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April 03, 2006

The Plaintiffs' Game Plan



I recently had an opportunity to sit in on a *Daubert* seminar for plaintiffs' attorneys. That was an eye-opener.

For instance, one of the speakers declared that defendants generally are more in need of junk science than are plaintiffs. He offered no basis for that opinion. He also was not troubled by the fact that, as he acknowledged, the vast majority of *Daubert* motions seem to be filed on behalf of defendants. That, he argued, simply shows that for far too long plaintiffs have been willing to "play defense" on *Daubert* issues.

Perhaps the most interesting portion of the seminar was the panel's suggestions to plaintiffs' attorneys regarding *Daubert* strategy. Of course, many of those suggestions were not plaintiff-specific. The panel recommended, for example, that plaintiffs' counsel should retain their experts early, study the relevant literature and treatises and watch the paper trails they generate with their experts. That is good advice in any context.

However, some of the advice was plaintiff-specific. For instance, the panel suggested that plaintiffs should try to have inserted into any scheduling order a timetable for the disclosure and discovery with respect to defense experts who will be used, not at trial, but solely to support a *Daubert* motion directed at the plaintiffs' experts.

The panel also urged plaintiffs' attorneys to insist on having the first and last word in all *Daubert* hearings challenging their experts. That right, they argued, should be vested with the plaintiff because the plaintiff bears the burden of proving that their experts satisfy *Daubert*.

Perhaps the most notable advice was one panelist's recommendation that plaintiffs file their own "offensive" *Daubert* motions in those cases where the defense has filed a *Daubert* motion directed at the plaintiff's experts. Reasoning that *Daubert* motions should not be granted where the expert opinion at issue is "fairly debatable," the panelist argued that courts are more likely to perceive a challenged opinion as being "fairly debatable" (and thus admissible) if the converse opinion offered by the defense expert is the subject of an "offensive" *Daubert* motion. The goal of the "offensive" *Daubert* motion is not so much to succeed in barring opinions of the defendant's expert, but rather to increase the likelihood that the plaintiff's own expert will survive the defendant's *Daubert* challenge. Though it does not necessarily follow that an attack on the opinion of the defense expert can or should remedy a defect in the opinion of the plaintiff's expert, the panelists agreed that as a practical matter courts tend to admit all of the expert testimony on an issue from both sides when it is the subject of competing *Daubert* motions.

Ultimately there were at least two points for the defense bar to take away from this seminar. First, to the extent that *Daubert* caught plaintiffs unawares, the effects of that surprise have worn off. Plaintiffs' counsel plainly are tuned in to *Daubert* and increasingly will be choosing and preparing experts with the eventual *Daubert* challenge in mind. Though that hopefully will result in an increase in the overall quality of scientific testimony, it also likely will require that defendants craft their future *Daubert* attacks with increasing care.

Second, defense counsel should not be surprised to find themselves with growing frequency on the receiving end of *Daubert* motions. Though some of those motions will be filed in a genuine attempt to bar the testimony of a defense expert, others will be filed primarily to "muddy the waters" in which the defendant's *Daubert* motion will be decided. In either case defendants can minimize the benefit that plaintiffs hope to gain through these tactics by continuing to retain qualified experts, insisting on the use of good science, and otherwise preparing their experts to be ready to meet any *Daubert* challenge the plaintiffs might make.

As always, if you have any thoughts, questions, comments or suggestions on this topic or for making this a more useful resource, please feel free to contact me directly.

Sincerely,

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Challenging Fire Experts in Product Liability Litigation

Determination of a Specific Defect Required



Products are often identified as the origin and cause of fires. In product liability litigation, does the plaintiff establish a *prima facie* case of liability if plaintiff merely establishes that the product was the origin and cause of the fire? No. Much more is required. For the manufacturer to be liable, the plaintiff must prove that the product was defective and the defect caused the fire. Experts who merely testify that the product was the origin and cause of the fire, without testifying that the product was defective and how that defect caused the fire, will likely face exclusion. Likewise, testimony that the product *could have* caused the fire, without reliable evidence that the product was in fact the origin and cause of the fire, is inadmissible.

Lack of Evidence of Specific Product Defect Results in Exclusion of Experts

The United States District Court for the District of Kansas recently decided a case, *McCoy v. Whirlpool Corporation*, 379 F. Supp. 2d 1187 (D. Kan. 2005), which will likely have an effect not only on how fire investigation experts testify, but on how they conduct their investigations. Although a fire investigation expert may testify as to the area of origin, and even the point of origin, as being at or near the product at issue, the investigation and opinions cannot stop there. As a matter of law, there must be testimony that the product at issue is defective in a particular way and that a specific defect caused the fire.

In *McCoy*, plaintiffs alleged that Whirlpool was strictly liable for damages in a fatal fire that allegedly started in the dishwasher. Plaintiffs offered testimony from four expert witnesses who agreed that the fire originated in the upper door of the dishwasher in the door latch switch assembly area and that the cause of the fire was electrical in nature.

Plaintiffs' electrical engineering expert testified that the terminals connecting microswitches to the wiring harness in the dishwasher door were not properly crimped to the conductors in the wiring harness or that the terminals were not properly attached to the microswitches themselves. Plaintiffs' expert opined that excessive resistance heating could result from improper connections with the terminals, and he ultimately concluded that "if the fire originated in the door latch assembly of the dishwasher, as the cause and origin experts had testified, then it resulted from a manufacturing defect which caused excessive resistance heating in the current flow path in the door latch assembly."

However, his testimony suffered a fundamental defect in that it ignored specific, undisputed facts – that the dishwasher's microswitches would melt if they reached 320 degrees, which was not hot enough to ignite the surrounding plastic combustibles; yet, when the microswitches melted, they would open the circuit and stop the current flow.

The expert's conclusory opinion that, absent a defect in the dishwasher the fire would not have occurred, was unreliable and failed to utilize scientific methods. The expert never explained how the microswitch would fail such that the current flow would not be interrupted before a fire could ignite. Nor did he explain how a fire could result from excessive heating in the particular dishwasher at issue in the case.

The court held that "generalized assertions that a product is defective are insufficient; plaintiffs must establish the existence of a *specific defect* to prevail on a defective product claim" (emphasis added). The court further concluded that evidence that a fire originated at or within a certain product is insufficient by itself to establish that a product defect caused the fire. Plaintiffs must prove that a defect in the product could and did cause the fire.

Plaintiffs experts were unable to offer opinions regarding the specific defect that allegedly caused the fire. Accordingly, the court excluded their opinions and granted defendant's Motion for Judgment as a Matter of Law, taking away a \$1.7 million jury verdict.

Similarly, in December, 2005, the United States District Court for the Western District of Missouri limited the opinions of the plaintiffs' experts because they could not identify a specific defect in the product at

issue.

In *Pro Service Automotive, LLC v. Lenan Corp.*, 2005 WL 3371054 (W.D. Mo. Dec. 12, 2005), a commercial building and its contents were destroyed by fire allegedly caused by a defective waste oil heater which had been mounted to the ceiling with metal brackets.

Plaintiffs' first expert concluded that the fire originated in the waste oil burner and was caused by a malfunction in the heater that resulted in the ignition of nearby combustibles. He based this opinion on burn patterns, charred combustibles in the area of the heater and the damage to the heater itself, which consisted of a hole in the fire box. However, this expert had no training in the mechanical design or manufacturing of a waste oil heater. Moreover, the expert was unable to definitively conclude and offer an opinion on whether the hole in the fire box was caused by the manufacture or design of the heater.

The court held that the expert was not competent or qualified to render an opinion regarding whether a potential malfunction of the heater caused the fire or what caused the hole in the fire box. The court allowed the expert to testify regarding the origin and cause of the fire, but precluded him from offering an opinion regarding a potential "malfunction" in the heater. The expert was precluded from using the word "malfunction" as it implies some sort of design or manufacturing defect about which he was not qualified to offer an opinion.

Likewise, plaintiffs' second expert's testimony was limited by the court because he failed to perform any tests to prove his theory that an alternative design would have prevented the fire. Admittedly, such tests would be required by engineering standards and protocols. Further, he admitted that the heater, as it was designed, met industry standards at the time.

Although each of plaintiffs' experts placed the area and point of origin at the waste oil heater, none of the experts could offer an opinion that a specific malfunction or defect in the heater caused the fire. The experts either lacked sufficient qualifications or lacked the foundation for their opinions. Because plaintiffs failed to offer reliable expert testimony that the heater was defective in any way, defendant prevailed on its motion for summary judgment.

As can be seen in the cases outlined above, an origin and cause investigation standing alone in a products liability case will be insufficient. The fire investigation expert first must possess the qualifications necessary to offer an opinion regarding manufacturing and design defects. Then the expert must be able to determine the specific defect, determine whether that defect existed in the product at issue at the time of the fire, and testify that the defect caused the fire at issue.

