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June 13, 2007

What Can You Do About Your Opponent's Junk Science Expert?



You won your *Daubert* challenge, obtained summary judgment and your opponent gave up without an appeal. That is a great outcome, but your client is still upset because without the junk testimony from your opponent's expert your opponent might never have taken the case or at least would have taken a sensible position in early settlement talks. Instead, thanks to your opponent's expert, your client had to spend huge sums of money defending the case through summary judgment. Of course, that is just part of the game. But does it have to be?

Recently, in *MacGregor v. Rutberg*, 478 F.3d 791 (7th Cir. 2007), the Seventh Circuit considered whether expert testimony should be excepted from the absolute privilege generally applicable to witness testimony in judicial proceedings. Note:

MacGregor did *not* recognize such an exception. However, the decision was closer than would be expected and appears to be one of the first cases really examining whether the policies behind the absolute privilege for witness testimony apply with the same force when the witness in question is a paid expert.

MacGregor involved a defamation claim brought by one neurosurgeon against another. Dr. Rutberg, the defendant in *MacGregor*, had testified as an expert witness in an earlier malpractice suit against Dr. MacGregor. Dr. MacGregor not only won that earlier malpractice suit, she obtained summary judgment. She then sued Dr. Rutberg for defamation. *Id.* at 791.

However, "Illinois, like other states, recognizes an absolute privilege for statements in testimony or pleadings" in judicial proceedings. *Id.* at 791. (*MacGregor* was a diversity case governed by Illinois law). Dr. MacGregor attacked that privilege directly, arguing that an exception should be recognized for paid experts who testify as witnesses. *Id.* at 791-792.

Though the court ultimately rejected that invitation, Dr. MacGregor's argument seemingly was well received. After noting that courts have recognized other exceptions to the absolute privilege for witness testimony (such as for testimony that "is unarguably irrelevant to the case in which it was given") the court carefully examined the public policy behind the privilege. *Id.* at 791. Specifically, the court observed that "it is true that the privilege is especially designed for the protection and encouragement of disinterested lay witnesses." *Id.* at 792. It would be cruel, the court notes, to force lay witnesses by testifying in a judicial proceeding to assume the risk that they later might be sued in a defamation action. Expert witnesses, on the other hand, "could be paid to assume the risk." *Id.* at 792. However, Judge Posner, writing for the court, ultimately rejected that as a rationale for excepting experts from the witness testimony privilege reasoning that:

Litigation is costly enough without judges making it more so by throwing open the door to defamation suits against expert witnesses. That would not only tend to turn one case into two or more cases (depending on the number of expert witnesses), but also drive up expert witnesses' fees; expert witnesses would demand as part of their fee for testifying compensation for assuming the risk of being sued because of what they testified to.

Id. at 792.

Judge Posner also acknowledged that there is pressure to allow defamation suits against expert witnesses "to keep expert testimony honest." *Id.* at 792. However, he rejected that as a basis to except experts from the judicial witness privilege reasoning that the pressure to allow defamation suits "has actually diminished in recent years because of enhanced awareness of the potential abuses involved in such testimony." *Id.* Citing Rule 702 of the Federal Rules of Evidence Judge Posner explained that he thought the screening of expert testimony by the courts "is a better check on the abuses [of expert testimony] than allowing every unsuccessful lawsuit to be turned into two or more lawsuits as the winner goes after the expert witnesses who testified unsuccessfully against him." *Id.* at 792.

However, Judge Posner also implied that given the procedural posture of the case the court was not favorably disposed to Dr. MacGregor's request to create an exception to the judicial witness privilege. Apparently during oral argument counsel for Dr. MacGregor proposed that the Seventh Circuit certify the question to the Illinois Supreme Court (which has yet to address this question). The Seventh Circuit, however, declined that invitation in part because Dr. MacGregor had brought her suit in federal court originally – as opposed to having the case come to federal court via removal from an Illinois state court. The court commented that it had noted “in previous cases that a person who wants a novel ruling of state law should sue in state court rather than federal court.” *Id.* at 793. The court also noted that the certification request was belated. Dr. MacGregor did not request certification until oral argument.

Nevertheless, one point that becomes clear when reading *MacGregor* is that litigants likely can make legitimate, viable arguments for a change in the law with respect to the absolute witness privilege when that privilege is invoked by paid expert witnesses. Indeed, though the Seventh Circuit refused Dr. MacGregor's request for such a change, the court cited to no other decision in which a state's highest appellate court had evaluated the relevant public policy considerations behind the application of the absolute privilege to paid expert testimony. Thus, even if the Seventh Circuit correctly predicted how the Illinois Supreme Court would rule on the issue, it appears that the routine application of the absolute witness privilege to the testimony of paid expert witnesses still could be challenged in good faith in a large number of jurisdictions.

Moreover, it is not entirely clear from *MacGregor* whether the Seventh Circuit even correctly predicted how the Illinois Supreme Court will rule when it ultimately is presented with the question. One of the reasons the court rejected such a carve out to the rule of absolute witness immunity in *MacGregor* was the court's perception that Rule 702 had led to increased vigilance by courts to “screen out expert testimony that does not satisfy reasonable standards of scientific accuracy.” *Id.* at 792. That consideration, though, is of doubtful effect in Illinois, which is a *Frye* jurisdiction. See *In re Commitment of Simons*, 821 N.E.2d 1184, 1188 (Ill. 2004).

In addition, the Seventh Circuit's concern that excepting expert witnesses from the absolute privilege for testimony in judicial proceedings would allow “every unsuccessful lawsuit to be turned into two or more lawsuits as the winner goes after the expert witness who testified unsuccessfully against him” seems exaggerated. Dr. MacGregor did not merely win the underlying malpractice claim against her. She prevailed at summary judgment. Moreover, Dr. MacGregor presumably sued Dr. Rutberg because Dr. MacGregor's summary judgment win was based in part on a deficiency in Dr. Rutberg's methodology. (Dr. MacGregor had appealed from the dismissal of her defamation claims, so the Seventh Circuit simply assumed the facts as alleged by Dr. MacGregor were true for purposes of appeal). Yet not every unsuccessful lawsuit fails during summary judgment. Not every unsuccessful lawsuit involves a finding that an expert's methodology is deficient. Moreover, even when a suit is unsuccessful due to an expert's deficient methodology, the expert's opinions still would be privileged so long as they did not imply the existence of untrue facts. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S. Ct. 2695, 2705-06 (1990). Thus, a rule excepting expert witnesses from the absolute judicial witness privilege seems unlikely to allow “every unsuccessful lawsuit to be turned into two or more lawsuits as the winner goes after the expert who testified unsuccessfully against him.”

In the end, the reasoning in and tone of *MacGregor* suggest that some courts in some jurisdictions might be receptive to the invitation that the Seventh Circuit rejected in *MacGregor*. The keys to such a claim, however, will be to fashion the claim as a direct request for a change in the law governing the absolute privilege for witness testimony – and to have a client who is prepared for the almost certain appeal.

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.

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June 13, 2007

How Experts and Attorneys Have Shot Themselves in the Foot



Over the past thirty-five years, I have worked as an engineer, manager and executive on construction projects valued at approximately \$20 billion, and have provided consulting and expert witness services on projects valued at an additional \$15 billion. The closer I get to the end of my construction industry career, I feel an increasing desire to share the essence of my experiences with defense attorneys, so that they can benefit from the many valuable lessons learned on these projects. It is in this context that I am writing about the many and varied ways in which causation and damages “experts” have shot themselves in the foot, e.g., how they (and counsel) have screwed-up in prosecuting disputes.

Lack of Qualifications

Lured ostensibly by the prospects of immediately higher income, we encounter a troubling number of consultants who have chosen to graduate from college, skip traditional employment with an owner or contractor in estimating, project management, superintendence or engineering, to instead become a consultant. Although potentially financially rewarding in the short-term, this career path has many shortcomings and creates great risk for both the individual and his/her clients.

While these consultants may have been trained to use Primavera and CPM techniques in "chronicling" the effects of certain events on a CPM schedule, they will have no true industry experience in, or supportable basis for, evaluating and assigning responsibility for causal events in analyses of delay, acceleration, labor productivity, damages, etc. At the end of the day, they are likely to be skewered and rotisserized by skilled counsel and shown to be mere "technicians," whose opinions on causation and/or damages should be given little, if any, weight by the panel, court or jury.

Deposition is of course the critical time for the examiner to learn about the "expert's" experience, or lack thereof, because such shortcomings have often been deliberately excluded from the witness's curriculum vitae. Because most cases settle prior to formal hearings, these consultants may have successfully navigated their way through a number of un-confrontational depositions before finally testifying at trial. Then, in the heat of the battle, their absence of construction experience becomes the basis for their being totally discredited and/or being prevented by the court from testifying, resulting in wasted fees and a poor outcome for their client.

Accordingly, we often recommend that counsel resist stipulations to expert qualifications, particularly in circumstances similar to those discussed herein. In our experience, such stipulations are usually used in a poorly veiled attempt to level the experience "playing field," rather than to save hearing time. Because the trier of fact may apply pressure to accept such a stipulation, we often include a one-page experience summary graphic in our direct examination materials.

Counsel may be held liable for retaining an "expert" who is subsequently prevented from testifying, because the court has ruled that the expert's qualifications fail to meet the requirements of Rule 702 and Daubert/Kumho tire.

