrections and Privacy. A public hearing was held on April 9, 2003. On October 10, 2003, the Senate Committee voted 3-2 to recommend passage of Senate Bill 49. On February 3, 2004, the Senate voted 18-15 to pass Senate Bill 49. On February 5, 2004, Senate Bill 49 was received by the Assembly and referred to the Assembly Committee on Corrections and the Courts. A public hearing was held on February 11, 2004. On March 3, 2004, the Committee voted 6-3 to recommend concurrence as amended of Senate Bill 49.

CONTACT: Andrew Nowlan, Office of Rep. Garey Bies

WISCONSIN STATE LEGISLATURE



he would draw a line in the sand and side with the utilities or with the f***ing farmer. Such testimony should be excluded as irrelevant and under Wis. Stat. § 904.03.

31. Plaintiffs cannot raise any issues regarding the Milan Cheese Factory as an issue in this case. Plaintiffs' expert, B. Arthur Hughes, has done no investigation regarding the equipment or electrical usage or equipment in the cheese factory.

32. Prohibiting plaintiffs from testifying about the effects of any electrical measurements made that are not a cow contact measurement. All of plaintiffs' experts agree that the cow must access electricity for it to cause harm. Unless measurements are made in a cow contact area, then there could be no relationship.

33. Plaintiffs may not argue that wraps placed on NSP's conductors north of the Gumz farm are evidence of any electrical activity other than that the wraps are designed to prevent conductors from galloping due to air flow. Plaintiffs have no foundation for making any claim regarding the wraps, and this information should be excluded under Wis. Stat. § 904.03.

34. Plaintiffs may not argue that electrical sags or swells as measured by the testing of David Stetzer have any impact. Both Messrs. Stetzer and Hughes admit that sags and swells are not of issue. Dr. Schulte did not have any information regarding sags or swells.

35. David Stetzer lacks competence to provide expert testimony. David Stetzer is an electrician, but he is not a master electrician.

36. Plaintiffs may not present evidence of methods of abatement at trial. The first time the issue of abatement came up was the day before mediation of July 27, 2004. Plaintiffs' Complaint alleges claims for injury and damage. (¶¶ 10, 13, 17, 21, 25, and 30-31). Plaintiffs' requested "compensatory damages" as a consequence of their negligence, the nuisance, trespassing statutory

testing. However, plaintiffs are able to question whether appropriate testing was conducted by NSP in this case.

Motion in Limine 28 - Stetzer/Hughes Cause Opinions: *Granted*; neither David Stetzer nor B. Arthur Hughes may testify that electricity was a cause of harm or impact of the Gumz dairy herd. Arthur Hughes may testify about electrical measurements calculated through circuit or model analysis, i.e., an electrical, not biological, analysis.

Motion in Limine 29 - Criticism of the Multigrounded Wye Distribution System: *Granted*; plaintiffs may not argue that the multigrounded wye distribution system is inappropriate, and will not be bringing in evidence of other types of distribution systems such as a five-wire system, unigrounded system, or delta system. However, plaintiffs may present evidence and testimony critical of the NSP distribution system providing service to the Gumz farmsteads.

Motion in Limine 30 - Alleged Statement of Mark Cook from the PSCW: *Denied*; plaintiffs may introduce Mr. Cook's alleged statement as it goes directly to credibility and bias.

Motion in Limine 31 - Milan Cheese Factory: *Granted/stipulated*; plaintiffs may not raise any issues regarding the Milan Cheese Factory in this case.

Motion in Limine 32 - Non-Cow Contact Electrical Testing: *Denied*; however, see the decision at Motion in Limine 45, which was *granted*. NSP *stipulates* that plaintiffs may use testing that would help demonstrate the source of any electricity measured in cow contact areas subject to limitations placed on test results as set forth in the decisions on Motions in Limine 45 and 52. Plaintiffs' proposed use of load logger test results of NSP's distribution system as evidence of NSP as a source of ground current and percentages related thereto is subject to the order in Motion in Limine 45.