It is equally fatal where the expert cannot testify reliably that the product was the origin of the fire. In *Bryte v. American Household, Inc.*, 429 F.3d 469 (4th Cir. 2005), *petition for cert. filed*, (xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />U.S. Mar. 6, 2006)(No. 05-1145), decedent was using an electrically heated blanket at the time of the fire. Decedent's caregiver assisted her into her recliner with the electric blanket, which was set on low and not tucked into her sides. A candle was lit on a small table next to the recliner. Decedent's assistant claimed decedent was not able to reach the candle or the lamp on the table, but she was able to reach the table itself. Decedent's caregiver left the house for approximately 15 minutes and upon her return, discovered the fire. Smoke and flames were reportedly coming from the side of the recliner where the table was located. The witness specifically saw that the candle was still lit and that the lamp on the table was not involved in the fire.

Plaintiffs alleged that the electric blanket had a defective safety circuit and that the defect caused the fire. Plaintiffs called two experts to testify at trial. The first witness, a Fire Marshal, determined the cause to be improper use of an electric blanket. He took no samples or artifacts, including the electric cord from the blanket, and did not physically examine the lamp, the candle, the cord, the wall outlet or its wiring. He did not even know that an extension cord had been plugged into the same outlet. The fire scene and the evidence at the scene (electrical plugs, electrical cords, electrical devices, the recliner) were not preserved.

The second expert testified that the blanket was the ignition source; that the blanket was defective and that the defective circuitry caused the fire. He based these opinions on the facts that: there were no other ignition sources in the area; decedent was confined to her chair; she did not smoke; she had no opportunity or means to set the fire; and there were a number of other instances where the product was reported to have "spontaneously burst into flames." The expert admitted, however, that his opinion that defective circuitry caused the fire was wholly dependent upon the Fire Marshal's conclusion that the blanket was the origin of the fire. Because there was no remaining physical evidence after the fire, the expert was unable to independently identify the source of ignition.

When the expert was asked to specifically identify evidence of a defect in the blanket supporting his conclusion that it caused the fire, he was unable to do so. He testified that he never saw any physical evidence of the blanket and did not know the specific cause of ignition. The expert admitted that he could not identify any evidence that reliably could support his conclusion that there was a defect in the blanket that caused the fire.

The expert's testimony was based on the Fire Marshal's testimony that the blanket was the origin and

cause of the fire. The Fire Marshal failed to exclude all or even most of the other possible causes of the fire in any methodical or reliable fashion. During the Fire Marshal's investigation, he did not physically examine the lamp, the candle, the electrical cord that was found on decedent's arm, the wall outlet or its wiring. Further, he was unaware of the extension cord that was plugged into the same outlet as the blanket and, as a result, did not inspect the extension cord. Although he was able to determine the "area of origin," the Fire Marshal was unable to identify the "point of origin." The court specifically noted that it was not required to credit the Fire Marshal's "say-so supporting his own reliability by way of excluding other causes."

Applying *Daubert*, the court held that the Fire Marshal's failure to independently evaluate other possible causes, including the candle, "cannot be reconciled with the reliability mandate" of *Daubert*. Nor is it consistent with NFPA 921's standards, which require an investigator to exclude all other reasonable origins and causes. On these bases, the court excluded the Fire Marshal's conclusions regarding the cause of the fire. Because the expert's testimony was based upon the Fire Marshal's opinions and he had no other basis to testify as to the origin of the fire, it was properly excluded.

Conclusion

To submit a *prima facie* case in a product liability action, a plaintiff must have reliable evidence that (1) the product was the origin of the fire (or in the area of origin of the fire); (2) the product was defective; and (3) that defect caused the fire. Fire investigation experts therefore should determine whether that defect existed in the product at issue at the time of the fire, and testify that the defect caused the fire at issue. If reliable evidence of any of these is absent, a *Daubert* challenge is likely to succeed.

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First Circuit Report

Ballistics testimony linking spent cartridge cases to a particular firearm must satisfy Daubert; expert opinion amounting to mere "common sense" is excluded.



Between November 2005 and mid-February 2006, the First Circuit did not issue any decisions on *Daubert*. However, four decisions from the Massachusetts and Maine district courts look destined for Boston. While two of these cases arise from criminal matters, all four provide further guidance on how courts in this Circuit are dealing with *Daubert* in new and different contexts.

In *U.S. v. Monteiro*, 2006 WL 27215 (D. Mass. Jan. 6, 2006), RICO defendants successfully challenged the testimony of a state police sergeant offered as a purported firearms expert. The court held that the sergeant's methodology was reliable, including the scientific principle that firearms leave unique marks on ammunition, and that the sergeant's training, experience, and proficiency qualified him to perform the tests. Nevertheless, the court held that the sergeant's testimony regarding the matching of spent cartridge cases to certain firearms was inadmissible under *Daubert* because it did not comport with peer review standards or documentation for ballistics field requirements. The court explained that if the test results were submitted in a method comporting with ballistics field standards, it would reconsider the admissibility of the results. This case contains an exhaustive treatment of firearms analysis as it relates to the various *Daubert* factors and is therefore recommended to anyone handling firearms cases.

Two weeks earlier, the same court (but a different judge) addressed a similar attack on ballistics testimony in *U.S. v. Green*, 405 F. Supp. 2d 104 (D. Mass. 2005). The *Green* court was decidedly more troubled by the proffered testimony of the government's ballistics expert and the nature of expert ballistics testimony generally, stating that the precedent of allowing expert ballistics testimony needs to be reevaluated in light of *Daubert* and *Kumho*. The court also provided a comprehensive discussion of the ballistics expert's credentials and methodology as well as a more global discussion of reliability and error rates under *Daubert*. In the end, the court allowed the government's expert to testify as to the tool marks matching, subject to cross examination, but did not permit the expert to offer an opinion excluding "all other guns" because the methodology used did not support such a conclusion.

Moving “downeast,” the Maine district court demonstrated a reluctance to prevent the jury from hearing from both parties’ experts. The issue in *Fullerton v. General Motors Corp.*, 2006 WL 62566 (D. Me. Jan. 11, 2006), was whether a car accident had been caused by an alleged defect that triggered the car to unexpectedly shift from “park” to “reverse.” The defendant filed seven *Daubert* challenges to plaintiff’s experts on this issue. The plaintiff filed one *Daubert* challenge to the defendant’s experts. On the defendant’s challenges, the court: (a) held that an expert’s word choice in creating a shorthand description for the event is not properly subject to a *Daubert* analysis; (b) found that the fact that the expert did not approach the accident in the same manner as plaintiff or determine conditions in which the car would remain stationary or move did not warrant exclusion, but rather went to the weight of testimony; (c) permitted opinion testimony on how the car moved from park to reverse because the expert was not asked about his methodology in his deposition and his affidavit in support of plaintiff’s opposition to the *Daubert* motion was sufficient to overcome the motion; (d) did not require that the expert exactly re-create the accident in order to testify as to what he believed had occurred under the circumstances of the accident; (e) denied defendant’s effort to exclude plaintiff’s expert’s proposed alternative design as impractical under *Kumho*, because the issue of whether the design was practical is proper cross-examination material; (f) allowed plaintiff’s expert to label as a “defective” condition the ability to put the car into park by putting the lever *between* park and reverse, even though it also could be done in a majority of other cars, because a defective condition need not be unique to the particular product at issue; and (g) allowed plaintiff’s expert to testify despite some of his deposition testimony being contrary to his report because “[e]ven if an expert directly contradicts his report in deposition testimony . . . that contradiction merely provides grounds for impeaching his testimony at trial” not excluding the opinion testimony.

The plaintiff fared no better. She moved to bar the testimony of defendant’s experts on the ground that it contradicted the plaintiff’s version of the facts. The court denied plaintiff’s motion, stating that the fact that “evidence is disputed” does not render it inadmissible but simply goes to the weight of the evidence.

Finally, in *Brown v. Wal-Mart Stores, Inc.*, 402 F. Supp. 2d 303 (Me. 2005), the laws of physics worked in Maine and aided defendant’s *Daubert* challenge. Plaintiff brought suit against Wal-Mart after she was hit by falling merchandise and injured. Plaintiff disclosed an expert engineer who opined that the boxes that hit her were improperly stacked and therefore unstable if bumped by a customer or sales person. Defendant moved to exclude the expert’s testimony on three grounds: (1) the facts upon which he relied were unreliable; (2) he did not articulate a reliable methodology in reaching his conclusions; and (3) the expert’s opinion would not assist the jury. The court held that the expert relied on appropriate facts in reaching his conclusion and a “foundation” challenge was misplaced because the factual basis of testimony goes to weight not admissibility. However, the court held that the expert’s conclusion, that when merchandise is bumped it might shift and fall, was based upon common sense (“Mr. Dodge arrives at conclusions that are as old as humanity itself”). Because there was no methodology supporting the expert’s conclusion (that bumping merchandise might cause it to fall), the court excluded that testimony as being “precisely the type of *ipse dixit* expert testimony” that *Daubert* and *Kumho* were designed to eliminate.