Straying Outside Area of Expertise

The problems experts encounter in this area are similar to those discussed above. However, they are also different in that the individual has chosen to venture outside the field in which he/she might actually have some recognized expertise. Some of the worst foot wounds here have occurred in cases where cost accountants have also been designated as damages experts and have been asked to testify to causation. These individuals may have survived had they only done what pure construction accountants should do; account for those costs charged to the project. Their demise resulted from counsel's direction to have them testify to "why" costs were incurred.

Labor productivity analyses also represent high risk undertakings for the unqualified consultant. An expert should be on relatively safe ground here if he/she has:

- Worked as a manager in the field for a contractor or owner, i.e, ARAMCO, Fluor, Bechtel, etc., developing, implementing and maintaining productivity management systems
- Studied and mastered key studies, texts and treatises
- Otherwise acquired the necessary knowledge, skill and experience described in Rule 702

Unqualified labor productivity consultants have caused self-inflicted wounds in numerous ways. For example, consultants have:

- Failed to analyze or understand the bid basis of their client's material and labor factors;
- Based lost labor productivity claims based on industry studies which had little, if any, relevance to the alleged cause of the loss;
- Never even read the study upon which their claim relies, but rather have simply included on a chart or conclusion from the study, book or trade publication;
- Misapplied studies of mechanical and electrical trades to claims in the civil trades;
- Applied the measured mile technique to too great a spectrum of trades, types of work and accounts;
- Failed to account for noncompensable causes of losses; and
- Claimed for more man-hours than are available to be recovered.

Professional liability aside, it seems safe to assume that these clients must have been stunned to discover that their experts and claims were of little value.

Lack of Sufficient Impartiality

One of the most common and easiest traps for an expert to fall into is to become unreasonably partial to the client's position and arguments. Of course, both experienced and inexperienced experts and consultants have been guilty of abandoning objectivity and adopting a client's unbalanced view of the case. At the risk of overstating the obvious, it seems plausible to conclude that such behavior often results from the consultant's conclusion that he/she would not be retained unless he/she agreed substantially with the client's key arguments.

Such partiality can manifest itself in the work of any type of expert. In construction cases impartiality often shows up in non-scientific analyses

such as delay, labor productivity, damages, etc.

For instance, regarding delay analysis, the decision to exclude non-excusable delays is an all too common and unfortunate element of many claims and expert reports. Such strategy may be partially defensible in change order negotiations or situations where the party is exclusively focused on settling the dispute and is unwilling to pursue a formal dispute. On the other hand, this approach can lead to disaster, successful dispositive motions and wasted fees.

Conclusion

Obvious measures that counsel and their experts could have taken to avoid such foot injuries include ensuring that:

1. the expert's methodologies satisfied the tenets of *Daubert/Kumho Tire*;
2. the proffered testimony clears *Daubert/Kumho Tire* hurdles;
3. the expert has sufficiently connected proposed testimony to facts of project in question – to wit – the expert has properly fit the analysis to the facts/project in question;
4. the expert had the requisite knowledge, skill, experience, training, and education per Rule 702 - Federal Rules of Evidence; and
5. the expert had considered all relevant facts and accounted for alternative explanations of events.

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June 13, 2007

Issue Spotting in Daubert Motion Practice:

Two Reasons Every Litigator Who Opposes or Uses an Expert Witness Wants Specialized Daubert Counsel on Their Litigation Team

Issue Spotting`<xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />`



The critical role of issue-spotting in litigation is as established as any proposition in the law. The ability of scientifically trained *Daubert* counsel to spot issues that non-scientifically trained lawyers are not trained to identify is the first and most important reason that litigators, regardless of specialization and regardless of level of advocacy skill, should have *Daubert* counsel in matters that involve the testimony of experts. In fact, the greater the skill of lead counsel and the greater the complexity of the matter, the greater is the value of the *Daubert* counsel.[1]

In most complex litigation that employs expert testimony, some member of the litigation team drafts and files *Daubert* motions to exclude or limit opposing expert testimony, along with briefs in support of those motions. These are followed by responses to those motions and replies to the responses. The following section provides examples of how incorporating specially trained *Daubert* counsel into litigation teams for this set of tasks gives even the very best lawyers an edge in litigating expert-dependent cases for their clients.

A *Daubert* specialist can spot issues that more generally trained litigators are not trained to recognize

A few examples illustrate the point.

In one matter, call it *Doe v. Jones*, plaintiff proffered a damages expert, Dr. Mesa,[2] who used a regression analysis that he labeled “Cox Regression.” The expert was a Dean and full Professor at a major research university and he claimed that he was using the model in accord with the generally accepted standards of his profession. Along with a damage estimate in the hundreds of millions of dollars, he even proffered the expert opinion that his analysis satisfied *Daubert*. Naturally, defendant wished to exclude this testimony.

The first problem with excluding this testimony was that, when used properly, Cox Regression apparently satisfies *Daubert*. Testing, peer review, error rates and general acceptance in the relevant learned community all characterize properly executed Cox Regression.

Mesa cited a range of peer reviewed publications in support of his testimony and he claimed that they indicated general acceptance of his method. He had tests and error rates. In short, his testimony passed the “smell” test. To complicate matters, a Lexis search for “Cox Regression” yields no hits and a Lexis search of “regression” yields no reference to Cox.

If Mesa’s testimony were admitted, it placed damages in the hundreds of millions of dollars, even long in advance of trial it would dramatically impact settlement ranges.

Daubert* Lawyering in *Doe v. Jones

Reviewing the literature on Cox regression (brush up on your statistical distribution theory first) in conjunction with Lexis research reveals that (1) Cox Regression is the equivalent of another regression model called the Proportional Hazards Model, and that (2) there was a case on the Proportional Hazards Model, *Coates v. Johnson & Johnson*, that allowed *Daubert* counsel to control Mesa’s testimony, and do it with a sense of humor.

In *Coates v. Johnson & Johnson* the 7th Circuit excluded plaintiff’s expert’s proffer of Proportional Hazards Model, (aka Cox Regression), based expert testimony and documented a list of errors in that expert’s methods. Many of these errors paralleled the errors made by Mesa, and Mesa’s errors, while complicated, were fundamental violations of the method that he used. If his errors could be established, the testimony should be excluded, keeping the hundreds of million dollar damages estimates from reaching the jury. Perhaps more importantly, it removes that threat as a settlement tool.

The sense of humor part comes in because the prevailing expert in *Coates*, Dr. George Neumann (an actual expert’s expert who had co-developed the Proportional Hazards Model), was a senior econometrics professor at the university where Mesa earned his Ph.D. If Mesa had made the errors in Neumann’s econometrics class that he made in his report, he would be unlikely to pass the course. As a result, and what seemed to lock it up for the defense, was that the defense was able to argue that the expert’s testimony not only didn’t meet *Daubert*’s four part test, it appeared not even to pass Dr. Newman’s Econometrics 1 exam. The case settled immediately after briefing these issues.

Only a lawyer who specializes in *Daubert* issues and has advanced statistical training makes this connection, and this is the core advantage of having a *Daubert* lawyer on your litigation team. The traditional second-best solution to spotting *Daubert* and expert testimony issues is that, at least in theory, a lawyer working closely with an expert can put together the science/statistics notions with the legal rules to identify and litigate such issues, but many times this does not work (lead counsel in *Doe* is listed in Best Lawyers in America, and lead counsel’s experts were among the national elite and they didn’t put Cox regression together with the Proportional Hazards Model to bring *Coates v. Johnson & Johnson* into the mix). Even if the litigator and expert working together do spot the critical expert testimony issues, that strategy involves billing the client for the time of two professionals where one person with both sets of skills can do the job better. A scientifically trained *Daubert* lawyer has the ability to evaluate and critique the testimony from all sides and find the flaws that will allow the expert’s testimony to be excluded under *Daubert* without the heavy reliance on the lawyer’s own expert’s time required by the second-best solution.

And *Doe v. Jones* is not an isolated incident. In another recent case, *Daubert* counsel opposed a damages expert from the University of Florida who was valuing a failed IPO. After evaluating his testimony, it was evident that, while qualified under *Daubert*, he was not considered an expert in valuing IPO’s by his academic colleagues. One of the more senior professors[3] in the same University of Florida finance department, Dr. Jay Ritter, was (Ritter was one of the original economists credited with explaining how IPO’s are valued, which turns out to be pretty complex). Reviewing Ritter’s scholarly papers showed that he had just published a paper in one of the most prestigious peer-reviewed finance journals explaining why many of the techniques the proffered “expert” relied upon were wrong, and that many of them were techniques often relied upon by professional witnesses to inflate valuation estimates.

Daubert counsel showed that the proffered expert’s methods are indeed peer reviewed, but that they are peer reviewed as being wrong; that they would not even pass the straight-face test if presented in a seminar to the other faculty members in his own department, and that they

surely did not meet *Daubert's* exacting requirements for federal court expert testimony. Virtually no other lawyer makes this connection, finds this Ritter article, and appreciates its usefulness in establishing the unreliability of the proffered expert's testimony. Because a *Daubert* lawyer with advanced statistical training was involved, the defense made the critical connections that allowed the defendant to control the expert testimony in this case.

Daubert Issues Spotting is not Just for Excluding Experts

Daubert techniques are not just for excluding expert testimony; they can get expert testimony admitted as well.

In another case, both plaintiff's lead counsel and his expert were convinced that plaintiff's expert's accounting testimony was going to be excluded on a pending *Daubert* motion. Neither could refute the motion's claims that the expert's methods had not been tested, were not peer reviewed or generally accepted and had been prepared specifically for litigation. Lead counsel was looking at losing his case by losing this dispositive motion. Facing dismissal, he retained *Daubert* counsel.

