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Hot Topics In Wrongful Conviction Litigation

Strategies and approaches for defending false claims of "wrongful conviction" based on witness coercion, questionable documents, and superficial conviction integrity reviews. Ideas for actually winning high exposure "wrongful conviction" cases.



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I. Introduction

Wrongful Conviction lawsuits are not new. These are high-profile and high-exposure lawsuits are being filed across the country and are costing municipalities millions of dollars to resolve. Generally, a plaintiff alleges that he was accused of crime he did not commit and that the police fabricated evidence to secure an unjust conviction. In the past, true DNA exonerations were the catalyst for releasing inmates. However, today, most wrongful conviction lawsuits involve allegations of witnesses recanting their original statements to the police. In witness recantation cases, a plaintiff generally does not have any physical evidence exonerating him from the crime; rather, the evidence of "innocence" is merely a witness who recanted prior sworn testimony. The recanting witnesses will also claim he or she was pressured by the police to identify the plaintiff as the perpetrator. This questionable recantation is later characterized as a *Brady* claim when the plaintiff alleges that the police failed to disclose the recanting witness's "true" statement and the allegedly coercive circumstances that surrounded the witness's statement. Under *Brady v. Maryland*, police officers have duty to disclose material exculpatory evidence. If the police withhold such evidence, the criminal defendant is denied his due process right to a fair trial.

II. Potential Liability

Plaintiffs in reversed conviction lawsuits typically seek $1 Million to $2 Million per year for every year they were incarcerated. These kinds of eye popping verdicts have been affirmed virtually across the country. *Limone v. US,* 579 F. 3d 79 (1st Cir. 2009) ("wrongfully imprisoned plaintiffs were entitled to compensation of *at least* $1 million per year of imprisonment."); *Thompson v. Connick,* 553 F.3d 836, 865-66 (5th Cir.2008) (upholding jury award of $14,000,000 for 18 years of wrongful incarceration), *vacated on other grounds by* 562 F.3d 711 (5th Cir.2009) (en banc); *Newsome v. McCabe,* 319 F.3d 301, 302-03 (7th Cir. 2003) (involving award of $15,000,000 for 15 years of wrongful incarceration); *White v. McKinley,* No. 05-203, 2009 WL 813001, at *22 (W.D.Mo. Mar.26, 2009) (upholding jury award of $14,000,000 in compensatory damages for 5½ years of wrongful incarceration); *Sarsfield v. City of Marlborough,* No. 03-10319, 2006 WL 2850359, at *1 (D.Mass. Oct. 4, 2006) (reflecting judicial award of more than $13,000,000 for 9½ years of wrongful incarceration). Just this year a North Carolina jury awarded $75 Million to brothers wrongly convicted of a 1983 murder.[1] Similarly, Fourth Circuit affirmed a $15 Million Judgment Against the City of Baltimore.[2]

In addition, like all civil rights litigation, under 42 U.S.C. § 1988, if a plaintiff prevails on his federal claims he will be entitled to attorneys' fees. Given the nature of this litigation and the amount of time generally spent, you can expect to see attorneys' fees petitions for several million dollars.

III. How Do You Win?

[1] https://www.theguardian.com/us-news/2021/may/16/north-carolina-jury-awards-75m-to-brothers-wrongly-convicted-of-1983

[2] https://news.bloomberglaw.com/us-law-week/jurys-15-million-judgment-against-baltimore-detective-affirmed

The standard approach to litigating reversed conviction cases typically does not lead to an outcome favorable to the defense. Motions to dismiss raising the qualified immunity defense are typically denied. Plaintiffs often spent years developing their cases to a point where they will be successful in creating a fact dispute that will defeat defense motions for summary judgment. The standard defense playbook is to subpoena vast records and take twenty or more depositions just to reach the point where the case settles. Plaintiffs assert privilege or work product over the documents most helpful to the defense and have no problem relying on witnesses who are lying. Riding a wave created by a prosecutorial or judicial decision to vacate the conviction, plaintiffs are able to garner sympathy from judges and juries. Often the only hope for the defense to actually win a reversed conviction case is to change the narrative by proving that the plaintiff actually duped the system and engaged in fraud or other misconduct in order to unjustly procure the reversal of his conviction. While each case is different, this paper explores approaches that can assist lawyers in defending, and winning, reversed conviction cases through (1) the careful review of prison phone calls; (2) examination of any questioned document; and (3) the creative use of expert witnesses.