Motion in Limine 33 - Wraps on NSP's Conductor: *Stipulated* that this will not be an issue at trial and will not be testified to.

Motion in Limine 34 - Electrical Sags/Swells Measured by Mr. Stetzer: Plaintiffs *stipulate* that sags and swells are not an issue in this trial and will not be testified to.

Motion in Limine 35 - Stetzer Expert Testimony: *Denied* in part; *granted* in part. Plaintiffs have *stipulated* that David Stetzer will be testifying regarding testing techniques, testing protocols, presentation of data, mitigation, sources of measurement, and interpretations of his results. These will be electrical interpretations only, and Mr. Stetzer will not talk about electricity's effect on cows.

Motion in Limine 36 - Methods of Abatement: *Granted*; there is not a claim for abatement or injunctive relief in this case and that will not be an issue at the trial of this action.

Q You've seen all the different documents that record the swells out at the Gumz farm. Are there any swells of this second order concern?
A The ones I've looked at did not show a distortion of the wave. And without the distortion of the wave I wouldn't have any concern with respect to the cow. Whether there's a equipment sensitive is another issue, but certainly not with respect to the cow.
Q So I don't have to worry about swells and sags, is that a fair statement?
A As far as I'm concerned you don't. I can't speak for everybody else.

(Hughes 7/21/04 Depo, p. 104-105, ll. 24-25, 1-21)

C. The following is testimony from Richard Schulte's deposition:

Q (By Mr. O'Brien, continuing) Okay. Do you agree with Mr. Stetzer who said that on a lot of his reports, the[y] record sags and swells, and that has nothing to do with the cattle?
A I'm not -- I can't comment on that.
Q So you have no opinions as to whether a sag would have any impact on a dairy cow, correct?
A I have no -- no information on that, no opinion.
Q And likewise, you have no opinion or information as to whether a swell would have an impact on a dairy cow?
A I don't.
Q What I said is correct?
A Correct.

(Schulte Depo., pp. 65-66, ll. 13-25, 1)

35. DAVID STETZER IS INCOMPETENT TO TESTIFY TO ANYTHING OTHER THAN BASIC ELECTRICIAN ISSUES.

A. The following is testimony from David Stetzer's July 20, 2004 deposition:

Q Please state your full name?
A David Allen Stetzer.
Q How old are you?
A 52.

Q Date of birth?
A 1st month, 8th day of '52.
Q Could you provide me your educational background?
A Yes. I was a graduate of Blair High School.
Q What year was that?
A 1970. I went to military in 1970.
Q Which branch?
A United States Air Force.
Q How long were you in the United States Air Force?
A Four years.
Q That brings us to '74, is that correct?
A Yes. End of '74.
Q Did you get any specific education or training while in the Air Force?
A Yes. I attended Keesler Air Force Base, Biloxi, Mississippi, where I was trained in electronics, was ground radio communications electronics technician. I later went to San Antonio, Texas, where I was trained in crypto.
Q That's decoding or encoding?
A Yes. Electronics.
Q Did you obtain any type of certificate or degree from the Air Force in terms of electricity or electronics?
A Yes. We had certificates, all the training classes we obtained, or that we went to.
Q What do those certificates, or what were they in?
A Electronics, crypto equipment, different pieces of equipment that we were skilled in.
Q What is the field of electronics?
A Well, it would be the theory of electricity. We had the first, I believe they call it BED, I believe six months of electrical theory. And then we went on to specific pieces of equipment and technology where we apply the theory to the different types of equipment that we repaired.
Q What is BED?
A Basic electronic development, or something. I don't remember the exact.
Q What type of electronic equipment were you trained in in the Air Force?
A Transmitters, receivers, mainly communications equipment.

