New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
Litigation
An ALM Publication
WWW.NYLJ.COM
MONDAY, FEBRUARY 23, 2015

Evidence Rulings Address Authentication, Present Sense Impressions

BIGSTOCK

BY MARK S. MULHOLLAND

The U.S. Supreme Court once observed that a party is entitled to a fair trial, not a perfect one.[1] At least one piece of inadmissible evidence creeps into the typical case, inadvertently if not by design.[2] Fortunately for an already over-burdened judicial system, the admission of inadmissible evidence usually is curable by a limiting instruction, rather than a reversible error requiring a mistrial.

Some mistakes of course are outcome determinative. Trial level lapses leading to faulty yet dispositive evidence reaching the jury may be rare, but epic mistakes do happen—and are enormously costly when they do. Litigants, lawyers and the judicial system at large collectively pay a high price when a trial is redone to correct an evidentiary miscue. Recent decisions from around New York state arising from an assortment of admission errors demonstrate the resilience and enduring importance of fundamental evidentiary rules.

Faulty Webpage Authentication

The U.S. Attorney's office learned the hard way that age-old principles of authentication and foundation apply to the treasure trove of ostensibly reliable data available on the Web. In *U.S. v. Vayner*,[3] at trial before U.S. District Judge I. Leo Glasser, the government aimed to convict Aliaksandr Zhyltsou of transferring a false identification document in violation of federal law. The prosecution's principal witness was Vladyslav Timku, a Ukranian citizen living in Brooklyn who reportedly wanted a forged birth certificate showing Timku to be the father of an invented infant daughter, which would permit Timku to avoid compulsory military service in his native Ukraine. Timku had been arrested and convicted himself for, among other deeds, impersonating a diplomat. Timku testified that he had met with Zhyltsou in a Brooklyn Internet café, where the two chatted over coffee while Zhyltsou composed the fake daughter document on a laptop. At trial, Timku testified that he received the completed forgery and successfully used it to avoid military service.[4]

The weak link in the government's case was that Timku had not received the forgery directly from Zhyltsou, but rather from a Gmail email address, which the prosecution claimed was operated by Zhyltsou. The government's case hinged on showing that the Gmail account belonged to the defendant. To do so, the government presented the testimony of a State Department security agent, who attested that he had visited a Russian social-media site, VK.com, which the agent characterized as the Russian equivalent of Facebook. The agent testified that he had printed out the profile page from the defendant's page, which included the Gmail account in question.[5]

Glasser admitted the print-out and the jury was able to reach a verdict convicting Zhyltsou of criminally transferring the phony birth certificate. On appeal, the Second Circuit held that Federal Rule of Evidence 901 governing authentication was not satisfied. Rule 901 requires "evidence sufficient to support a finding that the item is what the proponent claims it is." While the information on the VK.com profile page did describe and facially relate to the defendant—including a photograph of him—the court of appeals observed that anyone with information concerning the defendant could have created the identical site.[6] There was thus insufficient basis to deem the print-out authenticated—despite that the State Department's security agent appeared in court and testified under oath that he had retrieved the data personally.

The Second Circuit reversed the conviction and remanded the case for a new trial.[7]

Prevention of Prior Bad Act Inquiry

Civil litigators have a sweet tooth for tax returns and routinely demand an opposing party's federal filings even in cases where tax issues are not directly presented. But an individual's tax returns usually are off limits unless a special showing can be made establishing that the underlying information is otherwise not available.[8] *Young v. Lacy* was such a case—and the tax returns proved to be a bonanza for the defense.[9] Bonnie Young sued Barbara Lacy for injuries sustained in a car accident. At trial, counsel for defendant Lacy sought to question Young about why she had filed federal tax returns for four consecutive years as the "head of household, " when she was living with her husband and did not qualify as a head of household under clear IRS guidelines. At trial, Judge James Murphy refused to allow the inquiry. Ultimately, the court awarded damages in the amount of $329,000.[10]

On appeal, the Appellate Division reversed and remanded on the ground that the plaintiff's credibility was clearly at issue—if for no other reason than simply through her own testimony as a key witness—and the defense should have been allowed to at least question the plaintiff as to whether she had lied on her taxes.[11]