Viewed through the eye of a *Daubert* legal specialist, this was a simple case. *Daubert* counsel defeated the motion to exclude the expert's testimony by showing that the expert's testimony was a simple application of basic accounting principles as taught in virtually all major universities in the United States, and that it accorded with GAAP (Generally Accepted Accounting Practices), words that play well with judges who are looking for *Daubert* factors.

Because it was a simple case, having the *Daubert* counsel involved was very inexpensive as well.

Daubert Issue Spotting in Other Types of Expert Testimony

Damages experts are the most common kinds of experts but *Daubert* techniques apply to all kinds of expert testimony.

In a products liability case, *Daubert* counsel opposed a pair of engineering experts whose testimony established an indispensable element of the products liability claim. The analysis there was somewhat complex to recount here, but the case settled on advantageous terms immediately after the motions and briefs. Lead counsel credited the settlement to the *Daubert* motion to exclude the experts. Future articles here will discuss the use of *Daubert* counsel with other kinds of expert testimony, but the parallels are obvious.

A scientifically and statistically trained *Daubert* lawyer brings to the litigation team a set of specialized skills that provide innovative tools for lawyering *Daubert* matters and the extra-legal issues that often decide them. *Daubert* issues are often case dispositive, so the party that commands the *Daubert* issues often commands the litigation. Whether the goal is to admit or exclude expert testimony, use of a *Daubert* counsel gives a cost effective edge in litigating complex matters that involve the testimony of experts.

Stephen Mahle is a scientifically trained lawyer who concentrates his practice in litigating *Daubert* and expert testimony issues. His clients range from solo practice lawyers to law firms, insurance companies and corporations that are among the largest in the United States. He has a doctorate in economics, has been a finance professor at several major universities, and publishes regularly on *Daubert* and expert testimony issues, some of which are reprinted on his website daubertexpert.com. He can be reached at (561) 451-8400 or at smahle@daubertexpert.com.

[1] This is a first cousin of why so many patent lawyers are now JD/Ph.D.s: so many of the increasingly complex subjects that the law governs require extra-legal training to fully command.

[2] Not their real names.

[3] "More senior" means of higher academic rank, not older. In this case, the "expert's expert" whose article we relied upon was a young full professor and "Eminent Scholar." The "expert" proffered in the IPO matter was an older associate professor in the same university and department, whose lower rank is indicative of less academic stature and accomplishment.

June 13, 2007

First Circuit Report

"Courts Must be Cautious" When Considering Daubert Challenges in Summary Judgment Practice.



Since my last report on First Circuit *Daubert* case law, the Circuit has been relatively quiet. Traditional *Daubert* concepts of “gatekeeper,” “reliability,” “methodology” and “assisting the trier of fact” continue to be the focus of the decisions.

In *United States v. Vargas*, 471 F.3d 255 (1st Cir. 2006), the Circuit reminded everyone of the trial court’s “gatekeeper” function under *Daubert*. In a case involving admissibility of fingerprint identification evidence (where the evidence was admitted and upheld on appeal), the Circuit wrote:

The inquiry under Rule 702 is a “flexible one.” The trial court enjoys broad latitude in executing its gate-keeping function; there is no particular procedure it is required to follow. The Supreme Court has emphasized the importance of such broad latitude, noting that, without it, the trial court “would lack the discretionary authority needed both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises (citations omitted).

xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" />*Id.* at 261-62. Just two weeks later, the District Court for Puerto Rico also addressed the latitude afforded trial courts under *Daubert* in the First Circuit. *Oliver-Gely v. HI Development PR Corp.*, 472 F. Supp. 2d 140 (D.P.R. 2007) involved a pretrial attack on plaintiff’s expert who was prepared to opine that the decedent died because of a bacterial infection contracted when he cut his buttocks after falling in a shower. The defendants’ motion was unsuccessful for a variety of reasons turning on the district court’s belief that most of the issues were matters of weight, not admissibility. The court, citing *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184 (1st Cir. 1997), held that:

[A] trial setting normally will provide the best operating environment for the triage which *Daubert* demands.” The Court noted that “given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of the expert proof on a truncated record.” From this, the [Cortes] Court concluded that “at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious-except when defects are obvious on the face of a proffer-not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

Oliver-Gely, 472 F. Supp. 2d at 142-43. Therefore, at least in the First Circuit, it appears that trial courts continue to have broad latitude in executing their gatekeeper functions, but they should also be circumspect in granting summary judgment based on *Daubert* because the record before it will be truncated. As the Circuit stated in *Cortes*, “[A] trial setting normally will provide the best operating environment for the triage which *Daubert* demands.” *Cortes-Irizarry*, 111 F.3d at 188.

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There is one case of particular note from the Circuit that applies *Daubert* principles to an often overlooked “expert” – the physician’s assistant. In *Akerson v. Falcon Transport Company*, 2006 WL 3377940 (D. Me. Nov. 21, 2006), the plaintiff, a 69 year-old trucker was sitting in his underwear at the edge of the lower bed of his tractor trailer eating some fried chicken and drinking soda at an Ohio truck stop, when, all of a sudden, his quiet dinner was interrupted when another truck rammed his vehicle. The next morning, the plaintiff awoke in great pain but was able to drive from Ohio to Maine. Four more days passed before plaintiff went to the ER where he was diagnosed with muscular whiplash injury. Thereafter, plaintiff began treating with a physician’s assistant, the same PA that had performed DOT examinations on plaintiff every 2 years for the past 8 years. Plaintiff disclosed the PA as well as the ER doctor as his experts for trial. The PA had extensive training and experience both in the military and private practice, and was authorized by the State of Maine to opine on whether various injuries were work related and, according to the court, had sufficient knowledge, skill, experience, training and education to qualify him to both diagnose and treat plaintiff, and to testify about his diagnosis and treatment. The court noted that though “there may be some highly specialized areas of medical care beyond his expertise as a physician’s assistant, the record demonstrates that neither the causes nor the treatment of whiplash is one of those areas.” *Id.*

Particular attention should be paid to footnote 5 of the opinion. That addresses not only the problem with defendant’s argument that, essentially, only doctors should be allowed to give medical causation opinions, but also the growing reality that in America today, many plaintiffs will be seeing physician assistants as their primary care giver and the law must recognize that fact in addressing *Daubert* type challenges. More specifically, in that footnote the district court opined:

The extension of Falcon’s argument from the rarefied world of legal theory to the real world of medical practice is troubling. It has been widely reported that in certain areas of the Country, both urban and rural, there is a growing scarcity of physicians. Numerous people, through no fault of their own, simply do not have direct access to physicians and instead receive care from a variety of physician extenders, including nurse practitioners, physician’s assistants, nurse anesthetists, and others. Physician extenders practice under the overall supervision of a licensed physician, but the responsible physician may not have direct contact with the patient and the evidentiary value of his testimony could be limited. If expert testimony of the physician is required to demonstrate causation, the patient who has had direct contact only with a physician extender could be placed at a significant disadvantage. Any causation opinion by the responsible physician could be attacked as lacking a sufficient foundation and any causation opinion by the physician extender could be challenged as lacking sufficient expertise, raising the possibility that some people would effectively be denied civil redress for personal injuries negligently caused by others. If this Country’s medical system has sufficient confidence in the expertise of physician extenders to entrust the treatment of its citizens to them, this Country’s legal system should have sufficient confidence to allow them to testify as experts to the extent of their expertise.

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Second Circuit Report

Fire Investigation Expert Could Not Testify Regarding the Application of Fire Retardants to Consumer Apparel



On March 22, 2007, the United States District Court for the Northern District of New York issued a lengthy decision precluding Meyer R. Rosen, M.S., of InterCity Testing & Consulting from testifying as plaintiff's expert in a product liability action involving the flammability of children's clothing. *Topliff v. Wal-Mart Stores East, L.P.*, 2007 WL 911891 (N.D.N.Y. Mar. 22, 2007). The court based its decision on a thorough review and rejection of Mr. Rosen's qualifications and the methodology he used to form his opinions. Mr. Rosen was qualified to testify on a few very discrete issues, but his inability to render an opinion on substantive matters resulted in an order granting the defendant summary judgment. `xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />`

Facts: Five-year old Tanisha Topliff was severely burned and permanently scarred when the 100% polyester jogging suit she was wearing ignited and melted upon contact with hot air and debris from a wood burning stove. Tanisha's father filed a product liability claim against Wal-Mart, the retailer of the jogging suit, on behalf of Tanisha and himself individually.

Plaintiffs retained Mr. Rosen as their expert. His report asserted that the jogging suit was defective in that it did not contain a fire retardant which would have extinguished the fire before the "melt-drip" feature of the jogging suit's fabric burned Tanisha. He also opined that the defendant failed to provide warnings on the jogging suit concerning the inherent danger of the "melt-drip" property of its 100% polyester fabric.

Defendant moved to preclude, arguing that: a) Mr. Rosen was not "qualified" to testify on these subjects because he did not possess the necessary "knowledge, skill, experience, training or education" in those areas pursuant to Rule 702 of the Federal Rules of Evidence; and b) Mr. Rosen's methods were not "reliable" because he altered standard testing protocols to achieve the results he desired and relied on insufficient facts to recreate the accident.

