

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WACHOVIA BANK, NATIONAL ASSOCIATION,)	
)	CIVIL ACTION
)	
Plaintiff,)	FILE NO: 1:03-CV-2642-WBH
)	
v.)	
)	
DARRYL DENNARD SHORTT, et al,)	
)	
Defendants.)	

**ISMG’S BRIEF IN SUPPORT OF MOTION
TO EXCLUDE THE TESTIMONY OF
JOHN A. HARRIS UNDER *DAUBERT***

In support of this effort to pass off its cost of self-insuring the loss of depositor’s assets from the January 11, 2003 robbery, for which it denies any responsibility, Wachovia hired John A. Harris, a local security expert witness. Mr. Harris prepared a Rule 26 report and has been deposed. Harris has resisted ISMG’s efforts to discover information underlying his military training and ASIS certification, which he claims as source and evidence, respectively, of his qualification as a security expert.

One might expect that a national, publicly-owned and regulated corporation such as Wachovia would be above concerns that an expert witness’ background might be exposed, but Wachovia has defended Harris with an unusual vehemence,

requesting sanctions ranging from attorneys fees to the unusual and legally questionable remedy of an order barring ISMG's counsel from serving subpoenas for discovery.

Regardless of the tactics employed by Wachovia, John Harris is not qualified to testify in this case under the Federal Rules of Evidence. Harris lacks sufficient qualifications, his methodology is unreliable and unfounded, and his opinions in this case lack the requisite foundation for admissibility required by Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny. Mr. Harris and his opinions should be excluded as a matter of law. ISMG has moved for summary judgment, for this and other reasons set forth in its Brief in Support of Motion for Summary Judgment.

I. Qualifications of John A. Harris as an expert witness in the area of Security

Mr. Harris is the owner, and one of two employees, of The Harris Group. Harris' career primarily consists of his testifying for plaintiffs in personal injury cases arising from criminal acts on the premises of multifamily dwellings and retail businesses. (Deposition of John Harris 11-12, 16). He began testifying as an expert witness recently, in 2000. That year, he purchased the client list and other assets from a former security expert, Larry Talley, who retired because of a medical disability. At first Harris operated the business as Larry Talley & Associates (in

Talley's permanent absence), then as Talley-Harris, until eventually settling on The Harris Group. The name recognition was necessary because Talley was a well known security expert, for whom Harris had worked as a clerical assistant since 1994.

Mr. Harris has never been qualified as an expert in any federal court. (Harris 99). In one of his few experiences being deposed in a federal court case, Harris testified in 2000 that his role for those six years working for Talley was doing "the grunt work" in taking information obtained from attorney clients and organizing it for Mr. Talley's use in testifying in litigation. (Id. 158). Harris testified that he never formed opinions as to a case, and Talley never asked him for any. (Id. 157). Harris testified that he did not interpret the information, or put any spin on it, and some times he did not know if the case was for the plaintiff or the defendant (Id. 158). Then the very next month, after Talley retired, Harris held himself out as an expert witness, testifying that he had been the "brains behind the operation" all along. (Id. 159).

Harris claims he is qualified to testify as an expert witness in security cases because of the experience with Talley. He also claims that his training as a Marine officer during the Vietnam War qualifies him, and every other person who received the same training, as a security expert (Harris 33). Harris also points to the fact that

he owned and operated apartment complexes from 1979-86, using the security principles he learned in the Marines, as a source of his expertise. (Id. 38-39).

Harris does concede that he is not a criminologist (Harris 20), or an expert in law or interpreting contracts (Id. 18, 19), and has no training or experience in law enforcement (Id. 17). He has no formal education regarding the security industry (Id. 21) and he has never worked as, or supervised, a contract security guard (Id. 20, 40).