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Second Circuit Report

District courts bar testimony regarding carbonless copy paper and infant formula; courts permit testimony by an al Qaeda expert.



Carbonless Copy Paper: Three plaintiffs in *Ellis v. Appleton Papers, Inc.*, 2006 WL 346417 (N.D.N.Y. Feb. 14, 2006) (J. Mordue) alleged that they developed toxic encephalopathy and/or building-related illness after using formaldehyde-containing CCP during the course of their employment at the Tompkins County Department of Social Services (“DSS”). They attempted to call a physician and a toxicologist to support their claims. The defendants moved to preclude the expert testimony on the grounds that the opinions offered by these experts did not reflect reliable, scientific knowledge derived by scientific method, and that the experts did not properly apply their scientific theories to

the facts of the case.

The defendants’ motion was granted. The court found that the opinions offered by the experts on general causation – that formaldehyde in CCP can cause toxic encephalopathy and/or building-related illness – did not meet the requirements of *Daubert*. For one thing, their diagnoses were “highly questionable” because one expert is an internist, not a neurologist, and the other expert is a toxicologist/immunologist, not a medical doctor. Moreover, the court held that even if their diagnoses were correct, the theory that formaldehyde in CCP can cause toxic encephalopathy and/or building-related illness has never been tested, has never been subjected to peer review, has no known or potential rate of error, and is not

generally accepted in the scientific community. The internist's attempt to overcome this ruling by presenting a differential diagnosis also failed because he offered nothing other than his own speculation to rule out other potential causes of toxic encephalopathy and "rule in" CCP as the most likely cause of that disease.

The court also held that both experts' theories of specific causation were inadmissible. The expert internist had no knowledge regarding the types of CCP to which the plaintiff he examined was exposed at DSS. He also did not know how much CCP the plaintiff used on a daily basis, and did not attempt to quantify her exposure by performing air quality tests. Similarly, the expert toxicologist performed no testing of CCP, did not evaluate other potential workplace sources that might have caused the symptoms in the plaintiff he examined, and did not test the air quality at the plaintiffs' work stations. Neither expert addressed the fact that air quality tests done by others detected no appreciable amounts of formaldehyde in the atmosphere.

Infant Formula: The plaintiff in *Colon v. Abbott Labs.*, 397 F. Supp. 2d 405 (E.D.N.Y. Nov. 15, 2005) (J. Dearie) alleged that her child developed Type 1 Juvenile Diabetes ("T1D") after ingesting Similac infant formula. She offered a Canadian pediatrician and "breast feeding advocate," as an expert witness on the issue of causation. The district court granted the defendant's motion to exclude the pediatrician's testimony. The court held that although expert pediatrician's lack of epidemiology or immunology credentials is itself enough to cast considerable doubt on the reliability of his statements, the speculative nature of his opinions required preclusion under Fed. R. Civ. P. 702.

The pediatrician's theory of general causation relied on the assertion that theoretical, laboratory, and epidemiological evidence existed to support the "possibility" that early exposure to cow milk protein "may" be the trigger for a series of events that culminate with the manifestation of T1D in a genetically susceptible child. However, he did not provide sufficient facts or data to support this assertion. He relied on studies that were epidemiologically flawed and he failed to identify a scientifically accepted link between cow's milk formula and T1D.

Further, the pediatrician's theory of specific causation failed because it was based upon nothing other than his own pronouncements. He noted that families with a marked history of T1D are strongly encouraged to breast feed, but failed to acknowledge that the infant involved in the *Colon* case had no such family history. Moreover, the expert was not a pediatric endocrinologist, and did not diagnose or treat patients with T1D. As a result, the court held that his testimony left a significant analytical gap between the possibility that infant formula might cause T1D and the expert's conclusion that Similac actually was a substantial factor in causing the T1D in the infant at issue in the case.

Al Qaeda: The defendant in *United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006) (J. Stein) was accused of conspiring to provide material support to al Qaeda. The government sought to call an expert witness to testify on the origins and structure of al Qaeda, its leaders, and its use of cells and individuals to provide logistical support to its terrorist activities.

The court held that Mr. Kohlman was qualified as an expert on these topics. Mr. Kohlman is the President and Founder of a clearinghouse for terrorism information, and has served as a consultant for a think tank devoted to researching terrorist organizations. He holds degrees in law, Foreign Service and Islamic studies, and has authored peer reviewed items on relevant topics. His opinions were generally accepted in the relevant community, and were similar in scope to those permitted in organized crime matters.

Mr. Kohlman's methodology, which consisted of gathering multiple sources of information, cross-checking and juxtaposing new information against existing information, and evaluating new information to determine whether his conclusions remain consonant with the most reliable sources, was similar to that employed by peers in his field. This methodology was not readily subject to testing and permitted no ready calculation of an error rate, but it was "more reliable than a simple cherry-picking of information from websites and other sources." *Paracha*, 2006 WL 12768 at *20. It was also similar to that employed by other experts in other terrorism cases. *Id.* (citing *United States v. Damrah*, 412 F.3d 618 (6th Cir. 2005); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004)).

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Third Circuit Report

Fire investigator's testimony is excluded due to failure to explain how allegedly defective lamp came into contact with drapes that were the source of the fire.



In the Third Circuit the past few months have been marked by many rulings on *Daubert* issues at the district court level, and one significant ruling on such issues at the appellate level.

In the appellate case, the Third Circuit Court of Appeals reviewed a district court's decision that excluded the testimony of plaintiff's fire origin expert, a decision that eventually resulted in the district court granting summary judgment in favor of the defendants. *State Farm Fire & Casualty Co. v.*

Holmes Products, 2006 U.S. App. LEXIS 2370 (3d Cir. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> Jan. 31, 2006) (unpublished opinion). In *Holmes Products*, the plaintiff sued the distributor and seller of a halogen floor lamp. The plaintiff alleged that the lamp, which did not have a wire or glass guard covering, was defective and caused a house fire when cotton drapes came into contact with the lamp's bulb. To support this claim, the plaintiff offered the opinions of its fire inspector, who ruled out all sources of the fire except the lamp. The fire inspector, however, could not offer an opinion as to how the lamp contacted the drapes. Instead, the fire inspector speculated that the dog in the house might have knocked the lamp over or pulled the drapes onto the uncovered bulb. In addition, the fire inspector could not testify definitively as to whether the lamp remained standing during the fire or not. On the motion of the defendants, the district court excluded the opinions of this proffered expert.

On appeal, the Third Circuit began its review by analyzing the fire inspector's theory that the dog had caused the drapes to come into contact with the lamp. The court found this testimony to be unreliable, since it "was not supported by any scientific analysis or methodology," but was rather "merely unsupported speculation." After affirming the exclusion of the fire inspector's sole theory of how the drapes came into contact with the lamp, the court concurred with the exclusion of the remainder of the inspector's opinions. Though labeling it a "close question," the court found that the lack of a causal link between the lamp and the subject fire doomed the entirety of the inspector's testimony. ("Without a causal link between the fire, the location of the halogen lamp, and the location of the heavy cotton drapes, the remainder of [the expert's] testimony would not have been helpful to the trier of fact for the purposes of determining causation").

The appellate court's affirmation of this wholesale exclusion is particularly significant in light of the court's recognition that the inspector, through his inspection of the scene and physical evidence, had "eliminated all but the draperies' contact with the halogen lamp as the possible source of the fire" Nevertheless, the court found that the inspector's "testimony lack[ed] that logical indicia that would allow the trier of fact to conclude that the remaining *possibility* was in fact the probable source of the fire." (internal citations omitted). Accordingly, the appellate court affirmed the district court's exclusion of the inspector's testimony and the district court's grant of summary judgment in the defendants' favor.

Recent district court opinions on *Daubert* issues cover a range of issues. However, each of the significant opinions is concerned with one of the "trilogy of interests" that govern *Daubert* decisions in the Third Circuit: qualification, reliability, and fit. Significant recent decisions analyzing these interests are as follows:

QUALIFICATION

In *Player v. Motiva Enterprises, LLC*, 2006 U.S. Dist. LEXIS 2288 (D.N.J. Jan. 20, 2006) (unpublished opinion), the district court was faced with issues of macro- and micro-qualification of plaintiff's real estate appraiser in a land contamination lawsuit. The proffered expert had been a licensed and practicing land appraiser for twenty-two years. However, he was not experienced in valuing property that was contaminated. Though recognizing that the appraiser was generally qualified, the court ruled that he was "unqualified to testify to the loss of value to Plaintiffs' properties arising from alleged contamination," because of his lack of experience in this specific area of valuation.

Similarly, in *D & D Associates, Inc. v. Board of Education of North Plainfield*, 411 F. Supp. 2d 483 (D.N.J. 2006), the court held that an attorney who was a general practitioner was not qualified to testify as to the alleged malpractice of an attorney within a specialized area of law.

