

**Gingrasso v Association for Help of Retarded
Children**

2001 NY Slip Op 30027(U)

January 23, 2001

Supreme Court, Suffolk County

Docket Number:

Judge: Alan D. Oshrin

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MEMORANDUM

Comment
1/29
papers in
Chambers

SUPREME COURT, SUFFOLK COUNTY

TRIAL TERM
PART 28

LUCILLE GIANGRASSO as Conservator for
ANNETTE DENISE GIANGRASSO,

BY: HON. ALAN D. OSHRIN
J.S.C.

Plaintiff,

DATED: January 23, 2001

- against -

ASSOCIATION FOR THE HELP OF
RETARDED CHILDREN and TOWN
TRANSPORT BUS CO.,

INDEX # 14514/1993

Defendants.

TOWNE BUS CORP. s/h/a TOWN
TRANSPORT BUS CO.,

Third-Party Plaintiff,

- against -

MARK BRITTON,

Third-Party Defendant.

Madeline L. Bryer, P.C.
By: Jonathan I. Edelstein, Esq.
Attorneys for Plaintiff
60 East 42nd Street
New York, NY 10165

Friedberg & Raven
By: Michael T. Reagan, Esq.
Attorneys for Defendant Towne Bus
110 E. 59th St. 29th Floor
New York, NY 10022

Morrison, Mahoney & Miller
Attorneys for Defendant AHRC
By: Brian P. Heermance, Esq.
100 Maiden Lane
New York, NY 10038-4892

Harvey Besunder, Esq.
Referee
One Suffolk Square
Islandia, New York 11722

The plaintiff, Annette Giangrasso, a mentally retarded adult, commenced this action by her conservator alleging that while being transported by the defendant Towne Transport Bus Company (hereinafter "Towne Bus") to and from a workshop operated by the defendant, Association for Help of Retarded Children (hereinafter "AHRC"), she was

sexually assaulted and molested by Mark Britton, an employee of Towne Bus. The incident occurred in 1993. Mark Britton has entered a plea of guilty to a criminal charge stemming from the incident.

The plaintiff has expanded her claims during the seven years of this lawsuit, claiming that AHRC failed to provide adequate supervision of the defendant Towne Bus' activities and that the defendant Towne Bus negligently hired, trained and supervised Mark Britton, and should have had another employee on the bus.

Summary judgment has been denied by Order of this Court dated September 27, 1996. In denying summary judgment this Court permitted inquiry into the custom in the industry regarding psychological testing and the degree of investigation into the moral character of bus drivers and stated that Article 19-A of the Vehicle and Traffic Law sets minimum not absolute requirements for the hiring of bus drivers.

Discovery has been conducted under the supervision of a Referee, with a view towards protecting the rights of other persons involved in incidents which may be germane to this case. The Referee, Harvey Besunder, Esq., was appointed by Order dated September 29, 1998.

The issue for resolution at this time is whether a Dr. Edward F. Dragan may testify as an expert for the plaintiff concerning custom and usage in the special education field concerning: 1] the hiring, screening, training, supervision and retention of bus drivers; 2] the duty of schools or districts to monitor transportation contractors; and 3] safety and supervision of clients on buses. Dr. Dragan also intends to testify regarding the capabilities and vulnerabilities of mentally retarded adults with respect to sexual abuse. The Court has before it motions by Towne Bus and AHRC to preclude

to preclude such testimony and a cross motion by the plaintiff for the Court to rule in limine that such testimony is admissible.

Initially the Court notes that when considering issues of the admissibility of expert testimony, particularly where, as here, issues of reliability and acceptability are presented, the most appropriate procedural vehicle is the pre-trial motion to preclude or the pre-trial in limine motion to permit. In no other way can proper trial preparation occur. Importantly, this procedure can only be effective if there has been complete and proper compliance with the requisites of CPLR 3101(d).

Dr. Dragan has submitted a report dated September 27, 2000, in which he states that the objective of the assignment was to present an opinion as to whether AHRC and Towne Bus acted reasonably, prudently, and within accepted practice and standard of care when providing for the supervision and safety of clients. Dr. Dragan's resume indicates that he is a "Special Education Expert ...(and) Certified School Administrator (and) Certified Management Consultant". Dr. Dragan has served as a Director-Division of Special Services dealing with issues relating to children with disabilities and has taught, as an Adjunct Professor, courses relating to persons with disabilities. Dr. Dragan has an educational background indicating he has taken courses dealing with persons with disabilities, and courses dealing with issues relating to sexual abuse and transportation of persons with disabilities. Dr. Dragan has also been involved in the hiring of bus drivers and the supervision of transportation of students with disabilities.