II. Methodology of Mr. Harris

Harris claims that he is an expert in “physical security and negligent hiring and retention.” (Harris 160). No aspect of his opinions in this case have anything to do with adequacy of the physical security used in this case (Id. 165) -- perhaps because he concedes that physical security was the responsibility of the Bank (Id. 166, 186)¹. He also has no opinion that any defendant was negligent in hiring, except defaulted defendant Angel’s Janitorial (Id. 163) which was hired by the

¹ Harris concedes that if the Bank had put a security fence around the Money Center, as it did after the robbery, employees stepping out the front door to smoke and for other reasons would not be subject to being compromised by intruders sauntering up to the front door as these robbers did. In his words, “we probably would not be sitting here.” (Harris at 82-83). Harris’ review of the Bank’s security assessment did not reveal that the Bank appreciated the risk before the robbery. (Id. 83-84).

Bank before JLL or ISMG or IPS came to the Money Center (Id. 88, 215), at which time the Bank did not do background checks on the ex-convicts working in its operations and money centers as janitors, Shortt and Preston, although Harris concedes they should have (Id. 217). Harris admits that ISMG was not negligent in hiring Allison Johnson (Id. 199).

In the U.S. Marines he was trained with a security manual which he claims is one of the preeminent texts on the subject. (Id. 29-30). However, he did not use that manual in this case at all. (Id. 191). In the Marines he says he (and every other Marine who received the same training) learned to do a security survey, security evaluation and a security assessment. (Id. 31-32). However, he did not do any of these things in this case. It is usually part of his “best practices” methodology to collect prior crime statistics of the premises involved, but he did not do that in this case. (Id. 78-79). He was not aware of any statistics regarding bank robberies, such as whether they were more or less common than theft by bank employees (Id. 90-91). He also did not examine policies and procedures formulated by Angel’s or ISMG (Id.).

The only part of his usual methodology that he followed in this case was to consider all of the documents that were provided to him by Wachovia counsel. *See Exhibit A*, Harris Group Web Site. He did not view the security video or photos of

the robbery or visit the Money Center until the week before he was deposed, and he has not met any of the participants in the robbery, or any employee of any of the defendants.

Wachovia had a duty to be responsible for protecting its depositors' assets (Harris 111). Wachovia retained all responsibility and control of physical security, one of Harris' areas of expertise. Harris concedes that Wachovia formulated and enforced the policy that one of its employees would man the security camera console when the single security guard was away for any reason, including taking smoking breaks (Harris at 74, 167). Wachovia failed to have an employee at the console when Allison Johnson stepped outside to smoke and allowed the three robbers to enter. Harris viewed the security video after he formed his opinions in this case, and noticed that it took a long time for the three robbers dressed all in black to saunter from the parking lot and into the building. (Id. 72). He also concedes that having more than one security guard at a time, which was the Bank's decision despite advice from JLL that it have more than one, may have offered more security, including against an inside job such as this one. (Id. 86).

III. Opinions of Mr. Harris against ISMG and IPS

Harris' opinions are set forth in his written report (Document 108). After a lengthy introduction about himself, Section I at page 11 of 21 sets forth his

opinions against JLL. Section II at page 15 details his charges against ISMG and IPS collectively. Section III is simply a statement that JLL and ISMG’s “failures to provide reasonable care were substantial contributing factors and proximate causes²” of the robbery of the money center. This statement, of course, is not for Harris or any expert witness to make, being a question instead first for the Court, and then for the jury, if any disputed issues of material fact exist.

Several of the statements in Section I do pertain to ISMG, and to Harris’ qualifications under *Daubert*. Harris opines in his report that JLL “negligently” breached the standard of care in the property management industry. However, Harris admitted at his deposition that his only source of this standard was attending a few meetings of an ASIS committee with other persons who actually are *in the property management industry*. (Harris 207, 209, 212). Harris’ report states that JLL should have reviewed the actual insurance policies of the vendors to determine that they were acceptable under the contract. But a review of an insurance policy tells one nothing about whether an insured will stop paying premiums (as Angel’s Janitorial did before the robbery) or whether the insurer will deny coverage

² For someone with no legal training or qualifications, Harris quite frequently attempts to parrot legal terminology. This is usually a sign of a testifying expert trying to sound important, in an area outside of the expert’s qualifications.

because of the employee dishonesty exclusion that is in every CGL policy (as the insurers for ISMG and IPS did)(Harris 113, 120-121). Harris admitted that nothing in any of the contracts called for ISMG to have any different kind of insurance or coverage than it did. Moreover, the contracts did not specify that ISMG even carry an employee dishonesty bond, which ISMG did. (Id. 113-117, 121).