RELIABILITY

In *Winnicki v. Bennigan's*, 2006 U.S. Dist. LEXIS 5568 (D.N.J. Feb. 9, 2006) (unpublished opinion), defendants attempted to exclude the testimony of plaintiff's medical expert that plaintiff's decedent's renal failure (and ultimate death) was linked to food poisoning that plaintiff's decedent received from a salad. Defendants moved for the exclusion of the proffered testimony on grounds that the medical expert, the decedent's physician, had employed an improper methodology in conducting his differential diagnosis. Specifically, defendants argued that the physician relied on an incomplete medical history and placed too much reliance on the temporal relationship between the eating of the salad and the onset of the decedent's gastrointestinal dysfunction. The court, however, denied the defendants' motion. It found that the physician had reviewed all available "historical information" as well as "laboratory data, toxicology screens, pathology reports, ultrasound, CT scans, and MRI reports." In addition, the expert personally examined and treated the decedent prior to her death and considered alternative causes of her illness and subsequent death. In response to the temporal relationship argument, the court found that the expert properly considered and rejected other possible causes that were not as close in time as the decedent's

ingestion of the salad, and that the expert had a reliable opinion to support plaintiff's allegation that the salad caused the decedent's illness. Accordingly, the defendants' *Daubert* motion was denied with the court noting that the defendants could raise the alleged weaknesses in the expert's analysis to attack the weight that the jury should give the testimony.

In *Willis v. Besam Automated Entrance Sys., Inc.*, 2005 U.S. Dist. LEXIS 26466 (E.D. Pa. Nov. 4, 2005) (unpublished opinion), which involved a revolving door at the entrance to a hotel, the court excluded the testimony of plaintiff's engineer, who intended to testify as to product defect and negligence. The court found the entirety of the proffered testimony to be unreliable because the engineer had not inspected the premises or the door in question, had not ruled out other causes of the accident, and had not inspected or tested any similar products. Rather, the engineer had formed his opinions after merely reviewing discovery documents. Thus, the engineer's opinions were not "derived from any testable hypothesis," and were excluded as "pure speculation and conjecture."

As in *Willis*, several other cases also rejected as unreliable proffered expert testimony that was based on speculation. See *Wood v. Developers Diversified Realty Corp.*, 2006 U.S. Dist. LEXIS 7593 (E.D. Pa. Feb. 27, 2006) (unpublished opinion); *Wartsila NSD North America, Inc. v. Hill Int'l, Inc.*, 2005 U.S. Dist. LEXIS 33881 (D.N.J. Dec. 14, 2005) (unpublished opinion).
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In *D & D Associates, Inc. v. Board of Education of North Plainfield*, 411 F. Supp. 2d 483 (D.N.J. 2006) the court excluded the expert testimony of an attorney due in part to its failure to fit with the issues in the case. In addition to finding the general practitioner unqualified and his methods unreliable, the court excluded the attorney's proposed expert testimony because it failed to satisfy the "fit" requirement. ("[I]f the Court assumes that Mr. Epstein provided poor advice to his client . . . it is unclear how this failure to perform a duty owed to the client transforms into the causes of action asserted by Plaintiff, mainly civil rights violations, tortious interference, libel and slander and malpractice").

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April 03, 2006

Fourth Circuit Report

State law governing proof of causation does not displace Daubert.

Over the past few months, the Fourth Circuit Court of Appeals has addressed several *Daubert* issues, continued to provide guidance on the admissibility of expert testimony, and affirmed its prior positions. The court's decisions focused primarily on the major concerns of *Daubert* including relevance and reliability. *Bryte v. American Household, Inc.*, 429 F.3d 469 (4th Cir. 2005), *petition for cert. filed*, (U.S. Mar. 6, 2006); *Testerman v. Ridell, Inc.*, 2006 WL 41193 (4th Cir. Jan. 6, 2006) (unpublished).
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In *Bryte v. American Household, Inc.* 429 F.3d 469 (4th Cir. 2005), *petition for cert. filed*, (U.S. Mar. 6, 2006), the court addressed the interesting question of whether it was error for the district court to apply *Daubert* rather than substantive West Virginia law as to causation. Plaintiffs' argument was that evidence as to causation is not controlled by *Daubert* and the Federal Rules of Evidence, but rather by the substantive law of West Virginia. Under West Virginia law when a product allegedly causing a fire has been destroyed by that fire, plaintiffs are allowed to rely on "Malfunction Theory" and circumstantial evidence to prove that a defect in the product caused the fire. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smartsags" /> *Id.* at 475. The district court rejected this argument and precluded plaintiffs from relying on the "Malfunction Theory" to establish the product defect.

The appellate court affirmed. It held that "[u]nlike evidentiary rules concerning burdens of proof or

presumptions, the admissibility of expert testimony in federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.” *Id.* (quoting *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1157 (4th Cir. 1996), cert. denied, 522 U.S. 1044 (1998)). Thus the district court’s decision was not a “misapplication” of West Virginia law, rather it was an application of evidence under *Daubert*. *Id.* at 476.

Later, in *Testerman v. Ridell, Inc.*, 2006 WL 41193 (4th Cir. Jan. 6, 2006) (unpublished), the court considered a classic *Daubert* issue. In *Testerman*, a college football player sued a shoulder pad manufacturer for negligently fitting him with pads that were too small to protect him during a football game in which he was injured. The court noted that the proper role of the trial court is to serve as gatekeeper for expert testimony and “ensure that any and all [such] testimony is not only relevant but reliable.” *Id.* at *2 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 582 (1993)). The court further held that the inquiry “must be solely on the principles and methodology, not on the conclusions that they generate.” *Id.*

In deciding the admissibility of the expert’s testimony, the district court focused on three key questions the expert was unable to answer: (1) which blow caused the plaintiff’s injury; (2) whether the area of impact was covered by the shoulder pad; and (3) whether the injury would have occurred or would have been substantially mitigated, had the plaintiff been wearing different pads. Because the expert could not answer these questions the district court excluded his testimony. The plaintiff argued that the district court improperly concentrated on the expert’s conclusions rather than the reliability of the methods used to reach those conclusions. The court rejected this position and held that “it was appropriate for the district court to concentrate on the weakness in [the expert’s] methods as well as on the other problems it enumerated when it held [the expert’s] testimony inadmissible. Thus, the district court properly emphasized the unreliability of [the expert’s] methods even though it looked to the conclusions those methods generated as evidence of unreliability.” *Id.* at *3.

Finally, in *United States v. Smith*, 153 Fed. Appx. 187 (4th Cir. 2005) (unpublished) the court, confirming the admission of handwriting comparison analysis, clarified that “under *Daubert*, the district court need not” expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered. *Id.* at 190. In fact, the court held that if a given theory or technique is “so firmly established as to have attained the status of scientific law, then it need not be examined at all, but instead may be properly subject to judicial notice.” *Id.*

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April 03, 2006

Fifth Circuit Report

Expert opinion excluded due to inadequate factual basis; retired judge is not automatically qualified to provide expert testimony on legal malpractice.



In addition to considering whether an expert is qualified and is asserting opinions that are based on good science, one must consider whether the expert has reviewed adequate factual information to support his opinions. This was discussed by the court in *McNabney v. Laboratory Corp. of America*, 153 Fed. Appx. 293 (5th Cir. 2005) (unpublished opinion). Ms. McNabney went to a lab to have blood drawn and experienced an extravasation which allegedly caused reflex sympathetic dystrophy (RSD).

Historically, Ms. McNabney had several prior injuries including multiple surgeries to her left wrist, and a severe injury to her left shoulder in 2001. Records indicate the 2001 shoulder injury may have caused RSD symptoms such as aching, stiffness, numbness, tingling, and coldness to the touch, which are all symptoms she attributed to the defendant’s medical care. Plaintiff’s expert was excluded because he did not review information regarding Ms. McNabney’s past medical history which included other possible causes of her RSD. Similarly, one of Ms. McNabney’s treating physicians, who had followed her since shortly after the incident, also was excluded because he did not have information regarding her medical history.

The court determined that pursuant to Fed. R. Evid. 702, expert testimony must be “based upon sufficient facts or data,” and be the product of “reliable principles and methods.” *McNabney*, 153 Fed. Appx. at 294-295. In summary, no matter how well qualified, an expert must have adequate background materials to offer the opinions that counsel wants admitted at the time of trial.

The court in *The Cadle Co. v. Sweet & Brousseau, P.C.*, 2006 U.S. Dist. Lexis 6862 (N.D. Tex. Feb. 23, 2006), granted defendants’ motion to exclude the deposition testimony of plaintiff’s expert, a former judge. The matter involved a legal malpractice action against the defendant attorneys and law firm.

Plaintiff designated a former Texas Supreme Court Justice as an expert on legal malpractice. The former

justice issued an expert report and gave a deposition, but according to plaintiff's designation was unavailable to testify live at trial due to his age and physical condition. The former justice testified in his deposition that the defendant attorney's duty required that he know exactly what is in the legal file or ask for a recess to examine the file before agreeing that the court can take judicial notice of a particular fact. However, he also testified that he did not ever recall being asked to take judicial notice of a particular document.