Dr. Dragan opines that AHRC failed to develop an anti-sexual abuse policy; failed to provide adequate supervision for the plaintiff, and failed to assure Towne Bus drivers

were adequately trained. Dr. Dragan states that there is no evidence of any policy regarding training for drivers of individuals with mental disabilities. Dr. Dragan opines at length about the nature of individuals with mental disabilities and the nature of abusers of such individuals. Dr. Dragan's opinion/report is predicated, in large measure, upon literature.

Dr. Dragan reviewed the deposition of Pat Zilko, the Personnel Director of Towne Bus and the deposition of Beverly Geiger, a Director of the Work Activities Program at AHRC, as well as Natale Leo, Administrator of Workshop Operations of AHRC. No training or supervision was provided to Mark Britton by the defendant Towne Bus, or required of Towne Bus by AHRC. That failure according to Dr. Dragan "contributed to Annette's sexual abuse".

Dr. Dragan also reviewed a report prepared by the Referee, Harvey Besunder, Esq. concerning incidents involving misconduct. Dr. Dragan claims that the report is substantially inadequate because of a lack of information as to, for example, the number of incidents involving the driver, Mark Britton. Dr. Dragan does conclude that from the number of incidents, there is a need for closer supervision.

In support of its motion to preclude the expert testimony of Dr. Dragan, Towne Bus argues that the plaintiff does not need expert testimony to establish negligent hiring, retention, supervision or control; that the opinions of the plaintiff's expert would unnecessarily and improperly intrude upon the province of the jury, and that the plaintiff's expert intends to testify that the defendants violated a common-law duty to institute specific procedures for hiring employees, for which there is no common-law duty. AHRC joins in Towne Bus' opposition. AHRC also argues that the plaintiff's

liability expert has failed to identify any particular industry custom, practice or standard of care claimed to be violated by the defendants, and has failed to indicate that workshop programs for persons of the age and IQ of Denise Giangrasso would provide for bus matrons.

In support of her motion to permit the expert testimony, the plaintiff argues that Dr. Dragan is qualified to opine on the proposed topics; that Dr. Dragan's testimony will assist the trier of fact; that expert testimony is appropriate for issues of supervision and safety, and that Dr. Dragan could assist the jury by helping them understand the vulnerabilities of mentally retarded adults. The plaintiff also argues that a Magistrate for the United States District Court, District of New Jersey, permitted Dr. Dragan to offer expert testimony as to educational hiring and screening procedures and proper monitoring of transportation contractors in a case involving a developmentally disabled child who was sexually molested by a bus driver (*Doe v. Mercer County Special Services*, Civil Action No. 95-5893 [D.N.J. 1998]). The plaintiff also argues that the *Frye* "general acceptance" test (*Frye v. United States*, 293 F. 1013 [1923]) is not applicable and that Dr. Dragan's testimony would satisfy the *Daubert* and *Kumho Tire* "reliability" test (*Daubert v. Merrell Dow Pharms. Inc.*, 509 US 579 [1993]; *Kumho Tire Co. Ltd. v. Carmichael*, 526 US 137 [1999]).

Whether or not expert testimony is admissible on a particular point, and the bounds thereof, is a mixed question of law and fact addressed primarily to the sound discretion of the trial court (see *People v. Cronin*, 60 NY2d 430, 470 NYS2d 110 [1983]; *Selkowitz v. County of Nassau*, 45 NY 2d 97, 408 NYS2d 10 [1978]). As a general rule the expert should be permitted to offer an opinion on an issue which

involves professional or scientific knowledge or skill not within the range of ordinary training and intelligence (see *Dougherty v. Milliken*, 163 NY 527 [1900]). It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day to day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness (see *People v. Cronin*, 60 NY2d 430, supra). The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror (see *DeLong v. County of Erie*, 60 NY2d 296, 469 NYS2d 611 [1983]). Indeed, even if the proposed testimony was not beyond the jury's ken, the Court of Appeals has upheld the admission of expert testimony for the purpose of clarifying an area of which the jurors have a general awareness (see *People v. Mooney*, 76 NY2d 827, 560 NYS2d 115 [1990][Kaye dissent]; *Selkowitz v. County of Nassau*, 45 NY2d 97, supra; *DeLong v. County of Erie*, 60 NY2d 296, supra).