IV. Recorded Prison Calls

Witnesses lie at depositions. Sadly, this is a frustrating truth that attorneys defending reversed conviction cases must accept as a practical reality. Recorded prison and jail phone calls, however, often provide an unfiltered window into a plaintiff's world that cannot be screened by their counsel. Prison calls tend to offer a treasure trove of helpful evidence - including outright admissions concerning the crime underlying the case as well as evidence of witness tampering and perjury. Discoveries made from the review of a plaintiff's prison phone calls often turn the entire case around.

Given the important information likely to be contained in a plaintiff's phone calls, it is imperative that this evidence be fully and methodically reviewed. Case-critical information will often arise briefly within a broader conversation which may seem unimportant. It is not unusual for inmates to have thousands of hours of recorded call time. With this volume of data, it is tempting to review the calls in an ad hoc and incomplete manner. However, if the defense takes short cuts and fails to review the entire database of available calls, case-critical information may be missed.

In addition, timeliness of the review is a critical component of any successful prison call review strategy. When the calls are reviewed quickly, it allows the assigned attorneys to utilize the information from the prison calls to develop carefully crafted interrogatories and deposition questions. For example, if the plaintiff's calls suggest that an intermediary was used to pay a witness, this information could be used to draft an interrogatory in order to obtain the identifying information for the intermediary. This information could then be used to take the individual's deposition. If the same information from a plaintiff's call is obtained after the close of discovery, the defense could expect a motion in limine to exclude the phone calls under Fed. R. Evid. 403 because the defense did not sufficiently establish the probative nature of the call. Thus, the later in the discovery process that a critical phone call is received, the likelihood that a court will permit it into evidence is greatly diminished.

Another good reason to review plaintiff's prison calls early in the case is the possibility that it will reveal evidence so powerful for the defense that it could result in the dismissal of the case. For instance, in one 13-year wrongful conviction lawsuit brought against Baltimore, the case was dismissed out right as a litigation sanction when the defense discovered plaintiff's phone calls which showed that he paid the recanting witness $10,000. *Dewitt v. Ritz*, No. CV DKC 18-3202, 2021 WL 915146, at *1 (D. Md. Mar. 10, 2021). The dismissal of this case was widely publicized in a front page article of the Baltimore Sun.[3] In a malicious prosecution case brought against Chicago arising out of a police scandal where two police officers were convicted of raiding homes based on bad search warrants, the plaintiff voluntarily dismissed his civil case after the defendants presented to the court that "roughly 20% of Plaintiff's [prison] calls involve discussions of drug manufacturing and/or sale activity."[4] In another case, plaintiff's attorney promptly withdrew after defendants obtained his phone calls.[5]

While not all phone call reviews will lead to a case's dismissal, it provides valuable information in virtually every case. Even where the calls do not contain direct admissions regarding direct culpability or witness tampering, they commonly contain information relevant to damages. It is typical for plaintiffs in reversed conviction cases to characterize the prison experience in the harshest terms possible. These allegations range in topics from prison food, isolation, and violence. Calls between the plaintiff and his family members which are inconsistent with the litigation characterization of the prison experience could be provided to defense damages experts to rebut plaintiff's claim for damages.

V. Prison Calls Are Discoverable

A savvy plaintiff's attorney will understand that plaintiff's recorded calls carry a high risk of including information that will be helpful for the defense. Therefore, defense counsel should expect plaintiff's counsel to heavily resist defense attempts to obtain the calls via subpoena. Typical objections to a defense subpoena will include scope, relevance, invasion of privacy, and the attorney-client privilege. Therefore, defense counsel should be prepared to craft subpoenas that anticipate these objections.