Qualifications: The court found that Mr. Rosen was qualified to testify as an expert on fire investigation and the limited subject of the chemical properties of polyester in general and how such properties are subject to change under heat or flame. However, it also held that he was not qualified to testify as an expert on the flammability of or the application of fire retardants to consumer apparel. Mr. Rosen could not substantiate the claims that his opinions relative to flammable fabrics had been accepted in two other jurisdictions and that he had rendered expert services and performed tests in these areas on numerous other occasions. In fact, Mr. Rosen had been excluded as a fabrics flammability expert in prior litigation and had only attended a one-day seminar on "Regulatory Compliance for Flammability of Children's Sleepwear."

Moreover, the court found that the application of fire retardants to consumer apparel is a specialized science in which Mr. Rosen failed to demonstrate "qualifications" within the meaning of Rule 702. Namely, he never had written about or consulted on the application of fire retardant chemicals to consumer apparel. The court also found that Mr. Rosen was not qualified to testify on the subject of the use, placement and composition of warnings in consumer apparel. He failed to specify what if any testing experience he had ever done with respect to warnings, cited his review of a one-page CPSC Safety Alert as sufficient research, and generally relied on unsupported assertions of plaintiff's counsel to support his positions.

Reliability: Mr. Rosen performed six tests to support his opinion that the jogging suit fabric tended to melt and drip excessively when it was exposed to heat. The defendant argued that Mr. Rosen conducted flammability tests on a garment that was exempt from such testing, altered the testing to generate particular results, and performed tests that were never intended for consumer clothing. The court agreed with defendant.

Rosen performed the CS 191-53 Test and the Modified CS 191-53 Test on an exemplar jogging suit, but when the tests showed that the garment was of normal or low flammability he made a number of "gratuitous" findings to support plaintiffs' position (e.g. he noted an undetermined quantity of "molten flaming drops"). He also subjected the jogging suit to the "Children's Sleepwear Standards Test." Mr. Rosen's proffered opinion concerning alternative design was also rejected. He failed to explain how he arrived at the conclusion that the application of fire retardants would have cost 10-30 cents per garment, and did not explain who ought to bear such an increase in cost. Similarly, he did not explain the technique or theory used to conclude that a chemically-treated jogging suit would retain its quality and durability, or would be safer in the first instance.

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Third Circuit Report



In the last quarter, district judges in the Third Circuit have, as one would expect, been quite busy applying *Daubert* standards in their courts. While many of these decisions generally focus on the "trilogy of interests" (qualification, reliability, and fit) integral to *Daubert* analyses in the Third Circuit, some recent rulings have touched on interesting, narrow issues that apply to particular types of litigation. This article focuses on two of those decisions, with an eye toward extrapolating lessons helpful to those who encounter *Daubert* issues on a regular basis in all types of cases.

In *Gutierrez v. Johnson & Johnson*, 2006 U.S. Dist. LEXIS 80834 (D.N.J. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" /> Nov. 6, 2006) (unpublished opinion), the court presiding over a proposed employment discrimination class action confronted dueling *Daubert* motions in the context of class certification proceedings. The court began by noting that the Third Circuit has not yet confronted the question of how to apply *Daubert* standards during class certification proceedings. Due to the narrow inquiry involved (whether the requirements of Rule 23 are satisfied) and the general prohibition against examining the merits of the case at this stage, the court decided to apply *Daubert* less stringently while considering class certification. In so doing, the court relied on decisions of other courts that had faced the issue, and particularly the Second Circuit Court of Appeals. See *In re Visa Checking/Master Money Anti-trust Litig.*, 280 F.3d 124 (2nd Cir. 2001).

Using the same standard as the Second Circuit, the court determined that *Daubert* inquiries at the class certification stage should focus on whether the proffered expert opinions are "so fatally flawed to be inadmissible as a matter of law." Applying this standard, the court denied the competing motions before it. Though the court noted that there were problems with the methodologies of the experts for each side (and especially the plaintiff), it ultimately found that both experts' opinions satisfied the more lenient standard that it chose to apply.

In light of *Gutierrez*, those whose practices involve class action litigation should pay close attention to how the courts within which they practice apply *Daubert* at the class certification stage. Since the Third Circuit has not yet been confronted with the issue, it will be notable if another district court uses a standard different than did the court in *Gutierrez*. This could lead to opportunities for the Third Circuit to weigh in on the question. Given the narrow inquiry being conducted, the fact that juries (and attendant concerns of confusion when dealing with expert testimony) are not involved, and the general rule that courts should not inquire as to the merits at the class certification stage, a more lenient *Daubert* standard seems logical. The standard adopted by the court in *Gutierrez* may, however, be too lenient, and the Third Circuit could possibly require a more stringent test. Ultimately, class action practitioners must be aware of how the Third Circuit resolves the issue, and adjust their strategies accordingly.

In *Pineda v. Ford Motor Company*, 2006 U.S. Dist. LEXIS 83439 (E.D.Pa. Nov. 15, 2006) (unpublished opinion), the court was confronted with *Daubert* issues in an automotive product liability action concerning the glass on the liftgate of a Ford Explorer. The plaintiff, a Ford mechanic, claimed he was injured by breaking glass while he was replacing the liftgate hinges on the vehicle. Ford sought to exclude the testimony of plaintiff's expert, whose proffered opinions were, essentially, that Ford failed to provide instructions for replacing the hinges and failed to warn that "proper hinge removal sequence was imperative to avoid shattering glass."

The court began its analysis by noting that *Daubert* standards must, at times, be adapted when dealing with "non-scientific" expert testimony. For instance, in this case, the court was confronted with applying general *Daubert* principles to the specific field of automotive engineering. Relying on a decision from another district court in the Third Circuit (*Milanowicz v. The Raymond Corp.*, 148 F. Supp. 2d 525 (D.N.J. 2001)), the court set forth additional reliability criteria to be considered when making *Daubert* determinations within this particular field: (1) adherence to any federal design and performance standards; (2) adherence to standards set by independent standards organizations; (3) relevant literature, which could include general design manuals or industry-specific journals; (4) conformance with industry practice; (5) product design and accident history; (6) charts and diagrams; (7) scientific testing; (8) the feasibility of the expert's suggested modification; and (9) the risk-utility of the suggested modification.

Applying these standards to the plaintiff's expert, the court excluded the testimony in its entirety. In the end, plaintiff's expert was precluded from testifying because he was admittedly not a warnings expert. While the expert appeared to be qualified as an engineer, the two major opinions he was to offer concerned warnings and instructions. The court noted: "even where an expert is a properly qualified engineer, he cannot testify that warnings or instructions were inadequate unless he can demonstrate indicia of reliability specific to warnings and instructions." The court found that the expert's proposed opinions did not demonstrate such reliability, especially since the expert did not propose any alternative warnings and had not objectively tested the effectiveness of the allegedly defective warning or any proposed alternatives.

The *Pineda* decision demonstrates how courts use the general principles of *Daubert* to tailor specific inquiries within the many different, specialized areas of expert testimony. In *Pineda*, the court fashioned particular standards to apply in the automotive engineering context. While some of these standards are easily transferable to other areas of specialty, some are peculiar to this particular type of litigation. *Daubert* practitioners must be aware of how each case, and each area of expert testimony within that case, involves issues within discrete technical fields, and plan accordingly. This planning must inform not only decisions about the type of expert testimony needed and the experts needed to provide it, but also decisions as to how to challenge the other side's experts. *Pineda* underscores the importance of such careful planning—with the exclusion of his only liability expert, plaintiff's case was essentially doomed. Indeed, the court later granted Ford's motion for summary judgment. See 2006 U.S. Dist. LEXIS 91992 (E.D.Pa. Dec. 19, 2006) (unpublished opinion).

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Fourth Circuit Report

Expert Testimony Is Required for the Admission of Horizontal Gaze Nystagmus Test Results



The Fourth Circuit continues to reaffirm the discretion available to the trial court in interpreting *Daubert* and its role of gatekeeping within the realm of expert testimony. In *United States v. Villarreal*, 185 F. App'x 260 (4th Cir. 2006), for example, the court found no abuse in discretion when the district court approved the admission of a law enforcement officer's expert opinion testimony in a drug trafficking case. The defendant was convicted by a jury of one count of conspiracy to possess with intent to distribute marijuana and one count of possession with intent to distribute marijuana. The appellate court disagreed with the defendant's contention that the district court improperly admitted expert testimony from a law enforcement officer regarding the nature of notations on

documents admitted at trial. Following *Daubert*, the court ruled that in allowing the testimony, the district court had to confirm that the testimony is scientifically valid and that it would assist the trier of fact in understanding or determining a fact at issue in the case. Accordingly, because the manner in which drug dealers record transactions was not a fact commonly known to a jury, and expert testimony regarding the manner of recording drug transactions would help the jury understand drug quantity, which was relevant to the offense charged to the defendant, the court found no abuse of discretion in admitting the expert testimony.

A district court within the Fourth Circuit recognized that not all evidence will pass *Daubert* muster. In *United States v. Van Hazel* 468 F. Supp. 2d 792 (E.D.N.C. 2006), the court found the results of a Horizontal Gaze Nystagmus ("HGN") test inadmissible as evidence that the defendant was impaired and sustained defendant's objection to the evidence. The defendant was charged and found guilty of driving while impaired under a North Carolina statute criminalizing such conduct. The case involved federal law because the offenses for which the defendant was convicted occurred on board a federal military base. In determining whether the HGN test, which is administered by passing an object in front of the subject and observing the subject's eye movements, required the use of expert testimony for admissibility, the court first reviewed how other state and federal courts addressed the test. The court found that state courts were split on the issue and that only one federal court, the United States District Court for the District of Maryland, had addressed the issue of HGN admissibility. *Id.* (analyzing *U.S. v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002) (avoiding the issue of whether expert testimony on the HGN test was required by taking judicial notice of the causal connection between the HGN and alcohol ingestion but not the reliability of the HGN test.) In the end, the court agreed with the majority of state courts including North Carolina and held that the HGN test is a scientific test. As such, the court declined to take judicial notice of the HGN test and ruled that any testimony regarding the HGN test is scientific testimony subject to Federal Rule of Evidence 702 and the standards established in *Daubert*. The court then stated that even though the government attempted to establish the officer in the case as an expert on the HGN test, it would not classify the officer as an expert because he was unable to adequately testify about the reliability of the HGN test.