Significantly, in a case in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training and intelligence, the qualified expert may testify not only to facts, but the conclusions to which they lead (see *Dougherty v. Milliken*, 163 NY 527, supra; see also *Schutz v. Union Railway, Co.*, 181 NY 33 [1905]). Where the expert states the facts and gives his conclusion in the form of an opinion, it remains for the jury to accept or reject such opinion (see *Dougherty v. Milliken*, 163 NY 527, supra). The test is one of need to be applied to the unique circumstances of each case (see *Dufel v. Green*, 84 NY2d 795, 622 NYS2d

900 [1995]). If the jury requires the benefit of the expert's specialized knowledge, the expert's opinion should be allowed even when it bears on an ultimate question (see *Dufel v. Green*, 84 NY2d 795, supra, citing Fisch, New York Evidence § 413 at 264 [2d ed]).

It has been said that "[i]n a sense, opinion testimony of an expert witness necessarily enters upon the juror's province since the expert - and not the jury - draws conclusions from the facts, which the jury is then asked to adopt" (*People v. Cronin*, 60 NY2d 433, supra; see also *People v. Miller*, 91 NY2d 372, 670 NYS2d 978 [1998]). Both sides, of course, may cross examine and impeach the opposition's experts and adduce different opinions through their own experts (see *People v. Cronin*, 60 NY2d 433, supra; *Selkowitz v. County of Nassau*, 45 NY2d 97, supra). As noted above, it remains for the jury to accept or reject any opinion presented (see *Dougherty v. Milliken*, 163 NY 527, supra).

Turning from the general to the specific, the Court observes that expert testimony has been found to be permissible in the areas of the supervision and safety of children (see e.g. *Maness v. City of New York*, 201 AD2d 347, 607 NYS2d 325 [1994]; *Amato v. Hudson Country Montessori Sch.*, 185 AD2d 803, 586 NYS2d 635 [1992]; *Chan v. Board of Educ. City of NY*, 162 AD2d 576, 557 NYS2d 91 [1990]; *Franck v. Minisink Valley Sch. Dist.*, 130 AD2d 588, 523 NYS2d 573 [1988]); the supervision and safety of mentally retarded children (see e.g. *Rodriguez v. Board of Educ. City of NY*, 104 AD2d 978, 480 NYS2d 901 [1984]), and the capabilities, limitations and vulnerabilities of developmentally disabled adults (see e.g. *Matter of Joyce T.*, 65 NY2d 39, 489 NYS2d 705 [1985]; *Matter of Abby B.*, 269 AD2d 819, 703 NYS2d 780 [2000]). The Court also

observes that experts may opine as to standards of care and the breach thereof (see generally *Portilla v. Rodriguez*, 179 AD2d 631, 578 NYS2d 241 [1992]; *Robillard v. Robbins*, 168 AD2d 803, 563 NYS2d 940 [1990] affd 78 NY2d 1105, 578 NYS2d 126 [1991]). Upon the principles discussed above, the Court finds that the defendants' arguments that expert testimony is unnecessary to establish negligent hiring, retention, supervision or control, that an expert opinion will unnecessarily intrude upon the province of the jury and that it is not proper for an expert to testify as to duty, standard of care and breaches thereof, are unpersuasive and pose no absolute impediment to the proposed testimony herein.

The Court will now address the issue of the standard to be applied in determining whether an expert's opinion may properly be presented to, and considered by, the jury. Initially, the Court notes that neither defendant offered argument or authority on this issue on the present applications, although the plaintiff did. The Court also notes that on a prior application subsequent to a July 5, 2000 Court Conference all parties submitted letters to the Court setting forth their respective positions on the standard to be applied. A review of these letters reveals that the parties are in essential agreement that the *Daubert* and *Kumho Tire* reliability standard should be applied by this Court in determining whether Dr. Dragan should be permitted to testify on the topics proposed. Additionally, Towne Bus argues that this Court should, as it did in *Wahl v. American Honda Motor Co.*, (181 Misc2d 396, 693 NYS2d 875 [1999]) conduct a hearing in which the "defendants should be allowed to cross-examine Dr. Dragan as to the exact content of his proposed testimony, as well as the relevance of said testimony to the facts of the case".