A. Addressing Objections Based on the Attorney-Client Privilege

Surprisingly, the attorney-client privilege is typically not a proper basis for plaintiffs to object to defense subpoenas for prison calls. This is because prison calls regularly include a warning message that the call is being monitored. Courts have found that this operates as a waiver of any attorney-client privilege that otherwise would have applied.

For example, on February 21, 2020, the United States District Court for the Western District of Wisconsin in *Lieberman v. Portage County* held that when an inmate received notice that calls made in prison were being recorded, the inmate did not have a reasonable expectation of

[3] https://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-false-affidavit-exoneration-20210316-ucxznrfowfhqfnd6dvqdsutzd4-story.html.
[4] *Teague v. Salgado et al*., (N.D.Ill. 19 CV 4113) (Apr. 2, 2021), Dkt. #94 p. 3.
[5] *Harris v. City of Chicago*, (N.D.Ill. 20 CV 4521).

privacy in any calls made to his attorney. *Lieberman v. Portage Cty*., No. 18-CV-450-JDP, 2020 WL 869232, at *1 (W.D. Wis. Feb. 21, 2020). Therefore, the recording and monitoring of such calls did not violate attorney-client privilege. *Id*. The *Lieberman* decision is consistent with holdings from courts in several jurisdictions. Moreover, since the Supreme Court has not "directly answered the question of whether the Fourth Amendment protects attorney-client conversations in the jail or prison setting," the *Lieberman* decision is persuasive authority in any federal circuit because it provides an up-to-date analysis on Fourth Amendment protection in the prison context.

The Supreme Court has held that the "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Hudson v. Palmer*, 468 U.S. 517-527-28 (1984). In *Lieberman*, the court noted that all inmates were informed prior to each call, and via handbook, that calls were recorded. At the time of the recordings, the prison had no mechanism to flag attorney calls as private. Therefore, prison officials did not intentionally attempt to violate any prisoner's attorney-client privilege because attorney calls just happened to be "swept up" with the rest of the recorded calls. As a result, the *Lieberman* court held that a prisoner with notice that all calls are being recorded does not have an objectively reasonable expectation of privacy in a call with his attorney.

The Eighth Circuit also held that attorney-client phone calls from prison were not protected because "the presence of the prison recording device destroyed the attorney-client privilege. Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private. The presence of the recording device was the functional equivalent of the presence of a third party." *U.S. v. Hatcher,* 323 F.3d 666 (8th Cir. 2003). Similarly, the Seventh Circuit has held that the Fourth Amendment did not give a federal prisoner's sister-in-law a reasonable expectation of privacy in telephone conversations she had with the prisoner. *United States v. Sababy,* 891 F.2d 1308, 1329-30 (7th Cir. 1989). The Seventh Circuit has also held that it was not a violation of attorney-client privilege for a guard to read correspondence between an inmate and their lawyer. *Guajardo-Palma v. Martinson*, 622 F.3d 801 (7th Cir. 2010).

In applying *Lieberman*, litigants can expect courts to undergo an intense fact-analysis to determine whether inmates were informed that calls were recorded and whether the jail or prison had a mechanism for keeping inmate calls with attorneys confidential. Should a court find that sufficient notice was given, it is likely that an inmate's calls with an attorney will not be considered privileged. Defense counsel litigating motions for protective orders regarding prison calls should be prepared to make a record that the plaintiff knew that his or her calls were being recorded. Helpful evidence in this regard may be sample phone calls as well as prison handbooks provided to inmates which often explicitly state that their phone calls will be monitored.

