South Carolina Evidence Rule 703: A Backdoor Exception to the Hearsay Rule?

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In 1995 the South Carolina Supreme Court promulgated the South Carolina Rules of Evidence, which largely track the counterpart Federal Rules of Evidence. Rule 703, which is a verbatim copy of the then existing federal rule, permits an expert witness to offer an opinion based upon factual information or hearsay that has not been admitted in the proceedings. That rule provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. SC R. Evid. 703.

The note to the rule states that it makes "clear that an expert may rely on facts or data in giving an opinion which are not admitted in evidence or even admissible in evidence." SC R. Evid. 703 note.

Despite the simplicity of allowing experts to base their opinions on documents or information not otherwise admissible in evidence, the text of the rule leaves an important question unanswered: If an expert reasonably relies upon factual information or hearsay testimony (that is otherwise inadmissible) to justify his opinion, should the court admit the underlying factual information or hearsay as evidence or allow its disclosure to the jury? The answer to this question is increasingly important given the proliferation of expert testimony in modern litigation. The various courts and commentators who have analyzed this issue have rendered divergent views on the subject. This article summarizes the various alternatives to resolving this question, highlights the pros and cons of each approach and analyzes recent South Carolina appellate opinions that addressed–but failed to resolve–this issue.

Alternative solutions

A few courts and commentators have adopted a restrictive approach that simply allows the expert to identify in general terms the extrinsic factual information or data that he used as a basis for his opinion; however, the information itself is not admitted in evidence for any

purpose (assuming, of course, that it is not independently admissible under a hearsay exception or other evidentiary rule). Further, under this approach, the expert is prohibited from reading the information to the trier of fact or making detailed disclosure of it during his testimony. See, e.g., People v. Campos, 38 Cal. Rptr. 2d 113 (Ct. App. 1995); First Southwest Lloyds Ins. Co. v. McDowell, 769 S.W.2d 954 (Tex. Ct. App. 1989); and Ronald L. Carlson, Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data, 36 U. Fla. L. Rev. 234 (1984).

An advantage of this approach is that it prohibits a party from using an expert as a conduit for admitting information that violates accepted hearsay rules and, therefore, discourages a party from feeding otherwise inadmissible factual information to an expert in the hopes of bringing those facts to the jury's attention. Additionally, in criminal cases, it ensures that a defendant's constitutional right to confront adverse witnesses is preserved. However, a downside of this approach is that it deprives the jury of the facts and detailed information which the expert relied upon in forming his opinion. If the expert is prevented from disclosing these facts to the jury, it could undermine the persuasive force of his opinion. The jury needs the facts underlying the expert's opinion to make a fully informed decision as to the validity of the expert's conclusions. Indeed, allowing jurors to blindly accept an expert's opinion based on his apparent credibility, while simultaneously depriving the jury of the factual basis for his opinion, arguably shifts the jury's fact-finding role to the expert.

A majority of jurisdictions and commentators have charted a less restrained course that allows the underlying factual information to be admitted for the limited purpose of showing the basis for and explaining the expert's opinion; however, the information is not treated as substantive evidence and a jury must be given a limiting instruction explaining the information's restricted use. See, e.g., U.S. v. 0.59 Acres of Land, 109 F.3d 1493 (9th Cir. 1997); Brennan v. Reinhart Institutional Foods, 211 F.3d 449 (8th Cir. 2000); Henry v. Brenner, 486 N.E.2d 934 (Ill. App. Ct. 1985); and JoAnne A. Epps, Clarifying the Meaning of Federal Rule of Evidence 703, 36 B.C. L. Rev. 53 (1994). Under this view, the expert's reliance upon inadmissible evidence does not alter the evidentiary character of the material. Instead, the courts merely allow the introduction of this background information for the limited purpose of explaining the expert's opinion. This view comports with the principle that out-of-court statements are hearsay only when offered to prove the truth of the matter asserted. See SC R. Evid. 801(c). If an out-of-court statement is offered merely to show the basis for an expert's conclusions or the matters upon which the expert has relied, it is not offered for the truth of the matter asserted and is not hearsay.

In 2000, after South Carolina's adoption of Rule 703, Congress amended the federal rule to effectively embrace this approach, with the caveat that the trial judge must employ a balancing test before admitting the underlying factual information. A sentence was added to the end of

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federal Rule 703 providing that "facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. The comment accompanying the amendment explains that "if the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes." Fed. R. Evid. 703 note. South Carolina has not adopted this amendment to its version of Rule 703.

An advantage of the majority approach is that it gives the jury the facts and detailed information that the expert relied upon in forming his opinion, thereby allowing the jury to make a fully informed decision as to the validity or persuasiveness of the expert's conclusions. Further, because the underlying facts are not treated as substantive evidence and the jury is so instructed, this approach reduces the temptation to use Rule 703 as a back door exception to the hearsay rule. Because of the information's limited admissibility, a party cannot prove an essential element of his case by relying on hearsay materials admitted solely to explain the basis for his expert's opinion.