Q Would that be the same in working with the crypto equipment?
A Yes. Crypto is classified.
Q But that's a transmitter or receiver type?
A Yes. That's the type.
Q When you were in the Air Force, did you do any training on meters for voltage current measurements?
A Define the training.
Q Well, were you trained in using electric meters?
A Oh, yes.
Q Tell me about that.
A Well, we used different pieces of equipment from, to repair this electronic equipment and to maintain it. We used oscilloscopes, spectrum analyzers, digital multimeters, frequency counters, to name a few.
Q And your use of those meters was basically to test, repair and maintain?
A Test, repair and maintain the?
Q The equipment?
A The electronic equipment, yes.
Q Any other areas of electricity or electronics that you dealt with while in the Air Force? You've talked to me about the general heading of electronics and crypto equipment.
A That was my specific job. If there was other problems, somebody had trouble with radar, I went there a couple times. Wherever they sent me.
Q Other than the BED that you described, have you had any formal training in electricity?
A I'm not sure what you mean by formal training. I've attended classes since then or different training classes on equipment sponsored by Allen Bradley, equipment manufacturers, programmable logic controllers, things like that.
Q Have you ever taken any college courses?
A No.
Q Have you taken any engineering courses?
A No.
Q Please describe for me these type of classes that you've taken, for example, you mentioned Allen Bradley and some other manufacturers, what type

of courses or seminars you've taken in the area of electricity?
A I don't remember all them. I've been electrician for in this field since 1975 in my own business. Different classes on different types of equipment that would be, it would be sponsored by different manufacturers of this equipment. I don't have a recollection of them all. Give you an example of programmable logic controllers, variable speed frequency drives.
Q You've indicated that you've had your own business since 1975. What's the name of that business?
A Stetzer Electric, Inc.
Q What is the business of Stetzer Electric, Inc.?
A Business of Stetzer Electric, Inc. is sales and service of electrical apparatus equipment, vibration analysis, electrical contracting.

(Stetzer Depo., pp. 5-9, ll. 18-25, 1-25 . . . 1-25)

Q Since the Air Force, what formal training have you had regarding transients and harmonics?
A I would believe there would be none, that I can remember.
Q Mr. Stetzer, what's your role in this case regarding the Gumz farm?
A I was hired by the Gumz as an electrical consultant to measure the voltage and power quality issues on their farm, the voltage on the barn floor.
Q In what areas will you render opinions at the trial in this case?
A I have no idea.

Q (By Mr. O'Brien, continuing) Well, we've got a document that was provided to me just before this deposition called key issues.
A Well, don't I have to answer any questions they ask me at the trial? I have no idea what kind of questions I'm going to be asked by you.
Q I'm trying to explore what areas that you have claimed knowledge and expertise in that will be

testified to at trial in this matter.
A Well, I think it would be the results of my meter readings and my findings.
Q I just asked you about formal training regarding transients and harmonics. How about informal training, have you had any informal training?
A That's a broad area. I don't know what you mean by informal training.
Q Well, anything other than sitting in a classroom I guess?
A Well, actually, I've been, I've traveled around the world. I've talked to several professors around the world. Dr. Martin Graham, Professor Yuri Grigoriev, Valery Cashnin, I'm not sure how to spell that, about transients and high frequencies and the effects on human health. Of course, Dr. Hughes, Dr. Magna Haves.

(Stetzer Depo., pp. 20-21, ll. 5-25, 1-21).

B. Please see Mr. Stetzer's deposition testimony in paragraph 28 at pages 7-11 of this affidavit.

36. ABATEMENT. (Please see pleadings).

37. PLAINTIFFS SHOULD BE PROHIBITED FROM ARGUING THAT HARMONICS OR HIGH FREQUENCY EVENTS WERE A CAUSE OF DAMAGE TO THE GUMZ HERD.