B. Plaintiff's Limited Privacy Rights and Scope Objections

Despite the general inapplicability of the attorney-client privilege in the prison call context, several courts have held that prisoners have a limited right to privacy in their phone calls and, therefore, defendants cannot simply fish for information in plaintiff's prison calls. *Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, at *7 (N.D. Ill. Oct. 20, 2020) ("Defendants need to present a

more convincing argument that relevant evidence will be found in Plaintiff's jailhouse calls before they will be allowed to "go fishing" in that particular pond."). On the other hand, once defendants establish that there is a reasonable likelihood that subpoenaed phone calls will contain relevant information, courts tend to permit discovery regarding the phone calls. *Coleman v. City of Peoria*, No. 15-CV-1100, 2016 WL 3974005, at *1 (C.D. Ill. July 22, 2016) (permitting discovery regarding plaintiff's recorded prison calls with witnesses in the case).

One court recently had little patience for plaintiff's efforts to shield his phone calls from discovery when the plaintiff himself expected defendants to produce robust *Monell* discovery. In *Velez v. City of Chicago*, the plaintiff filed a motion to quash a defense issued subpoena to the Illinois Department of Corrections for production of a selection of Plaintiff's prison calls between the plaintiff and his wife, daughter, and brother. Plaintiff argued that calls' relevance was speculative; the scope of the subpoena was out of proportion with the needs of the case under Rule 26; and that the subpoena violated Plaintiff's privacy interest. The court rejected these arguments. First, defendants were able to demonstrate that the phone calls during the period at issue revealed that plaintiff was coordinating affidavits with witnesses. Second, the court held that the subpoena was not overbroad because the calls being sought covered a relevant time period. Finally, "as case after case holds, the mere invocation of the right of privacy is never the end of analysis, requiring a predetermined outcome in favor of the party asserting the claimed privacy interest. As the plaintiff must concede, he knew (or should have known) his phone calls were being monitored or recorded." *John Velez v. City of Chicago, et al.,* 18 C 8144, 2021 WL 3231726 (N.D. IL July 29, 2021). The Court noted:

> Plaintiff makes what some courts have found to be a valid point, and it is somewhat attractive, at least on the surface: "while [plaintiff] knew that his call recordings might be reviewed for a limited correctional purpose, he never could have imagined that every single one of his retained conversations with his minor daughter, wife, and brother would be indiscriminately produced en masse to be combed through by adverse parties in civil litigation. But, the few courts that have accepted this premise did not go beyond the plaintiff's bald assertion, and given the circumstances here, accepting that same assertion seems naive. In any event, the worth of a judicial opinion depends on its reasoning, not on its conclusion.
>
> The plaintiff says he "[n]ever g[ave] up on proving his innocence" and "worked tirelessly to show that he had absolutely nothing to do with this crime." His investigation began years ago, paying off, as he says, in 2016. While plaintiff worked without a lawyer early on, he was represented by one of the attorneys representing him here as things developed, and an amended post-conviction petition was filed, which eventually led to the State's decision to vacate his conviction in December 2017. So, not only is it clear from the content of some of the calls that litigation was in mind in 2013-14, it is likely that it was based on the timeline. Plaintiff may have even been represented by counsel by the time. This is a far cry from cases where the plaintiff was supposedly surprised to be involved in litigation years later.

Id.

As such, when plaintiffs move to quash a subpoena for recorded prison calls, it is important to consider the above cases. It is possible that a series of subpoenas will be needed, beginning with calls between plaintiff and known witnesses and then potentially broadening the scope of the subpoena as relevant information is learned from defendants' review of the calls.

VI. Expert Witnesses

The right expert can win your reversed conviction case. Each case is fact specific, but here are some examples that highlight how experts can help defendants win a reverse conviction case.