However, despite the theoretical benefits of this approach, commentators have sharply criticized it as being illogical and unworkable in practice. One commentator states:
Thus, on the one hand, the jury may consider the facts or data upon which the expert based her opinion to assess the weight to be given to that opinion. Yet, on the other hand, the jury, when deciding whether to arrive at the same conclusion, cannot accept what the expert relied upon as true. In reaching its own conclusion, the jury can rely only upon the product of that evidence–the expert's opinion. If this practice sounds like judicial double talk, it is. …

Admitting an expert's opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion. The value of any conclusion necessarily is tied to and dependent on its premise.

Consequently, if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts. Compounding the absurdity of the [majority approach] is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert's opinion. This instruction is pure fiction; it cannot be done. Even if the instruction's distinction logically were possible, jurors likely would not be capable of performing such mental gymnastics. Paul R. Rice, Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson, 40 Vand. L. Rev. 583, 584-85 (1987) (footnotes omitted).

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Other courts and scholars have similarly questioned the efficacy of instructing juries to listen to the inadmissible testimony as the basis for the expert's opinion but not to treat it as substantive evidence. See, e.g., Gong v. Hirsch, 913 F.2d 1269, 1273 n.4 (7th Cir. 1990); Edward J. Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C. L. Rev. 1, 12 (1988); and L. Timothy Perrin, Expert Witness Testimony: Back to the Future, 29 U. Rich. L. Rev. 1389, 1401 (1985).

Some courts and commentators follow a liberal approach that allows the underlying factual information to be admitted as substantive evidence (i.e., for the truth of the matter asserted) as long as it was reasonably relied upon by the expert in forming his opinions –in effect, recognizing a de facto hearsay exception. See, e.g., U. S. v. Rollins, 862 F.2d 1282 (7th Cir. 1988); Stevens v. Cessna Aircraft, 634 F. Supp. 137 (E.D. Pa.), aff'd, 806 F.2d 254 (3rd Cir. 1986); Rice, supra, at 584. This approach has received criticism because of the potential for abuse. As one scholar argues, this approach allows "all manners of raw and unexpurgated hearsay" to be "dumped into the record" by having an expert "rely upon" it in forming his opinions. Ronald L. Carlson, Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?, 52 U. Fla. L. Rev. 715, 716 (2000).

However, in a provocative law review article, Professor Paul Rice argues that the underlying factual information should qualify as an exception to the hearsay rule (and, therefore, be admitted as substantive evidence) provided that courts properly screen the expert's testimony to ensure compliance with the mandate of Rule 703–that the information or data be of the "type reasonably relied upon by experts in the particular field." Rice, supra, at 587-91. Under this view, as long as the court is satisfied that the expert witness possesses sufficient expertise and qualifications, that he actually relied upon the factual information in forming his opinion, that the factual information is the type of information reasonably relied upon by those in the particular field to form opinions and that the expert actually applied his expertise to evaluate the reliability of the otherwise inadmissible evidence, then the underlying factual information is admissible as substantive evidence. As stated by Professor Rice, "if courts properly scrutinize expert testimony to ensure that each expert has used her special talents in screening the facts upon which she has relied," then "no justification exists for precluding the finder of fact from hearing and using those facts supporting an opinion to the same extent as the expert." Rice, supra, at 590-91.

The South Carolina cases

In two cases decided after South Carolina's adoption of Rule 703, the South Carolina Court of Appeals grappled with the question involving the proper role of the supporting factual information once an expert's opinion is deemed admissible. Unfortunately, the Court failed to provide a definitive resolution. State v. Slocumb, 521 S.E.2d 507 (SC Ct. App. 1999); and Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc., 529 S.E.2d 45 (SC Ct. App. 2000).

Indeed, the opinions in Slocumb and Hundley appear to have separately embraced two of the competing approaches for resolving this problem as summarized above.

State v. Slocumb

The opinion in Slocumb appears to fall in line with the majority view. In that case, two psychiatrists testified that they relied upon a MRI report prepared by another doctor in formulating their opinions and, over objection, the contents of the report were admitted in evidence. 521 S.E.2d at 519. On appeal, the Court of Appeals seems to hold that, under Rule 703, when an expert reasonably relies on hearsay to form an opinion, the underlying hearsay is admissible in evidence for the limited purpose of explaining the basis for the expert's opinion, but it is not substantive evidence. Id. at 518 (quoting treatise stating that "facts, data or opinions reasonably relied upon under Rule 703 may be disclosed to the jury on either direct or cross-examination to assist the jury in evaluating the expert's opinion by considering its bases … even if the facts, data or opinions have not themselves been admitted and thus may not be considered for their truth"). The Court held:

The admission of the contents of the report during the direct-examination of Dr. Schwartz-Watts and Dr. Morgan is seemingly inconsistent with its exclusion during Dr. Merikangas's cross-examination. However, unlike Dr. Merikangas, both Dr. Schwartz-Watts and Dr. Morgan had relied on the MRI report in formulating their opinions. As such, they were not mere conduits of hearsay information. During their testimonies the report was not admitted for the truth of the matter asserted, as it had been during Dr. Merikangas's testimony. Rather, it was offered as a basis of their opinions as permitted under Rule 703, SCRE.