As this Court observed in Wahl, where the evidence is not scientific or not novel, the “general acceptance” test of Frye v. United States (293F. 1013, supra) is not applicable (citing People v. Persuad, 244 AD2d 577, 665 NYS2d 671 [1997] app den 9l NY2d 976, 672 NYS2d 885 [1998]; People v. Roraback, 242 AD2d 400, 662 NYS2d 327 [1997] app den 9l NY2d 879, 668 NYS2d 577 [1997]; People v. DiNonno, 171 Misc2d 335, 659 NYS2d 390 [1997]; see also “Considering the ‘Frye’ Rule in New York Justice”, Hon. Walter J. Relihan, Jr., NYLJ Sept 15, 2000, P. 1 Col. 1). In the case at bar, the proposed testimony of Dr. Dragan would be of a professional nature rather than a scientific or technical nature. As such, the Frye “general acceptance” test is not the appropriate standard. In this regard, the Court notes that Chief Judge Kaye in her dissent in People v. Mooney (76 NY2d, supra) stated that the Frye standard is not “the appropriate standard to be applied to the testimony of a qualified psychologist who proposes to explain to the jury how certain factors shown by the record can affect perception and memory, and thus the accuracy of identification testimony”. The Court, therefore, is in agreement with the parties that the appropriate test to be applied is the reliability standard as derives from Daubert and Kumho Tire and not the more stringent Frye standard.

In Daubert v. Merrell Dow Pharms. Inc. (509 US 579, supra) the United States Supreme Court focused on the admissibility of scientific expert testimony, stating that such testimony is admissible only if it is both relevant and reliable. The Supreme Court held that it was the task of the trial judge to ensure that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand (509 US at 597). The Supreme Court also discussed certain factors, such as testing, peer review, error rates, and acceptability in the relevant scientific community, some or all of which might prove

helpful in determining the reliability of a particular scientific theory or technique (509 US at 593-594).

In *Kumho Tire Co., Ltd. v. Carmichael* (526 US 137, *supra*) the United States Supreme Court ruled that *Daubert's* general holding, setting forth the trial judge's general "gate-keeping" obligation applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge (526 US at 141). The Supreme Court also ruled that the trial court may consider one or more of the specific *Daubert* factors when doing so will help determine the reliability of proposed testimony (526 US at 141). The Supreme Court stated that the test of reliability is flexible; that the specific *Daubert* factors neither necessarily nor exclusively applies to all experts or in every case, and that the trial court has broad discretion in the manner in which it determines reliability in light of the particular facts and circumstances of the particular case (526 US at 141; 149-150).

In discussing how the evidentiary rationale that underlies the Court's basic *Daubert* "gate-keeping" determination is not to be limited to "scientific" knowledge, the Supreme Court in *Kumho Tire* observed that "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gate-keeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge" (526 US at 148). The Court further observed

Neither is there a convincing need to make such distinctions.

Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from ... specialized experience". Hand, Historical and Practical Considerations Regarding expert Testimony,

15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own". The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

(526 US at 148-149). In this regard, the Court notes that the New York Court of Appeals in *Price v. New York City Hous. Auth.* (92 NY2d 553, 684 NYS2d 143 [1998]) observed that although the expert witness "did not have formal training in psychology or the behavioral sciences, an expert may be qualified without specialized academic training through 'long observation and actual experience'" and that "an expert's competency can be derived just as well 'from the real world of everyday use' as from a laboratory".

The background and experience of Dr. Dragan, the areas of his proposed testimony and the essence of his opinions and conclusions were discussed above. Also discussed above are the factors and principles which guide the trial court in performing its "gate-keeping" function to assure that the proposed testimony of an expert is sufficiently reliable, trustworthy and relevant so as to be presented to, and considered by, the jury.

Testimony similar to that which the plaintiff seeks to have Dr. Dragan offer to the

jury in the case at bar was permitted by Magistrate Judge Wolfson in the case of *Doe v. Mercer County Special Services* mentioned above. As noted, the *Doe* case concerned a developmentally disabled child who was sexually molested by a bus driver. The Magistrate permitted Dr. Dragan to opine as to whether supervision of an employee comported with established standards in the education industry and whether there was a proper training of employees. The Magistrate did not permit Dr. Dragan to opine as to whether abuse would have occurred if proper training and supervision occurred, and whether based on certain facts a report of misconduct should have been filed. Although this decision is instructive, it does not mandate admission of the proposed testimony in the case at bar because of the distinguishing facts of a mentally retarded adult being transported to and from a workshop program, as opposed to a developmentally disabled infant being transported to and from a school offering special education programs.