Finally, in *Holland v. Psychological Assessment Resources, Inc.*, 2007 WL 1149882, (D. Md. Mar. 30, 2007), the United States District Court for the District of Maryland found that the expert testimony of psychologists relating to the development of a unique career guide and methodology, known by the acronym "SDS," the theory behind SDS, and its use as a clinical tool is admissible. Plaintiff, the creator of the SDS, sued defendants for breach of contract and violation of the Lanham Act, among many other things. Ruling against defendants' motion to exclude the expert testimony of psychologists, the court followed *Daubert* and noted that the defendants had not argued that the experts' experiences were not grounded in sound scientific methods or principles. The court was unconvinced by the defendants' arguments that the psychologists' experiences were not relevant to decide the central issue in the case, whether the Internet version of SDS constituted a revised edition such that plaintiff's consent was required. The court ruled that the proper analysis was to determine whether the reasoning and methodology underlying an expert's testimony is scientifically valid and properly can be applied to the facts at issue and not whether the experts' experiences were relevant to the central issue.

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June 13, 2007

Fifth Circuit Report

Plaintiff's Causation Expert Excluded under the Robinson Factors

Plaintiff's expert testimony was legally insufficient in tread separation casexml:namespace prefix = o ns =



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The Texas Supreme Court reversed and rendered judgment in favor of Cooper Tire & Rubber Company, after determining that plaintiff's expert testimony was legally insufficient. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" />Tex. 2006). Plaintiff alleged a manufacturing defect in the tire on the plaintiff's vehicle caused tread separation. Plaintiff relied on Richard Grogan to offer testimony that the tire failed because of contamination in the "skim stock," wherein he asserted the skim stock was contaminated with hydrocarbon wax. "Skim stock" is the rubber compound that coats the steels belts in tires and hold tires together.

The Court began by noting that expert testimony is admissible if the expert is qualified and the testimony is relevant and based on a reliable foundation. To be qualified, an expert must have expertise concerning the actual subject matter about which they are offering an opinion. The Court reviewed the six *Robinson* factors as follows:

1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies upon the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;
5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. the non-judicial uses which have been made of the theory or technique.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

As to the first and third factors, the Court noted the record contained no evidence of scientific testing or peer-reviewed studies confirming Grogan's contamination theory that wax contamination causes radial tire belts to separate. Considering the second factor, there was no evidence that Grogan made any quantitative determination about the amount of wax contamination required to cause tread separation. Under the fourth factor, because there had been no testing, the rate of error was unknown. There was no evidence showing Grogan's theory had been accepted in the scientific community that would support the fifth factor. Similarly, where the wax contamination theory was not generally accepted, there was no evidence that the theory had been used in the industry or expert community, outside the judicial context (the sixth factor).

Grogan testified that the wax contamination may have come from cutting machinery, but he did not visit the Cooper Tire plant to determine if that really happened, and in fact Grogan had not been in a tire manufacturing plant since 1980. Grogan had no proof that wax would cause tread separation after the tire had been through the vulcanization process. In fact, the chief chemist at the Cooper Tire plant testified that wax makes a poor lubricant, and waxes are not used to lubricate Cooper Tire's machinery. Lastly, Grogan could not explain why, if the tire left the plant with a manufacturing defect, it could be used for 30,000 miles, experience a nail puncture, and not fail, if there was a defect due to wax contamination.

The Court noted that the fact the tire failed is inadequate to establish a manufacturing defect, as opposed to a design defect. However, a design defect would have required proof of a safer alternative.

Expert's qualifications must be pertinent to the matter at hand and have substance

Judge Nancy Atlas recently granted plaintiff's motion to exclude the defendant's expert in *MGM Well Services, Inc. v. Mega Lift Systems, LLC*, 2007 U.S. Dist. LEXIS 2886 (S.D. Tex., Jan. 19, 2007). MGM owned a patent for a "two-piece plunger lift" system used to remove excess fluid from gas wells. MGM's suit alleged that Mega Lift was infringing on the product with a Mega Lift system. Mega Lift designated Dr. Charles Alworth as an expert, and MGM moved to exclude Dr. Alworth, arguing he lacked appropriate education, training and knowledge as a patent expert.

Considering the *Daubert* factors, the court determined that Dr. Alworth did not have the appropriate training and qualifications where he had never worked as a patent examiner or in any position with the United States Patent and Trademark Office, and had represented clients in only two patent litigation matters. Although Dr. Alworth had extensive experience in the field of electrical engineering, he had no education or experience in the field of plunger lift system used for oil and gas wells. The Court noted that Dr. Alworth had not been accepted by "any court as an expert on any subject." Finally, the court determined that Dr. Alworth's opinions simply reiterated the client's personal views, and did not really provide expert analysis.

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Sixth Circuit Report

Sixth Circuit Affirms Use of Non-Scientific Experts Whose Expertise Is Founded on General Industry Experience



The United States Court of Appeals for the Sixth Circuit recently affirmed a district court's decision to permit two non-scientific experts to testify based on their experience. The case is a good template for those proffering or challenging non-scientific experts based on their backgrounds and other technical experience.

Surles v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007), involved a claim by a Greyhound bus passenger for injuries she sustained after a terrorist-type bus accident. During a bus trip from Michigan to Georgia, a passenger attacked the bus driver with a box cutter, causing the driver to lose control. The bus careened off the road into a ditch. The plaintiff suffered severe injuries to her spinal cord, which left her a paraplegic.

At trial the plaintiff offered testimony from two experts. The first was a former law enforcement official who, while working for the Los Angeles Police Department, started a threat management unit that managed violently inclined situations involving mentally ill individuals. This expert offered testimony regarding prior incidents on Greyhound's buses and Greyhound's failure to react adequately to these incidents. The second expert was a forensic engineer who testified to the feasibility of designing and installing an entry-resistant barrier to protect bus drivers from passengers. The jury returned an eight million dollar verdict in the plaintiff's favor, and Greyhound appealed on numerous grounds.

Greyhound founded its *Daubert* challenge against the plaintiff's two experts on qualification and reliability grounds. In reviewing the district court's decision to admit the experts' testimony, the Sixth Circuit noted the deference afforded to the district court and could not say "with definite and firm conviction that the district court committed a clear error of judgment" in evaluating the experts' qualifications. *Id.* at 294 (citing *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 781 (6th Cir. 2002)). Although the former Los Angeles police officer did not have any experience specific to the bus industry, the appellate court found that his background and experience left him "well-positioned to assist the trier of fact to make sense of the prior incident reports from the perspective of a specialist in threat assessment." *Id.* at 294. The court found it of "little consequence" that the expert lacked expertise in the bus industry. Instead, the court noted that this lack of experience merely affected the weight of the expert's testimony – not its admissibility. *Id.* (citing *Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001)). The forensic engineering expert had, before being retained as an expert, previously designed an entry-resistant barrier to protect bus drivers from passenger attacks. As a result the Sixth Circuit had little difficulty finding that the district court did not abuse its discretion in qualifying this expert.

In evaluating the reliability of the experts' testimony, the court first discussed the flexibility permitted under *Daubert* and *Kumho Tire*. *Id.* at 295 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993) (the reliability inquiry "is a flexible one") and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) ("the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination")). After taking this flexible standard into account, the Sixth Circuit recognized that the engineer's testimony did not constitute scientific expert testimony; instead it constituted "technical or other specialized knowledge" that was not susceptible to strict application of the factors enumerated in *Daubert*. *Id.* at 295.

Applying a more flexible standard to the non-scientific testimony, the Sixth Circuit found that the district court adequately discharged its gatekeeping role to ensure the reliability of the experts' testimony for three reasons. First, the district court prohibited the plaintiffs' experts from testifying about the foreseeability of attacks on Greyhound's bus drivers – the court found that anyone could give that opinion based on the number of prior incidents. Second, the court conducted a *Daubert* hearing where both sides offered argument about the reliability of the experts' testimony, and plaintiffs' counsel adequately "set forth the basis of the proffered witnesses' expertise and linked it to the facts of the case." *Id.* Finally, during their depositions and in their written opinions the experts themselves explained how their personal experiences provided sufficient bases for their opinions, and they explained how they could reliably apply their experiences to the facts of the case. Based on these threshold indicia for reliability, the Sixth Circuit found that the district court did not abuse its discretion in allowing both of the experts to testify.

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Seventh Circuit Report

Expert Testimony May Be Admitted Based on a Report In Substantial Compliance With Rule 26(a)(2)(B); A Contaminated Crime Scene Renders Testimony Based on the Behavior of a Tracking Dog Unreliable

In one recent case, *Jenkins v. Bartlett*, 2007 WL 1174848 (7th Cir. Apr. 23, 2007), the Seventh Circuit affirmed the admission



of expert testimony over an objection that the experts' report did not comply with the requirements of Federal Rule 26. *Jenkins* involved civil rights claims brought by the plaintiffs against John Bartlett, a police officer in the Milwaukee Police Department, and civil rights claims directed at the City of Milwaukee and the Chief of the Milwaukee Police Department. The plaintiffs' claims were based on the alleged excessive use of force by Officer Bartlett when he shot and killed Mr. Jenkins as he attempted to flee custody.

