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CHAPTER 11

Nonscientific Testimony

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Nonscientific Testimony

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First Circuit

Am. Computer Innovators, Inc. v. Elec. Data Sys. Corp.

74 F. Supp. 2d 64 (D. Mass. 1999)

Factual Summary

Defendant EDS allegedly wrongfully terminated its contract with plaintiff concerning the development of an improved "copy flow" and misappropriated confidential information provided to plaintiff during discussions concerning the project. Plaintiff proposed to offer a damages expert (an investment consultant) to provide testimony in support of its allegation that EDS misappropriated its intellectual property and that it suffered damages as a result. After conducting a *Daubert* hearing, the court held that the plaintiff's proposed expert's opinion was admissible and thus denied defendant's motion to exclude his testimony. Expert: Larry E. Justice (investment consultant).

Key Language

- The expert had "in-depth, lengthy, personal experience in the very area" on which he would be testifying. 74 F. Supp. 2d at 69.
- The court disagreed with the notion that the expert was "analogous to the all-purpose engineer who offers testimony on everything from refrigerators to diapers to airplane engines." *Id.*
- The expert's analysis "includes comparisons to other companies operating in the general area." *Id.*
- Although the court characterized the damages amount suggested by the expert as "enormous," it opined that "nothing in his reasoning or methodology renders his testimony inadmissible." *Id.*

Saia v. Sears Roebuck & Co.

47 F. Supp. 2d 141 (D. Mass. 1999)

Factual Summary

Plaintiff's right index finger was amputated at the upper joint while he was erecting a ping-pong table designed and manufactured by defendant Escalade Sports and sold by defendant Sears Roebuck. Defendants sought to exclude the testimony of plaintiffs' expert who was prepared to testify concerning the loss of enjoyment of life suffered by plaintiff as a result of the injury. The court precluded the expert from testifying on the ground that his opinion was unreliable and unhelpful to the jury determining any issues of fact. Expert: Stan V. Smith, Ph.D. (economist).

Key Language

- The court characterized as "arbitrary" the 10 percent to 20 percent reduction in the ability of plaintiff to lead a normal life as a result of his injury. 47 F. Supp. 2d 141 at 146.
- The court found it relevant that one of the ways to establish an actual rate for the diminished value of life was to conduct a specific psycho-social evaluation of plaintiff, and that such an evaluation had not been done in this matter. *Id.*
- Citing the expert's testimony at the *Daubert* hearing that his calculations could be provided to the jury as an aid or a guide, the court opined that a jury itself could establish a figure for plaintiff's diminution of enjoyment of life. *Id.*
- The court noted that, "Despite many favorable articles, the sociological and economic foundations of hedonic damages have been as often assailed as lacking in a verifiable basis." 47 F. Supp. 2d at 148.

United States v. Hines

55 F. Supp. 2d 62 (D. Mass. 1999)

Factual Summary

Defendant was charged with robbing a bank, during which he left a "stick-up" note at the scene of the crime. The teller whom he robbed made an eyewitness identification of him for the government. Defendant sought to preclude the government's witness, a document examiner, who would testify as to the authorship of the "stick-up" note. The government moved to preclude the testimony of defendant's expert, an eyewitness identification expert, who would testify concerning the accuracy and reliability of the teller's eyewitness identification of defendant. The court concluded that the handwriting expert could only testify with respect to the similarities between the known handwriting of defendant and the "stick-up" note, not with respect to whether defendant was indeed the note's author, citing the lack of testing and peer review of handwriting analysis by an academic community. The court permitted both the government's and the defendant's respective experts on eyewitness identification based on the scientific underpinnings of such testimony. Experts: Mark Denbeaux (handwriting analyst); Dr. Saul Kassin (psychologist).