Because the erroneous admission of the MRI report during Dr. Merikangas's cross-examination was cumulative to the properly admitted evidence, the error was harmless. Id. at 519 (emphasis added).

The Slocumb opinion does not specifically address the necessity of giving a limiting instruction to the jury, but its holding suggests that the opponent of the evidence would be entitled to such an instruction advising the jury that the MRI report was not admitted for the truth of the matter asserted therein (i.e., it was not substantive evidence), but was admitted merely to assist the jury in evaluating the basis for the expert's opinion. See SC R. Evid. 105. Of course, the expert's opinion would be substantive evidence.

Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.

In Hundley, without mentioning its prior opinion in Slocumb, the Court appears to have followed the third approach outlined above. In that case, over objection, the plaintiff's economist was allowed to disclose to the jury the amount of the plaintiff's anticipated future medical expenses as calculated in a life care plan that a third party had prepared for the plaintiff and which was never admitted in evidence. The Court's opinion suggests that the plaintiff offered no other evidence besides the figures in the life care plan (as relayed to the

jury through the economist's expert testimony) to prove the amount of the anticipated future medical expenses.

The defendants argued that by permitting the expert to relay to the jury the amount of the future medical costs "the trial court erred by allowing the expert, under the guise of Rule 703, to act as a 'conduit' for inadmissible hearsay." 529 S.E.2d at 50. The defendants further maintained that "the figures were not the type of data relied upon by economists, but were instead foundational facts which must be separately proved." Id. In ruling that the expert properly disclosed to the jury the figures contained in the life care plan (even though the plan itself was inadmissible hearsay) and presumably finding that these figures (as disclosed by the expert) constituted substantive evidence sufficient to justify the jury's award of future medical expenses to the plaintiff, the Court stated:

Dr. Wood rendered his opinion as to the economic damages sustained by the Hundleys, which included the present value of future medical and related costs. To render his opinion, he relied upon cost information contained in the Life Care Plan. As to the costs associated with future care, he testified that he could have obtained the figures himself, but the information contained in the plan was of the type normally relied upon by experts in his field in rendering an opinion. Based upon this foundation, the trial court allowed the testimony. We see no abuse of discretion.

In this case, the contested cost components were not opinions of others. The information was easily ascertainable, and would have been no less hearsay had the economist made the inquiry from the health care providers himself. Indeed, we see no distinction between this information and the other information necessary to a present day value calculation, such as inflation rates, wage rate tables, and life expectancy tables. …

In reaching this conclusion, we disagree with the defendants' assertion that Dr. Wood was a "mere conduit" to introduce evidence which had already been ruled inadmissible as hearsay. … In each of [the cases cited by the defendants] the evidence was excluded because it did not meet the criteria set forth under Rule 703. It was not information upon which an expert in the field would reasonably rely in reaching an opinion and/or did not form the basis of the expert's own opinion. Here, the evidence does meet the criteria set forth under Rule 703. Id. at 51-53 (citations omitted).

Interestingly, the Hundley Court analogizes a life care plan to statistical and mortality tables. The latter are commonly admissible under recognized exceptions to the hearsay rule. See SC R. Evid. 803(17) (market reports and commercial publications); SC Code Ann. § 19-1-150 (mortality tables). However, the former does not seem to fall under any such hearsay exception. Therefore, the analogy is not entirely convincing.

The Hundley Court apparently allowed the hearsay evidence (the figures in the life care plan)

to be admitted as substantive evidence because it found that the plaintiff's expert had reasonably relied upon those figures in forming his opinions. 529 S.E.2d at 52-53 ("Dr. Wood testified that the cost figures contained in the Life Care Plan were the type of information relied upon by experts in the field of economics, and the court determined that reliance to be reasonable. … We find [the case law cited by the defendants] readily distinguishable, because in each of these cases the expert attempted to testify to hearsay which did not form a part of the basis for a valid opinion."). The Court was sufficiently satisfied that the figures in the life care plan were of the "type reasonably relied upon by experts in the particular field" of economics and that the plaintiff's economist had actually relied upon those figures; therefore, the Court admitted the underlying factual information as substantive evidence. Dictum in a South Carolina Supreme Court opinion also could be construed to support this approach. State v. Hutto, 481 S.E. 2d 432, 433 (SC 1997) ("At the outset, we note it is well-settled than an exception to the rule prohibiting hearsay exists when it is used by an expert.").

Neither Slocumb nor Hundley acknowledges or debates the competing approaches for resolving the question of whether Rule 703 allows an expert's underlying factual information and data to be admitted as substantive evidence or revealed to the jury. As summarized above, several alternatives have been proposed with accompanying pros and cons. Although the holdings in Slocumb and Hundley suggest that the factual information and data relied upon by an expert witness in formulating his opinion is admissible, they seemingly adopt inconsistent rationales. Consequently, it is uncertain whether the underlying factual information constitutes substantive evidence sufficient to survive a summary judgment or directed verdict motion or whether it is admissible merely to explain the basis for the expert's opinion. If the underlying factual information is considered substantive evidence, then the courts have effectively recognized a backdoor exception to the hearsay rule.

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