Officer Bartlett designated as his expert witnesses the Milwaukee County Medical Examiner and an Assistant Medical Examiner, both of whom had been involved in the autopsy of Mr. Jenkins and in a reconstruction of the shooting. One month before the expert disclosure deadline defense counsel sent the plaintiffs' attorney a letter "that identified the expert witnesses the defendants expected to call, their anticipated testimony and the bases for the opinions to which the experts would testify, including the autopsy protocol the defendants previously had provided to Ms. Jenkins." *Id.* at *2. Neither of the physician experts signed the letter, but both subsequently provided sworn affidavits adopting the contents of the letter.

The plaintiffs argued that the letter from defense counsel did not satisfy Rule 26(a)(2)(B) and that the experts' testimony therefore should be excluded. However, the plaintiffs "did not specify the deficiencies" with the defendants' expert disclosures. The district court "noted that the absence of the physicians' signatures . . . left the reports in technical noncompliance with Rule 26(a)(2)(B)." *Id.* at *4 n.3. Nevertheless, because the doctors each had adopted the contents of the letter through subsequent affidavits, the district court held that there had been substantial compliance with Rule 26 and it therefore allowed the testimony of both experts.

The Seventh Circuit affirmed. In so doing the appellate court commented several times that the plaintiffs had failed to identify the basis for their objections to the experts' report. The court agreed with the district court that the letter provided by defense counsel substantially complied with Rule 26(a)(2)(B) and that the defendants "cured the main defect in the expert report, the absence of the physicians' signatures, by submitting sworn affidavits from the physicians adopting the contents of the October 1, 2003 letter." *Id.* at *4. Therefore, the Seventh Circuit held that the district court had not abused its discretion by permitting the two physicians to testify.

The plaintiffs further challenged the testimony of one of the physicians, arguing that the testimony was unreliable under the standards set forth in *Daubert*. However, the plaintiffs' arguments in that regard consisted of simply pointing out facts that the physician admitted that she did not know, such as whether Officer Bartlett had fired from the ground or from the hood of the car. However, plaintiffs "did not explain how such knowledge, or the lack thereof, would affect the reliability" of the challenged testimony. *Id.* at *5. Therefore, after also noting that defense counsel had "provided the court with ample grounds to find [the challenged] testimony reliable," the Seventh Circuit held that the district court had not abused its discretion in admitting the testimony at issue. *Id.*

In a second case, *United States v. Renken*, 474 F. 3d. 984 (7th Cir. 2007), the Seventh Circuit considered the admissibility of a dog handler's testimony regarding the meaning of a search dog's behavior in a criminal investigation. The defendant in *Renken* was appealing from a conviction for bank robbery. Following the robbery, the defendant had made his escape from the bank wearing a green hooded parka and riding a bicycle. An officer responding to the bank robbery realized that he had passed a man in a green parka riding a bicycle headed towards a bike path in a wooded area. The officer drove to the bike path and found a mountain bike that had been discarded there. Nearby he also discovered a Chevy Blazer that later was identified as belonging to the defendant's wife. The officer removed the bike from the path and set it near the squad car, (which was parked next to the Blazer), wearing gloves and being careful not to touch the bike's seat. A few hours later another officer, Officer Tracz, with a trained bloodhound had the bike returned to the path where it had been found originally. Then Officer Tracz offered the bloodhound the bicycle seat for a scent and gave the dog a "find" command. The dog followed the path from the bike to the Chevy Blazer and then jumped on the Blazer. Officer Tracz later testified that the fact that the dog had jumped on the Blazer constituted "a hit." *Id.* at 986.

The defendant argued that Officer Tracz's testimony about the dog's actions on the bike path should have been excluded as unreliable under Rule 702 of the Federal Rules of Evidence. In support of that argument the defendant noted that Officer Tracz had received no special training on how to work with search dogs, the particular search dog had only been used on two prior investigations, and the dog never had received a certificate authenticating her tracking ability. In addition, Officer Tracz had testified that a young search dog must be worked regularly, but the search dog in question had missed a week or more of training time at several points in the year prior to the bank robbery. Finally, the defendant argued that the trail tracked by the dog had been contaminated both because the bicycle had been removed and then replaced and also because another search team previously had searched the area where the bicycle and the Blazer were found.

The Seventh Circuit seemed to agree with the defendant's reliability arguments. Specifically, the court stated that "there may be some reason to question the reliability of Tracz's methods in this particular case, if only because of the apparent contamination of the search area caused by moving the bicycle." *Id.* at 988. However, because the evidence of the defendant's guilt was overwhelming, the Seventh Circuit held that even if the district court had erred in admitting the testimony of Officer Tracz, that error was harmless.

Unlike most *Daubert* decisions, the court in *Renken* did not force its reliability analysis into a discussion framed with *Daubert* factors. One of the objects of a *Daubert* analysis is to ensure that expert testimony is the product of reliable methodologies. In *Renken* the expert testimony was based on tracking across a contaminated crime scene. The court did not (and did not need to) engage in a lengthy discussion of *Daubert* factors to explain why that rendered Officer Tracz's testimony unreliable. Though the appellate court likely would have provided a more explicit *Daubert* analysis if Officer Tracz's testimony appeared to be outcome-determinative, *Renken* serves as a good reminder that the "*Daubert* factors" are just some of the many considerations that can reveal the reliability, or lack thereof, of an expert's methodology.

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June 14, 2007

Eighth Circuit Report

Pharmacologist May Testify as to Blood Alcohol Levels; Fire Expert Permitted to Opine as to Causation Based on Res Ipsa Theory



While in recent opinions district courts within the Eighth Circuit for the most part addressed familiar *Daubert* issues and engaged in straightforward application of established rules, the appellate court addressed two issues of interest.

In a products liability case the wife of a man killed in a single-vehicle accident claimed that a defectively designed cruise control activator cable was responsible for his death. The Eighth Circuit affirmed the decision of the district court to admit testimony of the defendant's pharmacologist concerning the deceased's blood alcohol level at the time of the accident, which opinion was based on test results of vitreous humors (fluid) drawn from the deceased's eyes. *Olson v. Ford Motor Co.*, 2007 WL 913809 (8th Cir. Mar. 28, 2007).

Richard Olson was killed after his Ford Explorer ran off the road and hit a tree as he was attempting to navigate a turn. Olson had been on his way home from a country club, where he had played golf and had a few drinks. Olson's wife brought suit against Ford, alleging that the design defect caused the accident. Ford presented evidence, in the form of testimony of a pharmacologist, that Mr. Olson's blood alcohol level likely exceeded 0.1% at the time of the accident and that the impairing effect of the alcohol contributed to the accident. Ultimately the jury found each party to be 50% at fault, which precluded recovery of any damages by the plaintiff.

On appeal, the plaintiff challenged the admission of the pharmacologist's testimony. The coroner had obtained the samples of the vitreous humor when it proved impossible to get a blood sample. Vitreous humor contains alcohol when a person has been drinking, but the level is initially higher than that in the blood, and the disparity increases over time as alcohol is eliminated from the blood faster. In this case, the initial tests indicated an alcohol level of 0.22%. Over the next six months, the samples were retested and the level gradually decreased to 0.095%. The pharmacologist reviewed scientific literature containing equations used to convert vitreous-humor-alcohol levels into blood-alcohol levels, then applied the equations and rendered his opinion.

Ms. Olson first challenged the pharmacologist's credentials and the reliability of the samples, arguing that the pharmacologist had never before performed the conversion and that the tests produced wildly varying results over time. However, the court found that application of the equations was a matter of simple arithmetic, and that evidence supported the explanation that the decreasing alcohol levels could be attributed to evaporation.

Ms. Olson next argued that there exists no reliable method for converting vitreous-humor levels into blood levels, citing testimony of the toxicologist and coroner. The court conceded that Ms. Olson presented evidence that the conversion method was not generally accepted in the relevant scientific community. However, it held that while such evidence may have been dispositive of the issue under the former *Frye* standard, it was only one factor to consider under *Daubert*. The court then found that the district court had explicitly considered all the *Daubert* factors, and did not abuse its discretion in admitting the testimony.

The Eighth Circuit reversed a decision of the United States District Court, Western District of Missouri, to exclude testimony of a fire investigator that a product defect in an electric scooter caused a fire that ultimately caused the death of plaintiff's wife. *Hickerson v. Pride Mobility Products Corp.*, 470 F.3d 1252 (8th Cir. 2006).

Plaintiff's expert, William Schoffstall, an experienced and certified fire investigator, was prepared to testify that, based on his determination of the origin of the fire and evidence that allowed him to rule out other possible causes within that area, a defect in the scooter must have been responsible for the fire. Schoffstall had performed an extensive investigation a day after the fire, concluding that the fire started in a particular area of a particular room of the house, and that the scooter was the only possible source of ignition within that area.

Defendants moved to exclude the testimony and for summary judgment, arguing that Schoffstall had no experience or expertise regarding the manufacture or failure of electric scooters, and no evidence would be presented as to a specific defect in the scooter's manufacture. The district court ruled in Defendants' favor, excluding Schoffstall's conclusion as to causation and granting the motion for summary judgment for lack of evidence as to a defect or that the defect caused the fire.