Key Language

- Handwriting analysis "has never been subject to meaningful reliability or validity testing, comparing the results of the handwriting examiners' conclusions with actual outcomes." 55 F. Supp. 2d at 68.
- Nor is there any "peer review by a 'competitive, unbiased community of practitioners and academics.'" *Id.* (quoting 1027, 1038 (S.D. N.Y. 1995)).
- Handwriting analysis "has never been shown to be more reliable than results obtained by lay people." *Id.*
- Although there has been some testing, all of the tests "lacked a control or comparison group of lay persons." *Id.*
- While expert testimony on the degree of similarity between a handwriting sample provided by defendant and the "stick-up" note may be useful, "There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out," and thus testimony should be disallowed regarding whether defendant authored the note. *Id.* at 69.
- In contrast, the proposed eyewitness identification expert's testimony was "based on experimental psychological studies, testing the acquisition of memory, retention, and retrieval of memory under different conditions." *Id.* at 72.
- The court found noteworthy that the science of eyewitness identification evaluation "makes no pretensions that it can predict whether a particular witness is accurate or mistaken." *Id.* at 73.

James A. Libbey v. Wabash Nat'l Corp.

2002 U.S. Dist. LEXIS 19039 (D. Me. Oct. 7, 2002)

Factual Summary

Plaintiff commenced a product liability action against defendant, the manufacturer of a truck trailer on which plaintiff was working when he slipped and fell. The plaintiff alleged that the truck trailer bed was defective and unreasonably dangerous due to a design defect. The plaintiffs designated Mr. William English, a mechanical engineer, as their sole expert witness. Mr. English was expected to testify that the painted metal surfaces of the I-beam flanges in the trailer bed would have been slippery when wet, that the wetness of the trailer bed would have been a normally expected condition of operation of the truck and that the presence of these surfaces contributed significantly to the plaintiff's injuries. He was also expected to testify that the installation of an available slip resistant surface on the smooth surfaces of the I-beam flanges would have prevented the accident. The defendant sought to exclude the expert's proposed testimony under *Daubert* contending that it was unreliable and irrelevant. The Court disagreed with defendant and permitted plaintiff's expert to testify at trial.

Key Language

- "To disallow expert testimony because there are no industry standards applicable to the precise mechanism of injury in a given case would prevent expert testimony in any case involving an injury that had not been anticipated or otherwise addressed by the industry involved. Such an irrational outcome is not contemplated by *Daubert* or *Kumho*." 2002 U.S. Dist. LEXIS 19039, at *10.
- The expert's "admitted lack of familiarity with the use, design and manufacture of flatbed trailers did not automatically disqualify him from expressing an expert opinion…." *Id.*

United States v. Monteiro

407 F. Supp. 2d 351 (D. Mass. 2006)

Factual Summary

The defendants sought to exclude the testimony of a firearms examiner from the Massachusetts State Police who concluded that cartridge casings at several crime scenes matched firearms linked to the defendants based on "unique" toolmarks transferred from the firearms to the ammunition. The defendants moved in limine to exclude the testimony of the prosecution's firearms examiner. The defendants' motion in limine was granted, without prejudice to supplementation by the prosecution. Expert: Sgt. Douglas Weddleton (Massachusetts State Police firearms examiner).

Key Language

- "*Daubert* directs that 'in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error.' In the case of firearm toolmark identification, because the process is so subjective and qualitative, it 'is not possible to calculate an absolute error rate for routine casework.'… Based on the record before [the court], the government has established that known error rate is not unacceptably high." 407 F. Supp. 2d at 366–67 (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594 (1993)).
- "[A]lthough the process of rendering an opinion is primarily subjective and based on the expertise of the examiner, the existence of the requirements of peer review and documentation ensure sufficient testability and reproducibility to ensure that the results of the technique are reliable." 407 F. Supp. 2d at 369.

- "The question, then, is whether a method that relies on the individual examiner's training and experience to distinguish between characteristics on a cartridge casing is fatal to the reliability of the technique on the whole. Based on the peer reviewed articles and the testimony of the witnesses," the court concluded that "the trained eye will be able to distinguish among the class, subclass, and individual characteristics produced by the firearms." *Id.* at 371.
- "It is clear that the community of firearm and toolmark examiners accepts the current identification methodology as reliable." *Id.* at 372.
- "One important caveat: during the testimony at the hearing, the examiners testified to the effect that they could be 100 percent sure of a match. Because an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty. Allowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer to her findings, but does not allow her to say more than is currently justified by the prevailing methodology. (citation omitted) The lack of absolute certainty on the part of the expert does not render her opinion unreliable under *Daubert*." *Id.* (citing *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 253 (1st Cir. 1998)) (allowing medical causation testimony even if not certain).
- "The government must ensure that its proffered firearms identification testimony comports with the established standards in the field for peer review and documentation. If the expert opinion meets these standards, the expert may testify that the cartridge cases were fired from a particular firearm to a reasonable degree of ballistic certainty. However, the expert may not testify that there is a match to an exact statistical certainty." 407 F. Supp. 2d at 375.