On page 13 of his report, Harris says JLL failed to ensure that the security guards were properly qualified. But Harris' analysis (also on page 16 in Part II) overlooks the last sentence of the Service Contractor's Agreement which states "or any equivalent combination of education and experience determine [sic] acceptable to client." (Harris 124). Harris concedes that Allison Johnson was known and acceptable to the Bank, and that she qualified under this language from the Bank's own security manual. (Id. 125). If Harris had not been called on this in cross-examination, his mistake would have gone unchallenged.

In Part II of his report, Harris begins by saying that ISMG "negligently" breached the appropriate standard of care of the security industry. However, Harris himself has no experience as a supervisor of security guards, and his report and testimony do not reveal where he claims that standard comes from. His first example, the qualifications in the Bank's security manual, does not support his opinions because he left out the last sentence. (Id. 25). His second example, his

claim that neither ISMG nor IPS prepared written post orders for the Money Center, concededly did not cause or allow the robbery and played no role in it. (Id. 128-130). Harris lists “numerous prior problems with unsatisfactory guard performance” (including legacy employees left over from the prior guard company which were retained at Wachovia’s insistence before JLL or IPS came onto the scene), but on cross-examination he concedes none of these employees or their various issues caused the robbery which is the relevant subject of this case. (Id. 137). Finally, Harris states on page 18 that no background checks were conducted on Allison Johnson. This is yet another incorrect statement, because the ISMG witnesses have testified that they did a criminal background check as is their habit, practice and custom ((Morton at 68-70, 73-75; Himebaugh at 63-65, 67-68, 136-138). The file from the State Licensing Board shows that Morton certified to the Board that a background check had been conducted, and that the State conducted its own separate background check, before it licensed Johnson as an armed security guard. (See Exhibit B; cf. Harris at 142).

John Harris’ opinions against ISMG in this case therefore all reduce down to one – that since he says Richard Morton was on notice that Allison Johnson was having financial troubles, that he and IPS should have removed her from the Money Center. This opinion – that persons of humble means cannot be trusted to

work with other people's money -- in no way meets *Daubert's* standard, and is not a fit subject for expert testimony in this or any Court.

IV. Argument and Citation of Authority

a. The Daubert Standard

Mr. Harris' lengthy self-praise in his resume and report do not make him an expert witness, nor do they qualify his opinions to be stated to a jury in this Court. Under the Federal Rules, expert testimony must be not only relevant, but reliable. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). Those who would testify as experts must face and pass the scrutiny of trial judges charged as "gatekeepers" to undertake a "preliminary assessment of whether the reasoning or methodology underlying [expert] testimony is scientifically valid." *Daubert*, 509 U.S. at 592-93. This obligation applies to all expert testimony, not just scientific testimony. *Kumho*, 526 U.S. at 147. Accordingly, the factors listed in *Daubert* for determining the reliability of scientific testimony – whether a theory or technique has been tested; whether it has been subject to peer review and publication; whether it has a known or potential margin of error; and whether it enjoys general acceptance within a relevant community – also bear on the reliability of technical or other specialized knowledge. *Id.*

This Court's gate keeping role requires it to keep unreliable and irrelevant information from the jury because of its inability to assist in the factual determinations, its potential to create confusion, and its lack of probative value. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999). Thus, the Court must exclude "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Expert testimony is inadmissible when "there is simply too great an analytical gap between the data and the opinion proffered." *Id.*

If judges do not take hold of expert testimony, "[t]he ultimate issue...can too easily become whatever an expert witness says it is, and trial courts must be wary lest the expert become nothing more than an advocate of policy before the jury." *In re Air Crash Disaster Near New Orleans*, 795 F.2d 1230, 1233-1234 (5th Cir. 1986). Advocacy and speculation do not qualify as expert testimony under Fed. R. Evid. 701 and 702. *Minasian v. Standard Chartered Bank*, 109 F.3d 1212, 1216 (7th Cir. 1997) ("An opinion has significance proportioned to the sources that sustain it. An expert who supplies nothing but the bottom line supplies nothing of value to the judicial process"); *USA v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993) (where an expert's testimony amounts to "mere guess or speculation", the

court should exclude his testimony); *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569 (11th Cir. 1985).