In denying Towne Bus' motion for summary judgment dismissing the Complaint in 1996, this Court found that genuine issues of material fact were presented as to the negligent hiring and/or negligent retention of Mark Britton which requires both denial of Towne Bus' motion for summary judgment and exploration during pre-trial discovery. This Court wrote:

In particular, the plaintiffs may explore during pre-trial discovery the nature of the moral character investigations performed by other bus companies which transport handicapped individuals; whether other bus companies which transport handicapped individuals perform psychological testing on potential employees, and the nature

and extent thereof; the steps other bus companies which transport handicapped individuals take against drivers who have a history of traffic infractions and accidents; what steps were taken by AHRC when notified by Lucille Giangrasso on two occasions of incidents involving bus drivers (at least one with Mark Britton); whether AHRC notified Towne Bus; whether AHRC was obligated to notify Towne Bus, and if notified what Towne Bus was obligated to do and what Towne Bus, in fact, did with respect to the two incidents.

The question is whether Dr. Dragan is qualified to offer testimony as an expert concerning custom and usage in the special education field concerning the hiring, screening, training, supervision and retention of bus drivers; the duty of schools or districts to monitor transportation contractors and the safety and supervision of clients or buses, as well as concerning the capabilities and vulnerabilities of mentally retarded adults with respect to sexual abuse. The companion question is whether the foundation for the proposed testimony is sufficient to permit the jury to hear and consider such testimony.

Dr. Dragan's conclusions as to the adequacy of the training, investigation and supervision by the defendants are offered in the context of the transportation of an adult with disabilities supported by reference to numerous articles and treatises whose relevancy the Court finds cannot be determined upon papers alone. Although Dr. Dragan appears to possess sufficient background to opine as to characteristics of persons with disabilities, insofar as such characteristics are relevant to the issues at

bar, there is an absence of material showing the relevant standards appropriate to this case. Inasmuch as the issue is the reasonableness of training, supervision and investigation, the expert's opinion must be demonstrated to be on a sound footing - a result which if it can be achieved at all, this Court finds cannot be achieved based upon only a report containing conclusions buttressed in large measure upon articles and treatises not made available to the Court. With respect to the written materials the Court is mindful that the materials must be of a kind accepted in the profession as reliable in forming a professional opinion (see People v. Sugden, 35 NY2d 458, 363 NYS2d 923 [1974]; see also Hambusch v. New York City Trans. Auth., 63 NY2d 723, 480 NYS2d 195 [1984]). The Court is also mindful that Dr. Dragan cannot be used as a mere conduit for the presentation and admission of what otherwise would be excluded as hearsay of another expert that bolster the testifying expert's opinion (see Hutchinson v. Groskin, 927 F 2d 722 [1991]; see also People v. Griffin, 985 P2d 15 [1998] [Colorado Ct of Aps]).

Although the defendant, AHRC has offered the report of its own expert, Margaret M. Groce, MS, to dispute the opinions and conclusions of Dr. Dragan, the defendants have not been afforded the opportunity to challenge Dr. Dragan's opinions and conclusions upon cross examination. Given that much of the basis for Dr. Dragan's opinions and conclusions derives from articles and treatises, and given that the defendant AHRC has produced its own expert to refute Dr. Dragan's opinions and conclusions, the Court finds that it cannot appropriately determine the question of the reliability, trustworthiness and relevancy of the proposed testimony of Dr. Dragan without an evidentiary hearing. Accordingly, Towne Bus and AHRC's motions to

preclude Dr. Dragan's testimony and the plaintiff's cross motion to permit Dr. Dragan's testimony are determined to the extent of this hearing, only, at the present time.

This Court will now address Towne Bus' CPLR 3215 motion for a default judgment as against the third-party defendant. Towne Bus did not submit an Affidavit of Service of the Third-Party Summons and Third-Party Complaint upon Mark Britton (CPLR 3215[f]). The Third-Party Complaint is not verified and no Affidavit of Merit was submitted (CPLR 3215[f]). There is no proof that the third-party defendant, Mark Britton, was served with all prior pleadings in the action within 120 days of filing of the Third-Party Summons and the Third-Party Complaint as required by CPLR 1007. Finally, more than one year has passed from the time of the purported default to the time of application to enter a default judgment, and the third-party plaintiff has made no attempt to show why the Third-Party Complaint should not be dismissed (CPLR 3215[c]). Accordingly, the motion for a default judgment is denied and the Third-Party Complaint is dismissed by operation of CPLR 3215[c] and CPLR 1007 and CPLR 306-b(a) (see Alexander Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR c1007:7)

SHORT FORM ORDER SIGNED SIMULTANEOUSLY HEREWITH.



J.S.C.