The Eighth Circuit reversed, relying on Missouri substantive products liability law. The court held that Missouri allows a plaintiff to proceed upon a *res ipsa* type theory of an implied product defect where sufficient circumstantial evidence is shown for the issue to go to a jury, despite the lack of any direct evidence of a defect. Defendant argued that such a *res ipsa* products liability theory was no longer valid, as the Missouri cases approving such an action preceded *Daubert*. However, the court stated that *Daubert* is a procedural rule that "does not deal with the substantive question of whether the circumstantial evidence in any given case is sufficient to permit a jury to infer a defect." This question is governed by state substantive law.

Consequently, the court held that Schoffstall would be permitted to identify the location of the origin of the fire and that he had inferred through the process of elimination that the scooter was the cause of the fire. No defect in his methodology in arriving at the point of origin was argued, and conflicting evidence regarding other possible sources of ignition went to the weight rather than the admissibility of his testimony.

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Ninth Circuit Report

"Passions of a Man but the Brain of a Child" – Expert Medical Testimony of a Brain Tumor Admissible under Daubert to Show Susceptibility to Entrapment; Ninth Circuit Reverses Exclusion of Metallurgist



This past quarter the Ninth Circuit reaffirmed the district court's role as gatekeeper, not fact finder. When qualified medical experts disagree on an issue of fact, it is the fact finder's, not the court's, role to decide the weight of the evidence. The Ninth Circuit also reversed a district court's exclusion of expert testimony offered on summary judgment and cautioned that district courts should not intermingle Fed. R. Evid. 702 and Fed. R. Civ. P. 56 and exclude expert testimony simply because it does not result in a triable issue of fact.

In *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006), the court reversed the defendant's conviction for conspiracy to sell methamphetamine. Sandoval-Mendoza appealed his conviction, arguing that the district court erroneously excluded medical evidence of an enormous brain tumor that made him especially vulnerable to entrapment. Sandoval-Mendoza sold drugs to two government informants but claimed the informants knew he had a large brain (pituitary) tumor that made him especially susceptible to suggestion and preyed upon his weakness. Sandoval-Mendoza was depressed, was worrying about dying and providing for his wife and five children, and worried about the impotence his brain tumor caused. Sandoval-Mendoza argued that the government informants suggested Sandoval-Mendoza sell drugs to support his family. Sandoval-Mendoza refused for several months but eventually caved in. Defendant testified that he only sold drugs to the informants and they used his depression and fear to persuade him.

To support the entrapment defense, Sandoval-Mendoza sought to introduce expert testimony from a neuropsychologist and neurologist who would testify that the brain tumor impaired Sandoval-Mendoza's intellect and judgment. The district court held an *in camera* Daubert hearing. It heard from defendants' experts and the prosecution's experts. Ultimately, the district court excluded the testimony in part because it did not demonstrate the tumor caused suggestibility and partly because it would be too long and confusing. Defendant's neuropsychologist testified that Sandoval-Mendoza's pituitary tumor caused damage to his brain that affected his memory, decision-making, judgment, mental flexibility and overall intellectual capacity. The neurologist testified that the brain damage suffered by defendant tended to affect judgment, memory and emotions connected to memory. Both of defendant's doctors testified the brain damage caused disinhibition. The prosecution offered experts to refute defendant's opinions. They testified that while defendant had an extremely large tumor, he was deliberately underperforming on memory tests. Moreover, they testified that while some brain tumors may cause disinhibition or greater susceptibility to influence, pituitary tumors do not, unless they are even larger than Sandoval-Mendoza's.

The district court excluded the expert testimony as not relevant to the entrapment defense and also because of "lack of scientific validity" and "absence of ability to make a causal connection" between the tumor and the inducement. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> *Id.* at 654. The Ninth Circuit confirmed that *Daubert* makes the district court a gatekeeper, not a fact finder, and "[w]hen credible, qualified experts disagree, a criminal defendant is entitled to have the jury, not the judge, decide whether the government has proved its case." *Id.* Medical expert opinion testimony showing that a medical condition renders a person unusually vulnerable to inducement is highly relevant to an entrapment defense. The Ninth Circuit determined the experts were qualified and laid the proper foundation. "Without the medical expert opinion testimony, the real issue in dispute was hidden from the jury. It could not determine whether the government's informants induced a vulnerable and suggestible man to break the law." *Id.* at 656. Failure to introduce their testimony left the jury with nothing but unpersuasive lay evidence on a medical matter beyond what laymen could usefully testify about. The Ninth Circuit reversed defendant's conviction.

In *Stilwell v. Smith & Nephew, Inc.*, 2007 U.S. App. LEXIS 8290 (9th Cir. Apr. 11, 2007), the plaintiff sustained two broken legs in an automobile accident. Her doctors twice implanted a Russell-Taylor metal reconstruction nail (RT nail) to stabilize the fracture. The RT nails failed during the healing process and plaintiff brought a product liability claim alleging strict liability, negligence and breach of warranty. On summary judgment, Stilwell sought to introduce the expert testimony of a metallurgist, Arun Kumar, Ph.D regarding the alleged design and manufacturing defects in the product. Kumar performed non-destructive tests on the RT nails and concluded they "fractured due to fatigue" and concluded that it constituted a design/manufacturing defect, since the sharp corners could be ground and polished for a smoother transition between the two intersecting surfaces. *Id.* at *4. Kumar prepared a second report that included the findings of a series of destructive tests that he conducted on the RT nails. There, he found that "[a] large variation in edge radius can be seen from one side to the other; the fatigue cracks had emanated at the sharper radius surface for both rods." *Id.* at *5. Kumar concluded that the RT nails suffered from correctable defects that shortened their life. According to his own testimony, he could examine the RT nail only as an object composed

of metal and he did not attempt to testify regarding its design as a medical device.

Smith & Nephew moved to disqualify Kumar under *Daubert* and the district court agreed that “he lacked the expertise to determine whether the nails served the biomechanical purpose for which they were designed.” *Id.* at *9. The district court also granted summary judgment to Smith & Nephew. The Ninth Circuit reversed the district court’s decision to exclude Kumar’s testimony. It stated that the district court’s analysis focused on the helpfulness, rather than reliability, of Kumar’s testimony, and in doing so, mingled the analysis under Fed. R. Evid. 702 and Fed. R. Civ. P. 56. Thus, the Ninth Circuit stated that, “a district court may not exclude expert testimony simply because the court can, at the time of summary judgment, determine that the testimony does not result in a triable issue of fact.” *Id.* *13. Rather, the court must determine whether there is “a link between the expert’s testimony and the matter to be proved.” *Id.* (quoting *United States v. Bighead*, 128 F.3d 1329, 1335 (9th Cir. 1997)). The district court failed to explain under *Daubert* why the metallurgist’s testimony that the metal device was both poorly manufactured and could have been designed to last longer than it did was not relevant to the product liability case. However, in reviewing the order granting summary judgment, the Ninth Circuit affirmed the district court’s dismissal of the case. Stilwell failed to explain the defect that formed the basis for her claim and only presented vague arguments regarding the expected life of the RT nail. This evidence could not refute Smith & Nephew’s evidence that the RT nails performed as intended in this case. Accordingly, the Ninth Circuit affirmed the summary judgment dismissing plaintiff’s claims against Smith & Nephew.

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Tenth Circuit Report

A Fire Expert Who Cannot Account for Alternative Causes Is Excluded; A Structural Engineer Who Cannot Account for Alternative Causes Is Admitted



The Tenth Circuit Court issued several new decisions involving *Daubert* challenges in the realm of civil and criminal law. Two of the civil cases provide interesting comparisons with respect to whether a court may exclude expert testimony when an expert cannot, with any scientific certainty, exclude the possibility that another cause proximately caused a party’s damages. *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985 (10th Cir. 2006); *McDonald v. North Am. Specialty Ins. Co.*, 2007 WL 867190 (10th Cir. xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" />Mar. 23, 2007).

In *103 Investors I, L.P. v. Square D Co.*, a fire had destroyed an office building in March 2001. Plaintiff attributed the cause of the fire to a busway malfunction. *103 Investors I, L.P.*, 470 F. 3d at 987. A busway is a “system of four insulated aluminum bars and aluminum casing that run from the basement to the top floor and distribute electricity to the floors.” *Id.* The defendant had manufactured the busway, but another company installed it in 1978. Plaintiff filed suit alleging strict liability and negligence based on theories of manufacturing defects and failure to warn. *Id.*xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Defendant moved to strike one of the plaintiff’s expert witnesses under Federal Rule 702 and *Daubert*. After conducting a *Daubert* hearing, the district court granted defendant’s motion to exclude the expert, which resulted in the court granting the defendant’s motion for summary judgment on plaintiff’s manufacturing defect and negligence allegations. *Id.* Plaintiff appealed the decision to the Tenth Circuit, claiming the district court abused its discretion when it excluded the expert’s testimony. *Id.* at 990.

Plaintiff’s fire investigator had opined that contaminants in the busway caused premature deterioration of Mylar insulation, resulting in a short circuit which generated heat through the insulation and caused the fire. *Id.* Plaintiff’s expert witness concluded the contaminants in the busway were created during the manufacturing process, and this was a manufacturing defect. *Id.*

The district court ruled, and the Court of Appeals agreed, that plaintiff had not established that its expert witness had expertise relating to how contaminants got into the duct system during the manufacturing process. *Id.* In particular, the expert’s methodology was based solely on a “permeability test.” During this test, the expert poured water on top of the Mylar insulation to see whether it could permeate the Mylar. The expert concluded that water could not permeate the surface of the Mylar. *Id.* at 991. The expert, however, did not test whether water and other contaminants could go around the Mylar insulation and into the duct system. This was important because there was evidence that not all portions of the duct system were insulated with Mylar, and that the Mylar insulation was not completely sealed. *Id.* Janitorial closets abutted the duct system in a manner that water could go around the Mylar, as opposed to permeating the Mylar.