The defendants filed a motion to exclude arguing that the former justice was not qualified as an expert under Fed. R. Evid. 702, that his opinions were not based on reliable principles or methods, and that he had not applied principles and methods reliably to the facts of the case. The court determined that plaintiff's counsel had failed to produce evidence that showed the former justice was familiar with the specific issue based on his practice as a judge or through participation in seminars, conferences, or reviewing articles on the subject of legal malpractice. The court held that he was not qualified to testify as an expert pursuant to Fed. R. Evid. 702 because plaintiff's counsel could not demonstrate that the former justice's testimony was reliable.

The court gave plaintiff's counsel additional time to submit information developed during discovery (no new affidavits or testimony could be submitted) to show that the former justice had specialized knowledge or experience about the legal malpractice issues specific to the underlying case that would assist the jury in determining a fact issue. xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

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April 03, 2006

Sixth Circuit Report

Court excludes the testimony of experts who could not formulate alternative designs or warnings.



In the lone *Daubert* decision handed down by the Sixth Circuit since our last report, the court yet again reaffirmed the trial court's discretion in its *Daubert* gatekeeping role. In *Brown v. Raymond Corp.*, 432 F.3d 640 (6th Cir. 2005), the court addressed the trial court's exclusion of two expert witnesses proffered by the plaintiff, a forklift operator injured in an on-the-job collision. The plaintiff sought to introduce the testimony of a lawyer and industrial engineer to opine on the unsafe design of the forklift. He also sought to introduce the expert testimony of a forklift operator who would testify that the warnings provided by the manufacturer were insufficient. The trial court excluded both, finding neither opinion reliable. The Sixth Circuit affirmed, noting that the industrial engineer/attorney "had no expertise in forklifts" and "had no alternative design to offer that would have eliminated the perceived safety hazard."

With respect to the forklift operator, the court observed that he, too, had not formulated any alternative warnings that would have avoided the harm to the plaintiff. In neither instance, the court held, had the trial court abused its discretion in excluding the experts' testimony. And, because expert testimony was required to prove that the forklift failed to meet the "reasonably prudent manufacturer" standard under Tennessee law, the court also affirmed summary judgment in favor of the manufacturer on all claims.

The Sixth Circuit continues to favor the defense in its *Daubert* rulings. Of its last eight decisions on the issue, the plaintiffs ultimately prevailed on liability in only one. The defense continues to win . . .

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Seventh Circuit Report

Expert's initial opinions are not relevant after a change in facts; experts may testify solely based on experience.



Courts in the Seventh Circuit have addressed *Daubert* issues in a number of contexts over the last few months. One of the more interesting decisions is *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706 (7th Cir. 2005). There the Seventh Circuit affirmed the district court's exclusion of expert testimony on the issue of damages. Kempner was the seller of various telephone products and services. Kempner and Cingular had numerous commercial dealings over the years. In one of those deals Cingular allegedly represented that Kempner would receive certain prices. Kempner claimed that it relied on this representation in choosing to decline a competing offer from Nextel. According to Kempner, Cingular never intended to provide the promised prices. The jury found in favor of Kempner on its fraud claim, but after an earlier appeal the case was remanded for a second trial on the issue of damages.

At that trial Kempner attempted to establish damages through the use of its expert witness. The expert apparently was qualified. However, the expert's damage calculations had been made earlier in the litigation. Intervening motion rulings had refocused the case and eliminated the factual bases upon which the expert's damage calculations had been made. The district court therefore excluded the expert's damage evidence on the grounds that it was not relevant. `xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />` *Id.* at 712-13. The court of appeals affirmed.

It appeared that a significant factor in the decision was the failure by Kempner to make a timely request for permission to amend its expert's earlier calculations. The district court noted, and the appellate court repeated, that Kempner knew its damage calculations no longer fit the claims that had survived the earlier motion rulings, but Kempner still did not submit further damage calculations or request leave to do so prior to the second trial. *Id.* at 13. As a result, there was no competent evidence of damages.

There also were two noteworthy *Daubert* rulings from Northern District of Illinois in the last few months. In the first, *Baker v. Buffenbarger*, 2006 WL 140548 (N.D. Ill. Jan. 13, 2006) (unpublished), the court admitted some of the proffered testimony from an indisputably qualified expert who based his opinion entirely upon his experience. The underlying dispute concerned disciplinary action taken by the International Association of Machinists and Aerospace Workers (the "union") against some of its members in connection with the union's "coordinated bargaining" with United Parcel Service. The disciplined union members claimed that the union was punishing them for exercising their free speech rights to criticize the union. The union responded that the actions it took were necessary to preserve its credibility and the effectiveness of its "coordinated bargaining" with UPS.

The union and some other union officials who also were named as defendants designated a labor historian, and former Secretary of Labor under President Ronald Reagan, as an expert witness with respect to various aspects of the union's conduct at issue in the case.

The disciplined union members moved to exclude the expert's testimony as unreliable, arguing among other things that the expert's opinions "were derived without any accepted methodology." *Id.* at *5. The district court agreed that the expert did not apply "any sort of standardized or generally accepted test or methodology in arriving at the conclusions he reached." However, the court discounted that objection reasoning that "experience alone may be enough." *Id.* The court noted that the expert "has a wide body of experience in the labor field and in union dealings from which to draw," and noted that the plaintiffs themselves did not dispute the expert's considerable expertise in the labor field. *Id.*

The district court further held that expert testimony may be admissible, even where the expert has testified without any sort of standardized or generally accepted methodology, if the expert explains "how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experienced is reliably applied to the facts." *Id.* (quoting Fed. R. Evid. 702 advisory committee notes). The district court concluded that the expert had linked his opinions regarding labor negotiations generally to his experience because he had attributed his opinions to his "research and writing in the labor field, his 50 years of close observation of collective bargaining and union growth, and also his role as a labor mediator and arbitrator over the years."

However, the district court did not permit the expert to testify with respect to whether the particular steps the union had taken in the case were consistent with or appropriate under the union's constitution, or whether the union's conduct was motivated by the plaintiffs' exercise of their free speech rights.

Finally in *Griffith v. Northeast Illinois Regional Commuter R.R. Corp.*, 233 F.R.D. 513 (N.D. Ill. 2006), the district court rejected an attempt to circumvent the disclosure requirements of Rule 26. The case was a personal injury action brought by an employee of the Northeast Illinois Regional Commuter Railroad Corporation. The plaintiff's expert disclosure had been stricken, and the plaintiff moved for reconsideration. The district court granted the motion to reconsider but then again struck the designation on different grounds.

Initially, the court observed that because the plaintiff's expert was also his treating physician he could testify to some matters as a fact witness rather than as an expert. *Id.* at 516-17. However, because the plaintiff intended to rely upon his treating physician for testimony that would exceed the "scope of treatment and ventures into more general expert testimony," the court held that the plaintiff was required to provide an expert report as required with Rule 26(a)(2)(A). *Id.* at 517.

Apparently attempting to circumvent Rule 26(a)(2)(A), the plaintiff submitted an expert "report" that amounted to a 12-page transcript consisting almost entirely of leading questions posed by the plaintiff's attorney together with the expert's response to those questions. The district court held that this type of "report" did not comply with Rule 26. The "report" contained virtually no information about the bases for the opinions expressed by the plaintiff's doctor. It provided no evidence that the doctor possessed the expertise to form at least some of the opinions contained in the "report," and it contained no description of the evidentiary foundation upon which many of the opinions were based. Ultimately the district court held the plaintiff's physician could testify with respect to the care and treatment of the plaintiff, but could not testify with respect to causation, prognosis, degree of permanency or a future disability without complying with Rule 26(a)(2)(B). However, the court then gave plaintiff additional time to attempt to comply.

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April 03, 2006

Eighth Circuit Report

Expert testimony was excluded where test did not incorporate the facts of the case.



In November, the Eighth Circuit considered a challenge to the admission of expert testimony based upon *Daubert* and Fed. R. Evid. 702 in *United States v. Cawthorn*, 429 F.3d 793 (8th Cir. 2005).

In *Cawthorn*, the appellant had been convicted in the District Court of Nebraska for possession of crack cocaine with intent to distribute, based in part on testimony of the prosecution's expert. While conceding that studies show that the U.S. money supply is contaminated with cocaine residue, the expert attempted to show that a positive result from the swab test on Cawthorn's hand could not be attributed to mere casual contact with money (Cawthorn was carrying \$1,380 at the time of arrest). The expert's first test involved swabbing a money counter and the hands of bank tellers to check for cocaine residue. The second test involved swabbing the steering wheels of cars impounded for drug offenses. Neither set of tests produced positive results, thereby indicating, according to the expert, that the swab test was not sensitive enough to detect residue amounts picked up from money and steering wheels. Cawthorn did not challenge the reliability of the tests themselves, but did challenge the conclusions of the expert.