In sum, expert testimony is admissible only if: (i) the expert is qualified to testify competently on the topic at issue; (ii) the methodology used by the expert is sufficiently reliable; and (iii) the testimony will assist the trier of fact. *Daubert*, 509 U.S. at 589; *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004). The burden of proving each of these three *Daubert* elements rests on Wachovia, the party offering John Harris to give expert opinion testimony in this case. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005).

b. Harris is not qualified to give the opinions he proposes to testify to in this case

John Harris might be qualified for some things, but certainly not for the opinions he proposes to testify to in this case. Harris is not qualified to testify about the standards in the commercial property management industry, and there is nothing in his experience and training that supports his central opinion against ISMG: that a person having money troubles is disqualified from working in a bank. Harris is not a criminologist, or a fortune teller, and he is no more able than any person to predict when or by whom a crime may take place. (Harris 35-36).

What Harris has done before in his brief career as a self-styled expert witness on premises security is to conduct risk surveys of properties to examine

whether they contain flaws in physical security that might have prevented a crime, and to examine records of prior crime to opine whether a premises owner might be on notice of the potential for future crime, including the crime in question in a lawsuit in which he is retained. Harris did neither of these things in this case. This is precisely because Wachovia was in complete charge of the physical security at the Money Center, and the flaws that existed, including the absence of a security fence to prevent employees from being compromised when they stepped outside to smoke, was the responsibility of Wachovia³. (Harris at 82, 111, 165-166). He not coincidentally excuses Wachovia for its undisputed breach of its own procedure to have one of its employees man the security camera post when Allison Johnson stepped outside to smoke, because he says they might not have seen anything wrong about three large men dressed head to toe in black, with black hats covering their faces and carrying large duffel bags, sauntering in from the parking lot and into the Money Center. (Harris 72-74). This speculation on behalf of Wachovia is no more worthy of consideration under *Daubert* than any of his speculation against the Defendants including ISMG.

³ Unlike his quibbles with ISMG that he is forced to admit did not cause the robbery, he testified reluctantly that if there had been a security fence, as there is now after the robbery, that the crime could not have occurred. Harris at 82).

c. Harris' methodology does not satisfy *Daubert* and militates the exclusion of his speculative advocacy disguised as expert opinion

Harris' opinions in this case suffer from unreliable methodology. All that he has done is review depositions, pleadings and discovery documents, and then issue speculative opinions that are simply advocacy of Wachovia's case against the Defendants. Courts applying *Daubert* do not allow such testimony. In *USA v. Masferrer*, 367 F.Supp. 2nd 1635 (11th Cir. 2005), the court excluded two proposed government expert witnesses in connection with a banking fraud case. One of the experts' testimony relied solely on the evidence of the transactions and his own conclusions, and so was held to be unreliable, and of no assistance to the court and jury. The other expert's testimony was excluded because the court found that it was "simply his opinion of what he would do if he were a juror considering the facts which need no interpretation by an 'expert.'" *Id.*

Harris has no support for his opinion that ISMG should have moved Allison Johnson to another post because of her financial situation. Harris has never met Allison Johnson or Richard Morton, and has interviewed no witnesses involved in this case. His understanding of her financial situation at all comes from her own testimony, that she was going through a divorce, and from the records indicating that before she was employed by ISMG or IPS, she bounced a check for \$58 at a

Wal-Mart three days before Christmas of 1999 (*See* Exhibit C). His understanding of what ISMG knew about her financial situation comes from a few leading questions by Wachovia’s lawyer directed to Johnson in prison:

Q. [By Wachovia counsel] *So it’s safe to say that you were going through some pretty serious financial difficulties at this time; correct?*

A. *Yes, ma’am.*

Q. *And did you tell Mr. Richard Morton about some of these financial difficulties?*

A. *Yes, ma’am.*

Q. *And so y’all had conversations prior to the robbery that you were going through some pretty serious financial difficulties?*

A. *Yes, ma’am.*

(Johnson 13). These few questions establish at most that Johnson told Morton that she was having financial troubles, some time before the robbery. Relying on this kind of information to form an opinion that Johnson should have been terminated or transferred is not a reliable or sufficient methodology under the Federal Rules.

