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## When It's Time to Face the Facts: Using the "Physical Facts Rule" to Win Summary Judgment

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Achieving success on a motion for summary judgment can be difficult, even when the facts are on your side. In some cases, all of the lay witness testimony supports the defense, but the plaintiff's expert has presented a theory that supports the plaintiff. The expert testimony alone will often be sufficient to present a question of fact for the jury, precluding summary judgment.

In Ohio, and other jurisdictions, there is a little-known doctrine that can act as a powerful tool for the defense to achieve summary judgment under the right set of circumstances. Known as the "physical facts rule," it stands for the notion that a witness' testimony that is positively contradicted by physical facts cannot be given probative value by the court. In the example above, if the expert's testimony is clearly in conflict with principles established by the laws of science, the court need not give the testimony any probative value. Without probative value, the testimony cannot create a question of fact to defeat summary judgment.

The Ohio Supreme Court first adopted the physical facts rule in *McDonald v. Ford Motor Co.*, 42 Ohio St.2d 8 (1975). There, the plaintiff asserted product liability claims against Ford when a Ford Cobra allegedly failed to make a left-hand curve, ran off the road and struck a tree, resulting in personal injuries to the driver and passenger. The plaintiffs claimed that the steering column fell away from the instrument panel before the accident, causing the driver to lose control of the Cobra. Ford's position was that the falling away of the steering column could only have occurred upon impact with the tree.

The Ohio Supreme Court relied on the physical facts rule to uphold the trial courts directed verdict in favor of Ford. The court described in great detail Ford's steering column's design, particularly its safety feature of breaking away from the instrument panel when compressed more than an inch. The explanation had been given by a Ford product quality engineer at trial. The court found that "[t]he inescapable conclusion from this physical evidence is that the steering column must have been compressed sufficiently so that the mounting blocks slid free, after which the steering column fell." *Id.* at 15.

Yet, that conclusion did not end the discussion. Rather, it presented the following dilemma for the court: "On one side is the testimony of both [plaintiffs] that something went wrong; on the other side is a theory that the mounting performed as it was intended." *Id.* at 15-16. The court explained that "[o]rdinarily, where testimony conflicts, the credibility of witnesses is a matter for the jury." *Id.* at 11-12. However, "in certain instances testimony cannot be considered credible." *Id.* The court described the "broad range of cases in which courts have recognized that eye-witnesses' testimony, essential though it may be, is fundamentally 'soft' evidence, subject to human failings of perception, memory and rectitude." *Id.* Put succinctly, "there is still no man who would not accept dog tracks in the mud against the sworn testimony of a hundred eye-witnesses that no dog has passed by." *Id.* (quoting *Prosser on Torts* (4 Ed.), 212).

With these principles in mind, the court explained that plaintiffs' testimony "provides no explanation of the physical manner in which the falling away of the steering column could have occurred, and requires the assumption of events which are either contradicted by the physical evidence or for which there is no evidence at all." *Id.* at 16. As such, "any jury verdict for [plaintiffs] would of necessity be grounded on sheer speculation as to the existence of facts for which no evidence was presented." *Id.* at 18. Because plaintiffs' testimony, "unsupported, is not sufficiently credible to overcome the evidence of physical facts which are compatible only with the theory that there was no defect in the

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mounting of the steering column," the trial court properly directed a verdict in favor of Ford. *Id.*

Since the Ohio Supreme Court first adopted the physical facts rule in 1975, Ohio courts have continued to rely on it. For instance, in *Pullins v. Vallery*, the issue was whether plaintiff's motorcycle or defendant's pickup truck crossed the median, causing a head-on collision. 1995 WL 650164 (Ohio App. Dist. Nov. 1, 1995). Such issues are normally questions of fact for the jury.

The court first determined what items could be considered physical facts for purposes of applying the rule. The court concluded that the estimates of speed of the vehicles are not physical facts. Therefore, testimony as to speed could not be considered a physical fact. Consequently, any estimates as to where each vehicle was located is not to be considered as a physical fact. On the other hand, the physical evidence at the collision scene and the collision damage to the vehicles involved were physical facts that could be considered.