A. DNA Experts

DNA evidence is not always as "exonerating" as a plaintiff would like to portray it and an expert will help defense counsel understand why. The following case illustrates this point. In 2016, Malcom Bryant was released from prison based on DNA evidence that he presented to the Baltimore City States Attorney's Office.[6] In 1998, Bryant was arrested and charged with the murder of Toni Bullock. Ms. Bullock was stabbed by her attacker. Bullock did not die right away. Paramedics and other first responders provided first aid and Bullock was transferred to a hospital where she died after medical staff were unable to save her life. Bryant was identified by an eyewitness, but no physical evidence tied him to the murder. Bryant sought post-conviction DNA testing on some physical evidence from the original case. A private lab, hired by Bryant, uncovered evidence of a partial YSTR (male DNA) profile on the victim's fingernails and a full YSTR profile on the victim's t-shirt. Bryant was excluded as contributing to either of these profiles. The actual source of the YSTR profile is unknown. Because the YSTR profile was inconsistent with Bryant, he represented it as DNA from the attacker and conclusive evidence of his innocence. This approach succeeded. Bryant's conviction was vacated and he filed a lawsuit against the primary detective and a member of the crime lab. Upon closer examination, however, the YSTR profile discovered by this private lab does not exonerate Bryant. First, there is no evidence that the attacker had any contact with the victim's tee shirt. The victim was wearing multiple layers of clothing and the attacker stabbed her through at least 3 layers of clothing prior to reaching her t-shirt. In addition, first responders and medical personnel had contact the victim, she was transported to a hospital and life saving efforts were preformed by several hospital removed. Therefore, any one of those first responders are potential sources of this YSTR profile.

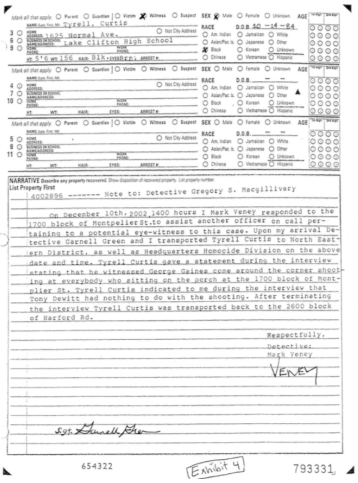
Defense counsel should not accept scientific representations being presented from the plaintiff. Experts should be consulted to evaluate any scientific findings and potential explanations for findings, that on their face, may appear exonerating. In Bryant, defense counsel hired a DNA expert to explain that the DNA evidence was not exonerating.

B. Questioned Documents

[6] DNA evidence frees man serving life for killing of teen in 1998, https://www.baltimoresun.com/news/crime/bs-md-ci-bryant-dna-exoneration-20160511-story.html).

Consider this scenario. Plaintiff produces a "smoking gun" document that seemingly checks all the boxes. It appears to capture an exculpatory eyewitness account regarding an alternative suspect and it was never disclosed to the accused. Defense counsel faced with this kind of situation should consider the strong possibility that such a document is not genuine even if prosecutors at a conviction integrity relied on the document to vacate a plaintiff's conviction.

Fraudulent documents are popping up with growing frequency in reversed conviction litigation. In *Dewitt,* for example, the plaintiff successfully overturned his conviction with a wholly fabricated document which purported to be a police report that memorialized a prior statement from an eyewitness to an police officer identifying an alternative suspect in the crime at issue. Plaintiff then pointed to this fraudulent evidence at his post-conviction proceedings and argued that it was "newly discovered" exculpatory *Brady* material which required his murder conviction to be reversed. And it worked. Plaintiff filed a post-conviction petition claiming this report, which said another eyewitness to the crime by the name of Tyrell Curtis, gave a statement that he witnessed George Gaines, commit the crime, was only discovered after his criminal case and was withheld from his criminal defense attorney. The criminal court ultimately agreed to release Dewitt. Dewitt filed a 13-year wrongful conviction lawsuit alleging the police withheld this report from him in violation of *Brady*. The document appeared suspicious. Below is a copy of the fraudulent police report.