In affirming the conviction, the Eighth Circuit held that it was proper to admit testimony concerning the first set of tests, stating that it was "scientific, supported by appropriate validation, and helps the trier of fact understand the evidence." The court noted that it had been shown through studies that the surfaces of all currency contain some trace amounts of cocaine. While the probative value of the testimony was deemed low, it was considered relevant because Cawthorn had argued that his positive result was due to casual contact with money. On the other hand, the court held that admission of the expert's testimony concerning the steering wheels test was an abuse of discretion by the district court. It reasoned that since the prosecution had not established that any of the steering wheels tested came into contact with cocaine or were impounded for cocaine-related offenses, the expert's conclusion that the test showed that the swab would not detect cocaine exposure from casual contact with steering wheels was "infirm," amounting to unsupported speculation. Hence, the court opined that the expert's testimony in this regard failed the reliability prong of *Daubert* and also would likely have failed the relevancy prong. Despite its finding, the court held that the erroneous admission of the expert's steering wheel testimony was harmless and affirmed the conviction.

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April 03, 2006

Ninth Circuit Report

Daubert standards are relevant to claims of spoliation regarding experts' notes.

Two of the more interesting *Daubert* decisions recently handed down within the Ninth Circuit are *McDonald v. Sun Oil Co.*, ___ F. Supp. 2d ___, 2006 WL 696316 (D. Or. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />Mar. 14, 2006) and *Living Designs, Inc. v. E.I. DuPont De Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005).

McDonald v. Sun Oil Co., ___ F. Supp. 2d ___, 2006 WL 696316 (D. Or. Mar. 14, 2006), involved a real estate transaction in which the subject property allegedly was contaminated with mercury. The parties filed a bevy of motions including one motion in limine for sanctions to remedy the supposed spoliation of evidence. The basis for this motion was the failure of the defendants to provide plaintiffs with copies of some of the defense experts' drafts and notes. The defendants produced their experts' draft reports, including those with defense counsels' red-lined editorial comments, all mail and e-mail between defense counsel and the experts, all *available* handwritten notes taken by the experts, and copies of articles and other publications reviewed by the experts, including highlighting, underlining, and notes.

The plaintiffs argued that defendants' production was not enough. They requested an array of sanctions including the use of an adverse inference instruction. They argued that there was spoliation of handwritten notes taken by the defense experts and that the alleged spoliation deprived the plaintiffs of both the opportunity to determine the admissibility of the experts' testimony and the ability to cross-examine them properly.

The district court denied the motion. In doing so, the court first noted that Rule 26 "does not require the production of an expert's working notes." *Id.* at *3. Thus, the court concluded, there was no duty to produce the notes even if they were retained. The court also held that an adverse inference instruction was not warranted because there was no showing by the plaintiffs that the notes would have been relevant to some issue in the case. *Id.* at *4. The court did not devote much discussion to this alternative basis for its ruling. However, it did make plain that its rationale was the failure by the plaintiffs to show that the evidence that had been destroyed was the type that would relate to a *Daubert* challenge of the defendants' experts. *Id.* Absent such a showing, the court concluded, sanctions were not warranted because the plaintiffs had "received all necessary information relating to the basis of the experts' opinions and their methodology." *Id.*

The issue in *Living Designs, Inc. v. E.I. DuPont De Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005), was whether DuPont fraudulently induced the plaintiffs to settle a prior products liability lawsuit. The original litigation concerned whether Benlate, a fungicide developed by DuPont, was contaminated with a herbicide during the manufacturing process. Farmers who used Benlate claimed they suffered serious crop damage due to the contamination.

The plaintiffs in *Living Designs* were parties who settled prior crop damage claims with DuPont. After they settled their crop damage claims, the *Living Designs* plaintiffs learned that DuPont was sanctioned in other courts for having withheld and misrepresented the results of tests regarding contaminated Benlate. The plaintiffs then filed the *Living Designs* litigation arguing that DuPont withheld and misrepresented the same information in order to secure their earlier crop damage settlements.

DuPont moved for summary judgment. Among other things, it argued that it was entitled to judgment as a matter of law because the damages that the *Living Designs* plaintiffs claimed they suffered (accepting lower settlement amounts due to fraudulent representations) were too speculative to be recovered. The plaintiffs responded to DuPont's summary judgment motion, tendering the testimony of two expert witnesses on the question of the materiality and impact of DuPont's alleged fraud. The district court apparently held that the testimony of the plaintiffs' experts was inadmissible, and it ultimately entered

The appellate court reversed on several grounds including the district court's ruling on the admissibility of the testimony of plaintiffs' experts. With respect to that ruling, the Ninth Circuit held that the district court had abused its discretion by excluding that testimony without considering the experts' respective knowledge and experience in their fields. That error, however, was not fatal. The appellate court did not consider whether the experts' testimony indeed was admissible. Rather, it simply held that on remand the district court must consider the issue in accordance with *Daubert*. *Id.* at 368 n.14.

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April 03, 2006

Tenth Circuit Report

Expert psychologist's testimony that a confession was not credible due to the defendant's "compliant nature" is barred.



The Tenth Circuit Court of Appeals issued an opinion on January 20, 2006, affirming the exclusion of expert testimony on whether the defendant was prone "to give false confessions based on his overly compliant nature and tendency to acquiesce to the wishes of others," including the federal agent who obtained the defendant's confession. See *United States v. Hebah*, 2006 WL 148275 at *1 (10th Cir. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />Jan. 20, 2006) (unpublished). The issue in *Hebah* was whether the trial court properly exercised its "gatekeeper" role pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Mr. Hebah was convicted on one count of sexual abuse by engaging in a sexual act with a person "incapable of appraising the nature of the conduct or physically incapable of declining participation, while on an Indian Reservation in violation of 18 U.S.C. §§1153 and 2242(2)(A) and (B)." *Hebah*, 2006 WL 148275 at *1. Mr. Hebah designated a clinical and forensic psychologist as an expert witness who would testify that Mr. Hebah's admission to the crime was not credible and should not be used because Mr. Hebah had an overly compliant nature, which induced him to accede to the will of others. *Id.* at *9. Mr. Hebah's expert witness alleged that Mr. Hebah's overly compliant nature caused him to give a false confession to the federal agent under the circumstances. *Id.*

The United States moved to preclude Mr. Hebah's expert witness from testifying under *Daubert* for the following reasons:

- (1) The witness did not have any expertise in the area of false confessions because his resume lacked any reference to training, research or published articles on the topic;
- (2) The witness testified that "he guessed" he had attended only a one-day workshop several years earlier on administering tests relating to false confessions;
- (3) He had administered false confession tests only five to ten times during his career;
- (4) The witness relied on the Mr. Hebah's family to verify Mr. Hebah's compliance test results;
- (5) The psychologist tested Mr. Hebah and his familial relatives simply by sending them questionnaires in the mail and then subsequently interviewing them over the telephone, and he admitted that their responses could have been influenced by others in the room;
- (6) The defendant's and relatives' answers to the test could be "self serving or based on lies";
- (7) The expert witness confused the error rate for two tests and was unable to establish the error rate for the tests that were actually administered;
- (8) The expert did not know if Mr. Hebah was truly a compliant or simply a false confessor despite offering

an earlier opinion that Mr. Hebah was both;

(9) The expert did not personally give Mr. Hebah a “Kaufman Brief Test,” which he used to gauge the defendant’s intelligence;

(10) The false confession studies upon which the expert relied were from Britain and Iceland, both countries with materially different legal systems from the United States; and

(11) Confession testing was “too meager to qualify as scientific knowledge” under *Daubert*.

Id. at *10.

The district court excluded Mr. Hebah’s expert. On appeal the *Hebah* Court reviewed *de novo* whether the district court properly performed its “gatekeeper” role under *Daubert* and Federal Rule of Evidence 702. *Hebah*, 2006 WL 148275 at *11. The court then used an abuse of discretion standard to determine whether the district court properly excluded the expert testimony pursuant to the court’s gate-keeping function. *Id.*

In affirming the district court, the Court of Appeals first noted that whether a confession is voluntary or credible is typically not subject to expert testimony because it “encroaches upon the jury’s vital and exclusive functions to make credibility determinations. *Id.* Ultimately the Court of Appeals found that Mr. Hebah’s expert witness lacked the training that was necessary to qualify him to testify on false confessions, and held that the expert’s procedures were shown to be unreliable. *Id.* at *12. The court also held that Mr. Hebah’s expert failed to use real or standard IQ tests, that he failed to establish any error rate for the tests, and that his testimony potentially could infringe on the jury’s witness credibility determinations. *Id.* Thus, the Court of Appeals agreed with the district court that Mr. Hebah’s expert should be stricken. *Id.* Because the court had determined that Mr. Hebah’s expert witness failed *Daubert*’s reliability requirement, it did not address whether his testimony was relevant. *Id.*

In another interesting opinion, the United States District Court for the Western District of Oklahoma considered whether an expert witness should be precluded from testifying at trial about opinions that were expanded substantively after the expert’s written report was produced. *Dixie Steel Erectors, Inc. v. Grove U.S., LLC*, 2005 WL 3558663 (W.D. Okla. Dec. 29, 2005) Although the issue in *Dixie Steel* was not whether the expert witness qualified to testify as an expert under *Daubert*, it is instructive concerning the ramifications of improperly prepared expert witness reports.