Plaintiff’s expert witness admitted at the *Daubert* hearing that there was a possibility that water could drain down inside the duct system and create a short circuit to ignite a fire. *Id.* at 991. The expert also testified that he was not familiar with the busway manufacturing process, nor was he familiar with the precautions taken when manufacturing a busway, or what codes governed a busway’s manufacturing and installation. *Id.* at 990. Based on this testimony, the court concluded that the expert witness could not testify that the contaminants in the busway resulted from a manufacturing defect. The district court ruled that the expert’s “testing and hypothesis did not account for the admitted fact that water can enter the bus duct by going around the Mylar insulation.” *Id.* Based on that record, the Tenth Circuit ruled the expert’s opinion “that the

contamination cannot be explained as anything but a manufacturing defect did not show to be grounded in expertise or accepted methodology.” *Id.* at 991.

But in *McDonald v. North Am. Specialty Ins. Co.*, 2007 WL 867190 (10th Cir. Mar. 23, 2007), the Tenth Circuit upheld the district court of Oklahoma’s decision permitting plaintiffs’ expert witness to testify that their property damage was caused by the blasting operations conducted by Ferrell Cooper Mining Company. In *McDonald*, plaintiffs sued their insurer, North American Specialty Insurance Company, after North American failed to pay insurance proceeds for two poultry houses that were allegedly damaged by blasting operations within a few hundred feet of McDonald’s poultry houses. North American Insurance paid the claim and sought subrogation against the mining company, alleging that the company’s blasting operations caused the property damage. *Id.* at *1.

The insurance company retained a structural engineer who testified that the damage to the poultry houses was most likely caused by the blasting operations. *Id.* at *2. The mining company, however, argued that the retained expert should not have been permitted to testify because the expert could not rule out other possible causes for the damage, including strong winds. *Id.* The district court denied defendant’s motion, and the mining company appealed that decision to the Tenth Circuit after a jury verdict was rendered in the district court awarding damages to North American for the amount paid by the insurance company for the two poultry houses. *Id.*

The mining company argued on appeal that the expert witness failed to explain how the blasting caused damage to the poultry houses, and that the expert was not qualified to offer expert testimony on whether blasting had damaged the poultry houses. *Id.* at *4. The Court of Appeals rejected this argument, citing to the record on appeal that the expert had testified that the poultry houses were likely damaged due to “blast-induced forces,” “air blast,” and from “heavy blasting going on within 150 feet or 200 feet of the poultry houses,” even though he could not quantify the forces. *Id.*

The Court of Appeals also ruled that the mining company failed to provide any support for its position that North American’s expert was not qualified to testify as an expert simply because the expert could not specifically quantify the “air blast force,” nor could he rule out the possibility that a 73-mile wind reported by the weather service had caused the poultry houses to lean. *Id.* The Court of Appeals, however, ruled that these admissions during cross examination simply went to the weight of his opinions about the cause of the property damage, but did not bear on the admissibility of his expert opinion. *Id.* (citing *Goebel v. Denver & Rio Grande Western R.R. Co.*, 346 F.3d 987, 998-99 (10th Cir. 2003)) (holding that an expert’s failure to rule out all possible alternative causal sources does not render the expert’s testimony inadmissible).

These two rulings appear to be difficult to reconcile with one another. The Court of Appeals upheld the district court’s ruling in *103 Investors* when the court prohibited an expert from testifying because he admitted that another possible explanation could have caused the fire (water intruding the busway around the Mylar insulation), and that he did not fully understand how the busway was manufactured. See *103 Investors I, L.P. v. Square D Co.*, 470 F.3d at 990-991. In contrast, the Court of Appeals in *McDonald* upheld the district court’s decision to permit an expert to testify as to what caused property damage to poultry houses, despite the expert’s concession that a strong wind may have caused the poultry houses to lean, and that he could not quantify the magnitude of the blasts that he attributed to the property damage. See *McDonald v. North Am. Specialty Ins. Co.*, 2007 WL 867190 (10th Cir. Mar. 23, 2007). However, in both cases the Tenth Circuit affirmed the district courts’ decisions under the deferential abuse of discretion standard. Thus it is possible that these two cases reflect a belief by the Tenth Circuit that the effect of potential alternative causes on the reliability of expert testimony is a matter that falls within the broad discretion of the district courts.

The Tenth Circuit also issued *Daubert* rulings in the context of criminal cases. In one case, *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007), the Court of Appeals upheld the defendant’s sentence for distribution of child pornography. Defendant proffered an expert witness to testify that the structure of his computer hard-drive was such that it was not set up to distribute any particular type of material, but was set up to conduct a “porn-fishing expedition with no particular calculation toward any particular type of material, other than generally sexually explicit material.” *Id.* at 1225. The district court, however, prohibited the expert from testifying on this particular matter, ruling that testimony went to the defendant’s state of mind. In other words, the expert was vouching for Mr. Shaffer that he did not intend to disseminate illegal child pornography. *Id.* The district court struck down the testimony, ruling that it was inadmissible because the expert witness was not allowed to testify as to whether the defendant did or did not have the requisite *mens rea* constituting an element of the crime. See Fed. R. Evid. 704(b). The Court of Appeals upheld the district court’s ruling, holding that the expert witness sought to suggest to the jury that the defendant did not knowingly possess or distribute unlawful child pornography. *Id.* at 1225.

In another criminal case, the Tenth Circuit upheld the district court’s decision to prohibit the defendant’s expert witness, who claimed to be a “corrections consultant,” from testifying about the “culture of violence in federal penitentiaries” to explain why an inmate might respond to a federal prison officer who had “disrespected” him in a violent fashion. See *United States v. Abdush-Shakur*, 465 F.3d 458, 466 (10th Cir. 2006). On appeal, the defendant argued that the district court erred in excluding this testimony because the testimony would have directly supported the defendant’s motive in attacking a federal penitentiary officer and would have also supported his argument that he only intended to wound, not kill, the federal prison officer. *Id.* The defendant was convicted for attempted murder. *Id.* at 458.

The Court of Appeals ruled that the proffered testimony, even if admitted, would not excuse the defendant’s attack on the corrections officer, nor would it negate any of the elements of the crime charged. *Id.* at 466-467. The court concluded that there was no basis in the proffered testimony to support the inference that the defendant’s motivation to retaliate for being disrespected would include assault but not attempted murder. *Id.* Therefore, the Court of Appeals upheld the district court’s decision to exclude the proffered testimony as irrelevant to any material issues in the case. *Id.*

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Eleventh Circuit Report

Tire Expert's Testimony Is Excluded Where the Tests upon Which He Relied Were Not Disclosed in His Report or Introduced at the Daubert Hearing



McCool v. Bridgestone/Firestone North American Tire, LLC, 2007 WL 761804 (11th Cir. Mar. 14, 2007) (unpublished), an interesting case, illustrates both the result of failing to properly support an expert's opinions under *Daubert* as well as a more practical point of adhering to deadlines imposed by the court.

The plaintiffs in *McCool* were injured in an automobile accident that they claimed was a result of negligent and defective design of the defendants' tires. After the case was remanded from multidistrict litigation the defendants filed a *Daubert* motion to exclude the plaintiffs' expert. After one extension to respond to the defendants' motion, the plaintiffs ultimately failed to properly and timely file a written response. The court allowed the plaintiffs to respond with testimony from their expert at the *Daubert* hearing.

Plaintiffs' expert testified that his opinions were based upon his experience in examining tires as well as tests conducted by "various companies that support that a nylon overlay improves the tire life." xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarts" /> *Id.* at *3. The tests to which he referred were never introduced and were not disclosed in his Rule 26 report.

The trial court concluded that the expert was not qualified on the subject matter, and the methodology used was not sufficiently reliable to assist the jury. The court also noted that the expert's theory concerning the defect had not been tested and had not been subjected to peer review and publication. The Eleventh Circuit affirmed the district court's holding and supported its reasoning.

The opinion contains a very interesting recitation of portions of testimony and argument from the *Daubert* hearing regarding the expert's memory lapses and extended periods of non-responsiveness. The court indicated that its opinion was not predicated on any medical condition of the expert at the time of the hearing.

In *Corwin v. Walt Disney Co.*, 475 F.3d 1239 (11th Cir. 2007), a copyright infringement case, the Eleventh Circuit affirmed the trial court's decision to exclude expert reports. The plaintiff brought a copyright infringement suit against a theme park developer alleging that the developer infringed on an artist's painting which was a rendering of a third-party's idea for a miniaturized theme park. (The plaintiff was the heir to the artist's estate).

The court recited the requirements of admissible expert testimony: "...the proponent of the testimony must show that: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Corwin* at 1250.

Although the proposed experts were competent to testify, the court agreed with the district court that the testimony was improper because it was based on improper methodology and failed to assist the trier of fact. "Ideas as opposed to expression of those ideas, are not protected by copyright laws." *Corwin* at 1250. The proposed experts' reports only focused on the concepts and ideas behind the painting and the theme park and not the protectable expressions of them.

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