The plaintiff had testified that the last thing he remembered before he blacked out was the defendant's truck coming towards him at an angle. However, if the defendant had hit the plaintiff as he travelled towards him at an angle, "common sense, as well as the laws of science, would dictate that there would be some damage to the front of the [defendant's] truck." *Id.* at \*5. Yet, the physical evidence showed no such damage. There were also gouge marks and the beginning of a trail of oil in defendant's lane. In light of these facts, "the [plaintiff's] testimony as to how this collision occurred cannot be considered credible since it is positively contradicted by the physical facts present." *Id.* at \*6. The appellate court therefore affirmed the trial court's grant of judgment notwithstanding the verdict in favor of the defendant. *Id.*

The physical facts rule demonstrates the importance of preserving evidence immediately after an accident. This is because even photographs documenting the physical evidence can serve as the means of contradicting the plaintiff's testimony. In *Pullins*, the court relied on photographs of the pickup truck damage as well as the gauge marks and trail of oil in defendant's lane. *Id.* at \*5. In *Maret v. CSX Transp., Inc.*, the court also applied the physical facts rule based on photographs. 130 Ohio App. 3d 816 (Ohio App. Dist.). There, a car collided with a CSX train. The driver of the car sued CSX claiming that "brush" (trees and shrubbery) obstructed his view of the railroad crossing's warning signs and that CSX negligently failed to remove the brush. In response, CSX presented a properly authenticated photograph taken shortly after the collision that clearly showed that brush did not obstruct any of the three pairs of flashing lights along its tracks. There was no evidence that any brush had been removed between the time of the collision and the time that the picture was taken. Relying on the physical-facts rule, the court held that "the evidence offered by [the plaintiff] is so 'inherently incredible' that it is entitled to no probative value." *Id.* at 823. As such, the court upheld the trial court's grant of summary judgment in favor of CSX. *Id.*

In addition to Ohio, several other states have adopted the physical facts rule. See e.g. *Bluell v. All Am. Homes, Inc.*, 2002 WL 32345611 (W.D. Wis. Nov. 4, 2002) ("Given the physical facts in this case, the inescapable conclusion is that the position of the crane's lift-line caused the accident," not plaintiffs' theory); *State v. Hornsby*, 858 S.W.2d 892, 894 (Tenn. 1993) ("where the testimony of a witness "cannot possibly be true, is inherently unbelievable, or is opposed to natural laws," courts can declare the testimony incredible as a matter of law and decline to consider it"); *Brock v. Walton*, 456 N.E.2d 1087 (Ind. App. 1983) (rule applies "when the physical facts are irrefutably established and permit but one inference"); *Crownover v. Nat'l Farmers Union Prop. & Cas. Co.*, 100 N.M. 568 (1983) (physical facts rule applies when the physical conditions are "indisputably established" and the conflicting testimony is "inherently improbable"); *State v. Davis*, 504 S.W.2d 221, 223 (Mo. App. 1973) (the "physical facts rule . . . provides that testimony should be disregarded because it is allegedly contrary to physical facts, has no application where variable or doubtful estimates are made with respect to the facts").

At least four federal circuit courts have applied the rule as well. See e.g. *Harris v. Gen. Motors Corp.*, 201 F.3d 800 (6th Cir. 2000); *Zollman v. Symington Wayne Corp.*, 438 F.2d 28, 31-32 (7th Cir. 1971); *Wood v. United States*, 342 F.2d 708 (8th Cir. 1965); *Granat v. Schoepski*, 272 F.2d 814 (9th Cir. 1959).

Albert Einstein once said, "If the facts don't fit the theory, change the facts." When plaintiffs attempt to do this with their testimony after an accident has occurred, the physical facts rule can be a powerful tool for removing all credibility from plaintiffs' testimony and achieving success at the summary judgment stage.