In *Dixie Steel*, a metallurgist was retained by the plaintiff to testify as an expert witness concerning an alleged design defect in a crane. *Id.* at *1. The plaintiff produced the expert’s written report on June 27, 2005. After his written report was produced, the expert traveled to the site of the crane in New Mexico, photographed the crane, took measurements of the crane’s specifications and interviewed crane operators. *Id.* at *4. When the expert was deposed in October 2005, the expert expanded his opinions beyond those in his written report based on his additional work that was completed after the report was produced. *Id.* The defendant moved to exclude the expert from testifying beyond the opinions in his written report. *Id.*

The court analyzed the following four factors to determine whether the expert’s so-called “surprise opinions” should be excluded:

- (1) The prejudice or surprise to the party against whom the testimony will be offered;
- (2) The ability of the party to cure the prejudice;
- (3) The extent to which introducing the testimony would disrupt the trial; and
- (4) The moving party’s bad faith or willfulness.

Id. at *7.

The district court reviewed the expert’s deposition transcript and the expert’s written report and concluded that the expert’s additional work completed after his expert report was produced was not simple “fine tuning of data previously disclosed,” as was asserted by the plaintiff. *Id.* Rather, the court noted, “when a veteran expert, working with experienced counsel, waits until more than three months have passed after the original report was rendered to do the most meaningful work in support of that report, the expert, and counsel, know exactly what they are doing.” *Id.* at *10. Using these factors, the district court held that the expert and counsel had knowingly waited until the defendant’s expert reports were produced so that the plaintiff’s expert could determine what additional work was necessary. *Id.*

The court emphasized that if additional work was necessary, the plaintiff should have sought relief from the court and requested authority to do additional work. The court ruled that “self-help is not a remedy available to a litigant desirous of sending its expert back to the drawing board or back into the laboratory to do significant additional work after the original report has been rendered.” *Id.* at *8.

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April 03, 2006

Eleventh Circuit Report

The jury is entitled to hear the opinion of a psychiatrist based on the hearsay of a surviving wife regarding the mental state of her husband prior to his death.



In the past six months there has been relatively little *Daubert* case law activity in the Eleventh Circuit. Two recent noteworthy cases from that circuit are *Williams v. Consolidated City of Jacksonville*, 2006 WL 305916 (M.D. Fla. Feb. 8, 2006) and *Nelson v. Freightliner, LLC*, 154 Fed. Appx. 98 (11th Cir. 2005).

In *Williams*, four white, male plaintiffs who were lieutenants in the city fire department alleged that the city had discriminated against them on the basis of sex and race. The plaintiff's expert psychiatrist interviewed the wife of one of the plaintiffs who had died about her observations of her husband subsequent to the alleged discrimination. The expert opined that the deceased plaintiff, along with the others, suffered from significant mental anguish and resulting mental disorder. He also testified that the related stress was probably the cause of the plaintiff's death. The defendants moved in limine to exclude the plaintiff's expert.

The district court held that the psychiatrist would be allowed to testify to these issues, and that it was within the jury's discretion to consider the weight of his testimony as it was based on hearsay statements (that were not excluded in limine) of the deceased plaintiff as related by his wife.

The plaintiff in *Nelson* was the wife of a deceased truck driver who alleged that her husband had died from carbon monoxide poisoning from exhaust fumes. The truck was idling at the time the decedent's body was found. The plaintiff offered into evidence a blood test, the testimony of the individual conducting the test, and measurements of the amount of carbon monoxide emitted from the truck. The Eleventh Circuit Court of Appeals held that the lower court did not abuse its discretion in determining that the test involved a question of weight rather than *Daubert* admissibility. The court also held that it was not error to admit the testimony of the person conducting the test even though he testified about matters that were beyond that of a fact witness. The court allowed this testimony because the defense opened the door to these issues on cross-examination.

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April 03, 2006

The importance of NFPA 921 in fire cases.



Fire experts have lived a charmed life for the past thirty years [the time I have been involved in fire investigation]. The only criteria for any person to qualify as an expert on fire investigation, and the associated science that must be considered, was to state that one worked for a public agency, such as a police or fire department, or had attended some training schools, such as untested seminars and conferences. The first time I qualified as an expert in 1974 while working as a police officer and fire fighter, I was terrified that I would not be able to answer questions associated with my craft. However, I was not asked any such questions. The opposing attorney did object to my testimony since I had never qualified before, but the judge overruled the objection stating, "[i]t is for the jury. It goes to the weight of the evidence." I don't pretend to know why such a comment would overcome a legal challenge, but I was overjoyed that it did.

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Since *Daubert*, fire experts have been increasingly scrutinized as to their knowledge, training, experience,

and the methodologies they use as fire investigators. Consequently, there have been a few fire experts that have not been permitted to testify in particular cases. Unfortunately, there have been far too few disqualifications by the “gatekeepers.”

Beginning in 1992 with the first publication of NFPA 921, *Guide for Fire and Explosion Investigations*, the fire investigation community, and the legal profession that interacts with them, recognized that there is a methodology to be followed in conducting a fire investigation. NFPA 921 provides the basic principles of fire science and related issues that the legal community can use to successfully measure the knowledge of a fire expert as it relates to their testimony. Prior to this document, attorneys and judicial gatekeepers had to rely in many instances on the very same witness to determine what the investigation entailed and how facts were developed to prove the opinions proffered. This is no longer necessary. In essence, NFPA 921 has become a standard of care in the industry and a guide book for the legal profession to measure and qualify or disqualify a fire expert.

For NFPA 921 to be most helpful, the legal profession must become familiar with it and the concepts introduced by it. This entails reading it. Far too many fire experts have not read it, so any reading by the attorney will provide, in many instances, more knowledge of NFPA 921 than the witness holds. Some attorneys believe that the concepts discussed in NFPA 921 are too technical and cannot be easily comprehended. This belief is incorrect. The scientific discussions in the document are basic and are intended to inform readers with little or no prior knowledge of fire science. The methodologies described in the document can be best measured by using common sense. However, this does not mean that reading NFPA 921 converts the reader into an expert on fire investigation methodology. Rather, if someone reads what the document says and compares the narrative to the expert’s stated or apparent methodology, it should be clear to the uninformed reader whether the best methodology was used by the expert.

Aside from comprehending the document, the attorney needs to understand the differences between an NFPA Standard and an NFPA Guide. A standard by NFPA’s definition is a document that can be promulgated into law and contains mandatory language. A guide does not include any mandatory language and cannot ever be raised to the level of a standard. The often heard phrase of some fire experts is that NFPA 921 is “only a guide” and therefore is not to be accepted as authoritative. Such a characterization is incorrect when one considers that the document is the ONLY peer-reviewed, consensus document in the fire investigation field that discusses fire investigation principals and methods. This unique status has led several gatekeepers to accept it as authoritative. One such gatekeeper went so far as to label it the “Gold Standard” of fire investigation.

When a fire expert declares that NFPA 921 is “only a guide,” it is likely that the expert has not read it, holds several misconceptions about what it says, and probably did not adhere to the methodology discussed in it. At that point, the attorney’s familiarity with the document becomes a huge advantage over the expert. Familiarity with NFPA 921 is also beneficial when trying to convince a gatekeeper that the document should be used to measure a fire expert’s qualifications and evaluate the expert’s investigation. Some of the published decisions rejecting the document as authoritative suggest that the judge may have had several misconceptions of the document and its purpose.

Many fire experts have taken a different approach to NFPA 921. Rather than describing it as “only a guide,” many fire experts endorse NFPA 921 and testify that they followed the methodologies in the document. Consequently, another developing area associated with fire expert qualifications and NFPA 921 is the use of fire investigation methodology experts. Methodology experts are very familiar with both the methodologies discussed in NFPA 921 and the underlying rationale for the methodologies. Having an expert in fire investigation methodology peer review the witnesses’ position may produce arguments against the witness’s claim of adherence to NFPA 921. These peer reviewers do not need to offer opinions related to the origin and cause of the fire; therefore they may not need to have specific knowledge of the technical issues of the case. They simply assess the methodology used by the expert, determine if the methodology adheres to NFPA 921, evaluate whether any exceptions were warranted, and evaluate if the professed methodology was thorough enough.