Harris seems to have no understanding about the normal financial means of security guards, to compare to Ms. Johnson’s, which is understandable given his lack of experience in the field. (*Cf.*, Booth at 54-55). But his opinion, that persons of lesser means cannot be trusted to work around other people’s money, is despicable and stereotypical speculation, not an opinion worthy of “expert” testimony in this Federal Court. Harris’ own testimony seems to be deeply

revealing, at one point he discussed what he might be tempted to do, before Wachovia counsel derailed his ramblings with a strategic break request (Harris 140-141). Mr. Harris knows about financial difficulties firsthand, since First Properties, the real estate company he worked for managing apartments dissolved owing state taxes, he himself had a \$12,000 tax lien about the time he came to work for Larry Talley doing “grunt work,” and one of the conditions of the sale of Talley’s testifying practice was the forgiveness of a debt that Harris owed Talley. (See Exhibit D, and Harris at 153). Harris’ proponent Wachovia has a similar standard, since it stated in response to an interrogatory that it had no way of knowing whether one of its employees had ever bounced a check as Ms. Johnson did, and in fact the manager of the Money Center, Brenda Patrick, testified that she herself had bounced a check, but that played no role in her employment. (Harris 143-144).

d. Harris’ opinions do not ‘fit’ the evidence and do not assist the trier of fact in understanding any issue in this case

Harris’ opinion, based on the scant evidence that Allison Johnson told her IPS supervisor that she was having financial troubles prior to the robbery, does not assist the jury in this or in any case with any information they might not know. Harris possesses no special qualifications, including his own personal financial experiences, to tell a jury that persons of limited financial means should be

disqualified from working in positions of trust, such as a money center. Harris' opinion in this regard is not supported by Wachovia's own hiring policies (see attachment), or any information about whether Wachovia has any idea of what the financial position of its own employees is at any point in time.

Security experts frequently offer such testimony that might help the party employing them, but which does not spring from real qualifications, reliable methodology or the actual facts of the case at hand. The court in *Torres v. K-Mart Corp.*, 145 F.Supp. 2d 161 (D.P.R. 2001) excluded the testimony of a security expert in a slip and fall case because it would not assist the trier of fact to understand the evidence or to determine a fact in issue. In *Bethea v Bristol Lodge Corp.*, 2003 U.S. Dist. Lexis 9011 (E.D.Pa 2003) the Court granted a motion to exclude the testimony of a security expert in an apartment shooting case, where the expert failed to show reliable methodology, and his analysis appeared to the court to be no more than his instinctive reaction to the materials provided. That expert, like Mr. Harris, did not testify to any existing standard or explain what such standard required, nor did he supply any opinion that could be peer reviewed or tested. See also, *Maguire v. National RR Corp.*, 2002 U.S. Dist. Lexis 5226 (N.D.Illinois 2002)(granted motion to exclude testimony of premises security

expert whose opinions failed to apply a reliable methodology to the facts, and which otherwise were not helpful to the trier of fact).

CONCLUSION

John Harris might be qualified to testify to some opinion in some case, but certainly not these opinions, or in this case. Harris failed to use his own methodologies in this case, and his opinions are demonstrably unreliable. His opinions are in no way supported by adequate factual basis, and invade the province of the jury. His opinions therefore are of no assistance to this Court or to a trier of fact, and his testimony should be excluded as a matter of law.

This 16th day of January 2007.

Respectfully submitted,

HAWKINS & PARNELL, LLP

____s/Charles R. Beans_____

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all counsel of record in the foregoing matter with a copy of the foregoing **ISMG'S BRIEF IN SUPPORT OF MOTION TO EXCLUDE THE TESTIMONY OF JOHN A. HARRIS UNDER DAUBERT** by electronic filing on this date, and by depositing thereafter in the United States Mail a copy of same in an envelope with adequate postage thereon, addressed as follows:

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This 16th day of January 2007.

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