NARRATIVE Describe any property recovered. Show disposition of recovered property. List property number.
List Property First

4002896 ------- Note to: Detective Gregory S. Macgillivery

On December 10th, 2002,1400 hours I Mark Veney responded to the 1700 block of Montpelier,to assist another officer on call pertaining to a potential eye-witness to this case. Upon my arrival Detective Darnell Green and I transported Tyrell Curtis to North Eastern District, as well as Headquarters Homocide Division on the above date and time. Tyrell Curtis gave a statement during the interview stating that he witnessed George Gaines come around the corner shooting at everybody who sitting on the porch at the 1700 block of Montpelier St. Tyrell Curtis indicated to me during the interview that Tony Dewitt had nothing to do with the shooting. After terminating the interview Tyrell Curtis was transported back to the 2600 block of Harford Rd.

Respectfully,
Detective,
Mark Veney

VENEY

Sgt. Darnell Green

654322 EXHIBIT 4 793331

This document was not located anywhere in the police file, which seemed suspicious to civil defense counsel. For starters, the document did not appear in the police file. How could it be that plaintiff had possession of the smoking gun report but it was not located anywhere in the official police file? But the truth is that the police did have the original of this police report in their file, but it was blank and not completed. Upon closer examination defense counsel observed that each police bubble report had its own unique identifying number—in the *Dewitt* case, "793331"—located at the lower right-hand corner of both pages of the document. This identifying number is similar to a Bates number in that it facilitates document tracking. This report, however, had the same identification number as an existing document in the police file. As such, experts retained by the defense determined that the blank, known police document was used to fabricate the report which plaintiff claimed was withheld. The unique identifying number exposes the fact that the document plaintiff presented in his post-conviction motion and at his post-conviction hearing was not genuine. Second, the questioned document experts were able to show that the signature of

Sergeant Garnell Green that appears on the report was not written by Sergeant Green. Although the purported signature of Green appears similar to a known exemplar, inspection revealed tremors in the signature, a lack of pressure patterns, and blunt endings, exposing the signature as a fake. The below side-by-side graphics showcase the defects in the copied as compared to the original signature.

Questioned Document

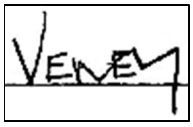


Known Signature

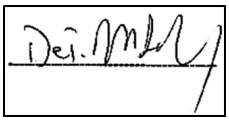


Third, the purported "signature" of Detective Mark E. Veney that appears on the Questioned Document had no resemblance to other known signatures or handprinted examples of the word "Veney" in the official police file. The following graphics showcase the obvious differences, such as that the final stroke of the "N" in the Questioned Document is diagonal and connects to the letter "Y," and that the letter "E" was added between the "N" and "Y" only afterward.

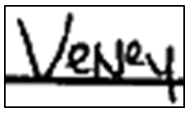
Questioned Document



Known Signature



Known Handprinted

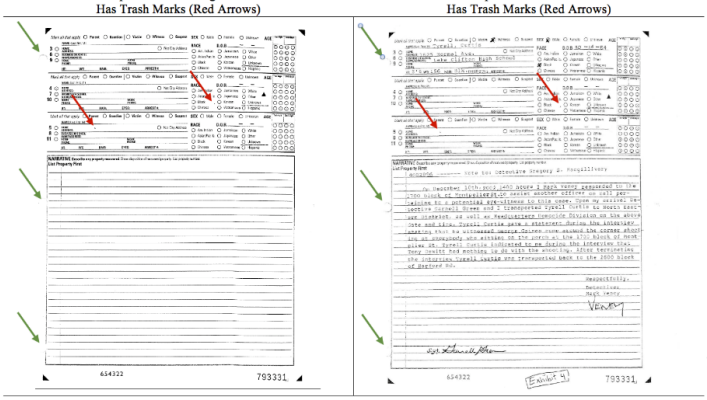


Finally, the report plaintiff presented contained hole punches and "trash marks" (imperfections, scratches or dirt from a copy machine which is visible on a photocopy) that line up perfectly with the unfilled copy plaintiff received from the prosecutor in discovery, as opposed to the known document in the official police file which did not contain hole punches or "trash marks."