A. The following is testimony from David Stetzer's July 20, 2004 deposition:

Q Then the other report that we were talking about is Gumz Farm RPM Report before filter and isolation transformer and again dated July 13, 2004. And now in reviewing those documents, you've stated that you don't have any information that would allow you to state whether or not NSP's distribution system was in violation of IEEE 519, correct?
A Not on this report.
Q Do you have any information anywhere else that indicates or provides any documentation to you that NSP was not in compliance with IEEE 519?

basis?
A. Again, I'd have to go back and look through the NSP stuff. Offhand, I cannot. That is not where we were primarily looking.
Q. And if I asked you the same question for Exhibit 1, which is the Hereford facility, are you able to locate any place in that facility where any of the dairy herd were exposed to one one-hundredth of a volt on a continuous basis?
A. To my knowledge, the only measurements taken there were taken by NSP at the last measurement, farm measurement, and I have not seen the results of that. So the answer is no. I don't think there was other measurements taken there. At least not recorded.

(Hughes 8/5/04 Depo., pp. 102-106, ll. 18-25, 1-8; 11-25, 1-25, 1-21; 1-18)

Q. (BY MR. O'BRIEN) Do I have to go along on this a fourth time?
You have no expertise that would allow you to state that any level of electricity will cause damage to a dairy cow. You've testified that three times now. Are you changing that?
A. No. I think that what I testified to, I don't know what level the damage. Certainly, I've seen more cows struck by lightening. And that's damage all right, and that's electricity. So at some level we know there's damage. Do I know what level it is? No. I'm not changing that. But -- well, no. That's it.

(Hughes 8/5/04 Depo., p. 128, ll. 2-13)

B. The following is testimony from David Stetzer's July 20, 2004 deposition:

Q Are you a master electrician?
A No.
Q Have you been certified as an electrician by any community or governmental unit?
A No.
Q Have you ever taken the master electrician test?
A No.
Q Is there an area of specialization that you have within Stetzer Electric, Inc.?
A I work with power quality more recently.

Q How long have you been working with power quality?
A I've been working with power quality issues I would imagine since about 1980, somewhere in there.
Q What do you as a representative of Stetzer Electric, Inc. do in terms of working with power quality? Let's talk about the last 10 years.
A Well, power quality is becoming more of a major issue in industry, and so I spend most of my time with industry, protecting equipment, troubleshooting, finding out why things are happening or explaining and try to eliminate the problems.
Q What is your definition of power quality?
A Basically anything that deviates from the pure sinusoid that would cause a problem on the customer side.

(Stetzer 7/20/04 Depo., pp. 10-11, ll. 17-25, 1-19)

Q Do you have any farming background?
A Not really.

Q Would you agree that your farming experience is very, very limited?
A I don't know about very, very. Based by today's standard, I would say yes. I'm very limited.
Q Have you had any education or training as a veterinarian?
A No.
Q Have you had any education or training in the area of dairy science?
A No.
Q Have you had any education or training in the area of statistics?
A No.
Q Have you had any education or training in the area of biology?
A No.
Q Do you claim any expertise in the area of effects of electricity on dairy animals?
A Yes.

Q Tell me about that.
A Basically in a nutshell, the more the animal gets shocked, the less milk she gives.
Q Have you done any studies or -- strike that. Have you determined a level at which a dairy cow is exposed to certain electrical phenomenon that will cause damage to a dairy cow?
A No.
Q Will you be providing any testimony that is your opinion that the Gumz herd was impacted by exposure to electricity?
A Yes.
Q What form or forms of electricity -- strike that. Why don't I ask you this. What is your opinion as to whether the Gumz herd has been affected by exposure to electricity?
A Based on the readings that I collected over long-term on the barn floor, that the Gumz farm, and the amount of energy that would have been perceived by the cow and correlated with milk production, it's my opinion that the more the animal gets shocked or the more electrical energy that she is exposed to from the ground currents, the less milk she gives.
Q Do you have any training in agricultural engineering?
A No.
Q What is the basis then for your opinion that a cow in the Gumz herd perceived any electrical energy?
A I measured it.
Q Well, you went out there and collected some data, correct?
A We collected data and we collected the data over a long period of time.
Q What is the data that you collected over a long period of time?
A We collected data, we put measurement instruments on the barn floor, oscilloscope readings, and we logged it on a daily basis, saved it, the Gumz saved it, and then we plotted against milk production.