The Appellate Division observed that the issue was not whether the defense should have been allowed to use extrinsic evidence to contradict the plaintiff's testimony on a collateral matter—which generally is disallowed as explained by the Court of Appeals in *Badr v. Hogan*.[12] Rather, the issue was whether the defense ought to have been able to at least question the plaintiff about whether she had committed tax fraud, under the general rule that any witness may be cross-examined with regard to

MARK S. MULHOLLAND *is a senior partner and litigator at Ruskin Moscou Faltischek.* GRACIE WRIGHT, *an associate, assisted in the preparation of this article.*

specific immoral, vicious or criminal acts bearing on the witness' credibility.[13]

The appellate division reversed the damage award and remanded the case for a new trial based on the trial court's refusal to allow the inquiry into plaintiff's prior bad acts.[14]

Mistrial Declared Based on Epithet

Trial counsel are dramatic by training. But too much drama can create serious problems—as the defense learned in *Hines v. Lopez*.[15] The plaintiff, Monique Hines, sued Angela Lopez and Varsity Bus for injuries sustained during an accident. During trial, the plaintiff presented evidence of injuries including a herniated disc, serious bodily sprains, and monetary loss supported by both medical and economic experts. But this was insufficient to overcome the onslaught of character attacks leveled not only at plaintiff, but her attorney and her physician as well. During cross-examination of the plaintiff's physician, the defense counsel asked, "You are aware that among civil defense lawyers, you are considered a butcher that plaintiff's attorney sends people to for unnecessary operations?" Counsel objected to the question and the court sustained the objection. Later during closing, counsel argued to the jury, "Let me say clearly and very directly. This is a scam. I will say it again, this is a scam … [T]he plaintiff … is lying to you about having suffered any injuries … ." Counsel referred to the plaintiff as a liar repeatedly, stating at one point, "She wouldn't know the truth if it jumped up and bit her on the elbow, okay?" Counsel also vouched for his own expert witness—calling him "one of the finest witnesses I have ever seen."

After trial, the plaintiff moved to set aside the verdict and for a new trial pursuant to CPLR 4404(a), which gives the court discretion to order a new trial in the interest of justice, such as when a counsel's misconduct unduly affected the verdict. The trial judge found that taken together, the defense's cross-examination of plaintiff's physician, character attacks on plaintiff and her counsel, and his comments vouching for his own witnesses "were not isolated, were inflammatory[,] were unduly prejudicial [and] so tainted the proceedings as to have deprived the plaintiff of a fair trial."[16]

The court set aside the verdict and ordered a new trial.[17]

New Trial After Statement Disallowed

The jury should have been told what infant plaintiff Leah N. stated to the emergency room staff, because she said it before any motive to lie might have come into play. That was the decision in *Nelson v. Friends of Associated Beth Rivka School for Girls*, where the Second Department invoked the prior consistent statement doctrine to reverse a defense verdict and return the case for a new trial.[18] The case presents a textbook example of how a prior out-of-court statement may be used to bolster a witness's testimony—and to respond to accusations of recent fabrication—when it can be shown that the statement was made before the motive to fabricate arose.

Baby infant Leah N. was injured at preschool and taken to the emergency room, where she told the E.R. doctor that she fell from the monkey bars. At trial, the defendant preschool admitted that the monkey bars were not age-appropriate for preschoolers, but denied that little Leah had been on them.[19] The defense's theory was that little Leah had been coached to state that she fell off the monkey bars, and that in truth she had fallen from a smaller, much safer and age-appropriate orange ladder, suitable for tikes just her age. The defense objected to the plaintiff's proffer of the E.R. entry on the ground that it was an out-of-court prior consistent statement offered for the truth of what was stated, and thus amounted to improper bolstering.[20]

The Appellate Division ruled that the Supreme Court erred by refusing to admit the E.R. entry. Observing that, "[o]rdinarily, 'the testimony of an impeached or discredited witness may not be supported or bolstered by proving that he [or she] has made similar declarations out of court." However, an out-of-court statement 'made at a time before a motive to falsify exists may be received in evidence after the testimony of the witness is attacked as a recent fabrication."[21]

Civil litigators have a sweet tooth for tax returns and **routinely demand an opposing party's federal filings** even in cases where tax issues are not directly presented.