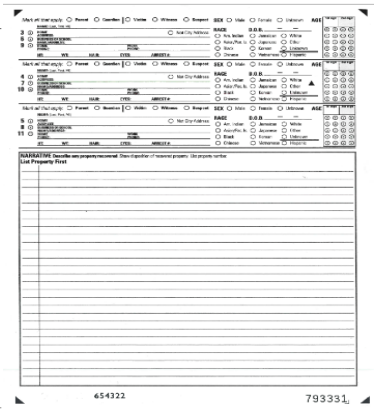
State's Attorney's Office Copy Compared to Questioned Document

STATE'S ATTORNEY'S OFFICE
K-4B Dated 07/03/02 or 07/05/02 3 pages not 2 separate sets
Has Hole Punches (Green Arrows – 3 on left)
Note: Holes do not penetrate the margin as far as K-5A above
Has Trash Marks (Red Arrows)

QUESTIONED DOCUMENT
Q-1 Dated 12/10/02
Has Hole Punches (Green Arrows – 3 on left)
Note: Holes in same position as K-4B and not K-4A above
Has Trash Marks (Red Arrows)



CENTRAL RECORDS OFFICE
K-4C Dated 07/05/02 (changed from (07/03/02)
No Hole Punches
No Trash Marks



Thus, the plaintiff in *Dewitt* deceived the criminal court and the prosecutor and secured his release from prison utilizing shockingly unacceptable means. Plaintiff forged the Questioned Document to support witness's false testimony, then presented the forgery to the court to procure the reversal of his conviction. Based on this discovery and evidence from plaintiff's phone calls, the district

court dismissed *Dewitt*'s 13-year reversed conviction case as a litigation sanction and awarded defendants over $100,000 in attorney's fees as prevailing parties.

C. Creative Use of Experiments

Plaintiffs rely heavily on experts to shift the factual landscape from the background that sustained their conviction into a new circumstance where a prosecutor and judge decides to overturn a jury verdict. These experts carried much weight in the criminal case and it takes defense determination and creativity in order to develop persuasive counter theories. Two examples below illustrate this point.

In one case, plaintiff was convicted of an arson and sentenced to life in prison. According to the plaintiff's confession, he started the fire by pouring gasoline from a milk container on the fire scene. Plaintiff succeeded in overturning his conviction, in part, by relying on two fire scientists who opined that the milk container contained a substance that was not gasoline. This opinion was then used to argue that plaintiff's confession—which stated that a milk container was used to transport gasoline—was false as a matter of science. Instead of accepting the opinions of plaintiff's experts, defense counsel conducted scientific testing to determine gasoline's rate of evaporation from a milk container. This testing showed that gasoline evaporates from a milk container to the point where it is undetectable between 8 and 24 hours. Therefore, the absence of detectible gasoline in the milk container was not a false fact contained within plaintiff's confession.

In another case, the plaintiff brought a suggestive identification claim after his conviction was reversed and he contended that the sole eyewitness at his trial was manipulated by law enforcement. Plaintiff retained an expert who opined that a sketch of the suspect was used with the witness to suggest to her that she should identify the plaintiff. Instead of countering this opinion testimony with the opinion of just another expert, Defendants commissioned a study to determine whether, in fact, individuals exposed to the sketch would select the plaintiff from a photo array at a higher rate than chance.

Good experts have the ability to change the course of a reversed conviction lawsuit. Defense counsel should think creatively and beyond simply identifying a police practices expert. Consider experts on a wide range of issues that could put the defense case on better footing. A reconstruction expert could help the jury understand that a confession was accurate. A child witness expert might take the sting out of plaintiff's false confessions expert. A forensic pathologist might explain that plaintiff's DNA expert's opinion is based on faulty assumptions about the crime scene. In order to place the defense case in the best posture for success, defense counsel should always keep an open mind about the evidence and not fall into a trap where the civil case is merely a re-do of the post-conviction litigation that resulted in plaintiff succeeding in having his or her conviction overturned.