

Serial: 104780

IN THE SUPREME COURT OF MISSISSIPPI
No. 89-R-99002-SCT

***RE: MISSISSIPPI RULES OF
EVIDENCE***

ORDER

This matter is before the Court en banc on its own motion for consideration of Rules 701 and 702 of the Mississippi Rules of Evidence. Having considered the matter, the Court finds that the amendment of Rules 701 and 702 and the Comments thereto as set forth in Exhibit “A” hereto will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that Rules 701 and 702 of the Mississippi Rules of Evidence and the Comments thereto are amended as set forth in Exhibit “A” hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 29th day of May, 2003.

/s/ William L. Waller, Jr. _____
WILLIAM L. WALLER, JR., JUSTICE
FOR THE COURT

McRAE, P.J. DISSENTS.

EASLEY, J. DISSENTS WITH SEPARATE STATEMENT JOINED BY McRAE, P.J.

DIAZ, J. NOT PARTICIPATING.

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IN RE: MISSISSIPPI RULES OF EVIDENCE

EASLEY, J., DISSENTS WITH SEPARATE WRITTEN STATEMENT

I have to wonder how many members of this Court have tried a case where they presented an expert witness. This amendment puts restraints on the evidence and is not in the best interest of justice.

McRAE, P.J., JOINS THIS STATEMENT.

EXHIBIT “A” TO ORDER
MISSISSIPPI RULES OF EVIDENCE

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, ~~his~~ the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to the clear understanding of ~~his~~ the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 2000. Amended effective May 29, 2003 to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.]

Comment

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing ~~himself~~ the witness’s thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

[Comment amended effective May 29, 2003.]

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an

opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[Amended effective May 29, 2003 to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.]

Comment

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the Federal Rules Advisory Committee's Note pointed out, it will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton*, 379 So.2d 520 (1980); *Early-Gary, Inc. v. Walters*, 294 So.2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. See *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* "list of factors was meant to be helpful, not definitive." *Kuhmo*, 526 U.S. at 151. See also *Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002). Nor does 702 relax the requirement that the scientific principle from which the expert's opinion is derived "must be sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. U.S.*, 293 Fed. 1013, 1014 (1923). *House v. State*, 445 So.2d 815 (Miss. 1984) provides useful guidance for determining whether or not the field of knowledge has gained such "general acceptance." The House case posits this test:

~~"Is the field of expertise one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion? Where the answer to this question is in the affirmative, we generally allow expert testimony."~~

~~See, also, *Hardy v. Brantley*, 471 So.2d 358, 366 (Miss. 1985).~~

[Comment amended May 29, 2003.]