Many fire experts do not provide a well defined origin and cause for a fire. Knowledge of what NFPA 921 recommends to define these very important investigative goals is critical for the attorney assessing if the expert has scientifically determined a fire’s origin and cause. Origin determinations relate to the physical location where the fire began. They serve to simplify the investigation by allowing the expert to ignore potential fire causes when addressing the matter, e.g. the smaller the area of origin, the smaller the number of heat sources that then must be eliminated. Cause determinations relate to the identification of the first fuel, the heat source, and how these two factors combined to create a fire. Far too many fire experts ignore the scientific method to address these causal factors and offer their opinions based on incomplete investigations.

In conclusion, the principal means of utilizing NFPA 921 to qualify or disqualify a fire expert is by knowing the document. In the early editions, fire investigators were encouraged to read it and become familiar with it. With the U. S. Supreme Court’s decisions in the 1990’s, the legal profession that specializes in fire litigation must be encouraged to do the same.

Dan Churchward began his career in 1971 as a police officer and as a career firefighter. During this time, Dan learned the craft of fire investigation and practiced his skills on hundreds of fire scenes. In 1981, Dan left the public employ and began to perform fire origin and cause determinations with a private laboratory.

He graduated from Purdue University with a BS Electrical Engineering Technology in 1988. In 1991, he worked for Royal Insurance in their SIU. He served as their only on-staff engineer and either investigated or managed large-loss fire scenes. In 1995, Dan started Kodiak Enterprises, Inc, which specializes in fire investigation, safety consulting, large-loss site management, and training. These services are described at www.kodiakconsulting.com. Dan has qualified as an expert witness in U. S. Federal District Courts and several State jurisdictions. The highlight of Dan's career has been his involvement in the National Fire Protection Association Technical Committee on Fire Investigations. This group produced the NFPA 921, *Guide for Fire and Explosion Investigations*. Dan is a charter member of this committee and currently serves as Committee Chairman. Kodiak Enterprises, Inc. accepts NFPA 921 as the most significant treatise on fire investigation.

April 04, 2006

The Daubert Tutorials



[An Introduction to the *Daubert* Tutorials](#)xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

The *Daubert* Tutorials are a series of a dozen “lessons” that begin with the original *Daubert* opinion and work systematically through the essential *Daubert* progeny.

They discuss the law that governs expert testimony in federal courts, and the science that informs that law. Eschewing technical lingo, the scientific notions are developed in the language of lawyers, and while the discussions will not always be elementary, the science discussed here will always be about novel strategies for prevailing in complex litigation.

The record shows that the original *Daubert* opinion was extensively informed by science and its methods. There were dozens of amicus briefs, including scientists’ briefs, and much of the scientist’s language found its way into the opinion. Because science informs the law of expert testimony pervasively, sophisticated articulations of the law of expert testimony require that the discussion be based in the elements of the science that *Daubert* cites. One senior law and science professor summarized this proposition tersely, saying, “If you are going to litigate scientific issues, its best to know some science.”

With some minor exceptions, there won’t be any math or much statistics either, because most of the scientific analysis upon which the *Daubert* line of cases relies can be developed in intuitive terms with only the most minimal use of mathematics and formal statistics. The origins of these notions of science are in the philosophy literature and that is mostly how we discuss them here.

[Daubert’s Roots in Science: The Origins of Testing and Error Rates](#)

Daubert discussions often start with the four factors, treated somehow they were handed down in the manner of the Ten Commandments, written de novo, of whole cloth. As a result, they miss one of *Daubert*’s critical mechanisms for controlling expert testimony: *Daubert* was not written de novo at all; it was written, in large part, by incorporating the elements of scientific inquiry into the law. This suggests a range of novel strategies for litigating expert testimony, many of which center on testing and error rate analysis, and all of which have roots in what the Supreme Court and the generally-accepted peer-reviewed scientific literature call “the scientific method.”

Daubert explains the criteria that gatekeeper trial courts should use to evaluate “purportedly scientific evidence” by parsing Rule 702, focusing on the meanings of the words “scientific” and “knowledge.” The Court said that “[t]he subject of an expert’s testimony must be ‘scientific . . . knowledge,’” because it is “the requirement that an expert’s testimony pertain to ‘scientific knowledge’” that “establishes a standard of evidentiary reliability.” In addition, the Court required that “to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method.” *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579, 590 (1993).

The Court’s statement that “to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method” presages much of the rest of *Daubert*, and fully parsing that phrase provides an opportunity for lawyers to prevail in matters that would be otherwise difficult. So now, the Scientific Method, as relied upon by *Daubert*.

[Daubert’s Foundations: The Scientific Method](#)

The phrase “the scientific method” is a term of art within the scientific community and has a specific meaning within that community. *Daubert*’s discussion of the scientific method quotes from seminal works on scientific inquiry enough to make it clear that the Court is using the phrase as that term of art. Indeed, much of the language relied upon by the Court in its discussion of the scientific method is strikingly similar to the language used in amicus briefs filed by or on behalf of scientists from industry and academia. *Daubert* says that:

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. “*Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.*” 509 U.S. at 593 (emphasis added).

This famous-in-some-circles quotation (which is the citation for the first of *Daubert*'s four factors) usually ends after the first sentence. But the real meat of how to control expert testimony with *Daubert*'s first factor comes from the emphasized first half of the second sentence. The testing of hypotheses that the Court's emphasized language requires is called “hypothesis testing” in the scientific community, and as the Court's quotations indicate, hypothesis testing is the essence of the scientific method. It is noteworthy that the *Daubert* Court required that experts follow this “scientific method” from the first moment of their discussion of the four factors that commentators and lower courts have fixed upon, because testimony that proceeds in accordance with the scientific method will always tend to satisfy the Court's testing and error rate criteria. Perhaps more importantly, by carefully defining what testing is, we can define what testing is not. And by defining what error rates are, we can define what they are not. Knowing what does not constitute testing and error rate analysis is at least as important for winning cases as knowing what does.

For example, in one recent *Daubert* issue in a products liability case, plaintiff's counsel claimed that his expert had tested a modification to the product by forming a prototype of a locking mechanism and installing it. But installing a locking mechanism (or a guard, or a warning) is not a *Daubert* test of the expert's methods, and although the fabrication-as-test argument has carried the day for plaintiffs in reported cases, it does not win when countered by arguments that explain what testing means in *Daubert*. Hypothesis testing is the core of the scientific method, is carefully defined, and will be the topic of a subsequent issue in this series. *Daubert* testing is likewise carefully defined: My mom tests the spaghetti noodles to see if they are done, but that is not a *Daubert* test. Neither is installing a locking mechanism on a lawn chair to hold it open a test of an alternate design. We will discuss testing more in coming issues.

The role of the scientific method is central to the Court's analysis and the Winter, 2006 issue will develop its fundamentals in lawyer-friendly language. For present purposes it suffices to say that the scientific method cited by *Daubert* requires that the analyst pose a hypothesis about some phenomenon and test that hypothesis at some specific rate of error.

In fact, all of the *Daubert* factors depend on the scientific method, half directly and half indirectly. The four *Daubert* criteria for evaluating the admissibility of expert testimony are: whether the methods upon which the testimony is based have been tested; the known or potential rate of error associated with that testing; whether the method has been subjected to peer review; and whether the method is generally accepted in the relevant scientific community. The first two of the Court's four criteria amount to asking whether the techniques upon which the testimony is based are grounded in the scientific method. And virtually no scientific expert testimony will satisfy the last two factors unless it satisfies the first two, because the third criteria requires the first two and the fourth requires the first three. See FAIGMAN, xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />KAYE, SAKS & SANDERS, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §1:15 (West Group 2005) (observing that “courts will find application of *Daubert* difficult if they treat testability as an optional factor. The other three factors all presuppose testability; in science, a non-testable hypothesis cannot have an error rate and is exceedingly unlikely to be published in a peer-reviewed journal and achieve general acceptance”).

Just like the scientific method, testing and error rate analysis are terms of art in the scientific literature that *Daubert* cites in its articulation of the evidentiary requirements for science to be admissible in federal court. They have specialized meanings that are discussed in the literature that the Court cites. Over the coming quarters we will cite much of that literature as this column discusses how the scientific method, testing and error rate analysis can control expert testimony in a range of practice areas.

We previewed one such example above in the products area and a second example was the subject of last issues' lead article, [Controlling Regression-Based Litigation with *Daubert* and Statistical Analysis](#). Coming issues will show how the scientific basis of testing, error rate analysis and the scientific method provide important controls in most defense practice areas, including but not limited to: patent, IP, medical device and malpractice, securities, antitrust, contract, and any matter that involves statistical estimation of damages.

Stephen Mahle is a scientifically trained lawyer who concentrates his practice in litigating *Daubert* and expert testimony issues for insurance companies and their outside counsel. He has a doctorate in economics, has been a finance professor at several major universities, is webmaster of daubertexpert.com, and lectures and publishes regularly on *Daubert* and expert testimony issues. He is a member of Keeley Hayes Garrett Lee & Mahle in Boca Raton, Florida, 2424 North Federal Highway, Suite 314, Boca Raton, Florida 33431, and can be reached at smahle@daubertexpert.com, or (561) 392-4300.

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