The fortification of a witness' testimony and credibility through the use of a prior consistent statement may be admissible, but only to rebut a claim of recent fabrication.[22] A prior consistent statement is admitted under this limited circumstance as an exception to the hearsay rule.[23] Significantly, the prior consistent statement prohibition—and the recent-fabrication exception—are long-standing contours on the hearsay landscape and anchored to the general rules concerning impeachment and rehabilitation of witnesses.[24]

Invoking the time-tested rule permitting bolstering through prior consistent statements made before the motive to falsify arose, in response to a charge of recent fabrication, the appellate division concluded that the error was not harmless and remitted the case back to supreme court for a new trial.

'Oh My God' Improperly Admitted

A present sense impression needs to be just what the name implies—an impression uttered presently, in order to be admissible as an exception to the hearsay rule. That was the holding of the Second Department in *Gonzalez v. City of New York*,[25] where the trial court's failure to hold the plaintiff to the rudimentary requirement resulted in a new trial on the issue of liability after a $1 million verdict against the New York City.

The plaintiff in *Gonzalez* alleged that she fell while entering the Public School 132 in Brooklyn. After she had fallen, and while she remained down, a security guard reportedly witnessed the plaintiff lying on the floor. At trial, the plaintiff testified regarding the security guard's utterance made at the moment—to the effect, "Oh my God, someone else fell." The statement on its face conveyed and implied information concerning other, unidentified accidental falls; as to those falls, the utterance was plainly not "present sense." Additionally, the security guard had not witnessed the plaintiff's fall but rather was speculating—albeit quite rationally—that falling had led to her being prone on the ground.

None of the foregoing justified characterizing the guard's out-of-court statement as a bona fide present sense impression, for purposes of the well-recognized exception to the rule against hearsay. As the court in *Gonzalez* explained:

Contrary to the plaintiff's contention, the security guard's statement did not qualify as a present sense impression or an excited utterance. The statement was not admissible as a present sense impression because it is clear that the statement was not made as the security guard perceived the happening of the accident, and there was no evidence that corroborated his statement.[26]

1. *Bruton v. U.S.*, 391 U.S. 123, 135 (1968).
2. Id.
3. 769 F.3d 125 (2d Cir. 2014).
4. Id. at 127-28.
5. Id. at 131-32.
6. Id. at 132.
7. Id. at 135.
8. See *Altidor v. State-Wide Ins. Co.*, 801 N.Y.S.2d 545 (2d Dept. 2005) ("tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources."); *Sadofsky v. Fiesta Products*, 252 F.R.D. 143 (E.D.N.Y. 2008) (requiring compelling need for production of individual tax returns).
9. 120 A.D.3d 1561 (2014).
10. Id. at 1561.
11. Id.
12. 75 N.Y.2d 629 (1990).
13. See *People v. Schwartzman*, 24 N.Y.2d 241 (1969); Richardson Evidence §500 (Prince 10th ed); Fisch, New York Evid. §455 (2d ed.).
14. 120 A.D.3d at 1561.
15. 45 Misc.3d 1203(A), Slip Op. 4144(U) (Sept. 12, 2014 Queens Cty. Sup. Ct.).
16. 2014 WL 4922268.
17. Id.
18. 119 A.D.3d 536 (2d Dept. 2014).
19. Id. at 536.
20. Id.
21. Id. (citations omitted).
22. *People v. McDaniel*, 81 N.Y.2d 10, 16 (1993).
23. *People v. Baker*, 23 N.Y.2d 307, 323 (1968); Prince, Richardson on Evidence [Farrell 11th ed. 1995] §8-615, at 65.
24. *People v. Buie*, 86 N.Y.2d 501, 510 (1995).
25. 109 A.D.3d 510 (2d Dept. 2013).
26. Id. at 512.