(Stetzer 7/20/04 Depo., pp. 21-24, ll. 22-23; 8-25, 1-25, 1-18)

Q You told me that you do not have the expertise to state what level of electricity a cow perceives, but you told me that you have an opinion that electricity was impacting the Gumz herd?
A That's true.
Q What's the basis for your opinion that the Gumz herd has been impacted by electricity?
A Cause and effect.
Q And when you say cause and effect, you're talking about these Gumz Daily Milk Tank Weights and Average Frequency and Gumz Average Vpp Reading and Production charts?
A That's part of it. I'm basing my decision on the other farms I've been on since 1998 where I see the same thing.

(Stetzer 7/20/04 Depo. pp. 31-32, ll. 18-25, 1-7)

Q (By Mr. O'Brien, continuing) There are numerous reasons why a cow may behave why she does?
A Yes.
Q There are numerous factors that affect milk production in a dairy cow and a dairy herd?
A Yes.
Q That there are numerous factors that are involved in herd health?
A Yes.
Q What did you do in your studies that are published in these articles to isolate the electrical studies and testing done as a source of the results that you've come up with?
A That I left to Mr. Goeke and to Mr. Hillman. That's their area of expertise.

(Stetzer 7/20/04 Depo., pp. 129-130, ll. 14-25, 1-3)

Q Do you relate anything to the number of events that occur over a period of time with opinions that you render regarding electrical impact on dairy cattle?
A Yes.
Q And what is that?
A The more events, the less milk production. The

less events, the more milk production. I think some of that can be explained here.
Q Which exhibit are we looking at?
A We have Exhibit 51, the average voltage reading. This would be the amplitude of the events.
Q And that's peak to peak, correct?
A Peak to peak, correct.
Q None of your test measurements are measured across a shunt resistor?
A None. This is a peak to peak. Average of that. And then the other one is Exhibit 52 showing the average frequency in herds, and frequency meaning the actual electrical frequency, not how often it happens, and there's a regression that affects milk production there.
Q And who prepared these charts?
A Chuck Goeke.
Q How many -- what was done to account for the other variables in milk production other than the two items listed here, the pounds of milk or either the level of voltage or the frequency?
A Okay, that you'll have to talk to Dr. Hillman and Mr. Goeke about.

(Stetzer 7/20/04 Depo., pp. 151-152, ll. 3-25, 1-7)

29. CRITICISMS OF MULTIGROUNDED WYE DISTRIBUTION SYSTEMS SHOULD BE STRICKEN AS IRRELEVANT.

The following is testimony from B. Arthur Hughes' July 21, 2004 deposition:

Q Do you have any criticism of utilities providing electrical power to dairy facilities on a multigrounded wye distribution system?
A If what you're saying is am I advocating or do I believe there should be a different form of distribution rather than multigrounded wye, is that what you're asking me?
(The court reporter read back as requested.)
A If the question is is the multigrounded wye an adequate construct, the answer is I have no trouble. If I -- if the question is do I believe that it is


FORWARD

AB 203 - Suder
Evidence of lay & expert witnesses

Conforms to federal standards and those adopted by 31 other states.

Witnesses must provide science-based testimony the product of ~~which must~~ reliable principles and methods.

Current law does allow judges to deny testimony of a witness if the judge feels the witness is in fact not an expert. There is a process in place in WI to attempt to exclude a witness from testifying before the witness appears befor a jury.

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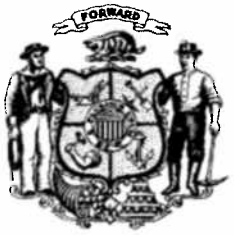

AB 203

Gundrum is a yes