Ting Ji v. Bose Corp.

538 F. Supp. 2d 354 (D. Mass. 2008)

Factual Summary

Plaintiff model was photographed by defendant photographer and the photographs were purchased by the defendant Bose for advertising. This case arises out of a dispute over the effect of two documents signed by the plaintiff on the day the photographs were taken. The parties intended to call experts to testify as to the industry practice with respect to such releases and both parties moved to exclude the other's expert testimony. The Court denied the motions, but prohibited the experts from expressing their legal and quasi-legal opinions. Experts: Kristie Raymond Babbin (modeling industry) and Richard W. Wolfe (entertainment law attorney)

Key Language

- *Daubert* factors do not always apply cleanly to nonscientific experts and the trial court's discretion in such matters is broad. 538 F. Supp. 2d at 357.
- An expert may not "assist" the jury by expounding upon the law because to do so would intrude upon the province of the trial judge. *Id.*
- The line between testimony regarding what the law requires and testimony describing how an industry practice typically operates is not always clear. The latter form of testimony is admissible. *Id.*
- The fact that an expert has an interest in the outcome of the case does not disqualify her from testifying. 538 F. Supp. 2d at 359.
- The roles of fact witness and expert witness are not necessarily mutually exclusive. *Id.*

Second Circuit

United States v. Starzecpyzel

880 F. Supp. 1027 (S.D. N.Y. 1995)

Factual Summary

The defendants in a criminal proceeding, regarding an indictment for conspiracy to commit theft, moved to exclude handwriting expert evidence relating to alleged forgery of documents. The court undertook to determine admissibility of forensic handwriting evidence on a nonscientific basis, and determined that the testimony was not admissible as scientific evidence. Experts: Mary Wenderoth Kelly (forensic document examination for plaintiff); George Edward Stelmach (forensic document examination for the defendant, professor of exercise science and psychology); Michael J. Saks (forensic document examination, professor of law and psychology).

Key Language

- Forensic testimony, despite certification programs and professional journals, cannot be regarded as scientific knowledge under Fed. R. Evid. 702. 880 F. Supp. at 1038.
- The fact that *Daubert* does not apply to nonscientific expertise does not suggest that judges are without an obligation to evaluate proffered expert testimony for reliability. This obligation derives from Rule 702 and from Rule 104(a), which provides that "[p]reliminary

questions concerning the qualifications of a person to be a witness… shall be determined by the court." *Id.* at 1030.
- "Whatever the historical practice may have been with regard to evaluating nonscientific testimony, this court concludes that adequate guidance can be found within Rule 702 to conduct a meaningful inquiry into the reliability and expertise claimed by forensic document experts." *Id.* at 1043.
- "Defendants will be permitted to attack the reliability of forensic document examination, as they did at the *Daubert* hearing, to attack the expertise of each testifying FDE, to introduce the testimony of their own FDE, or employ any combination of such approaches." *Id.* at 1050.

Koppell v. N.Y. State Bd. of Elections

97 F. Supp. 2d 477 (S.D. N.Y. 2000)

Factual Summary

Plaintiffs challenged the constitutionality of New York election law, which provided the position of candidates on the ballot was determined by lottery. Plaintiffs filed a motion to strike the reports of defendant's two proposed expert witnesses, and defendant filed a motion to strike the report of plaintiff's proposed expert witness on the grounds that each failed to meet the *Daubert* test for relevancy and reliability. The court granted plaintiff's motion to strike one of the defendant's expert reports because the techniques upon which the expert relied had neither been tested nor subject to peer review, and because the analysis provided was largely anecdotal and did not rely on any particular type of expertise. All experts' reports and testimony were regarding the existence or nonexistence of ballot position bias. Experts: Dr. Henry Bain (election ballot bias expert); Dr. James Chapin (election ballot bias expert); Dr. Robert Darcy (election ballot bias expert).

Key Language

- Because the techniques upon which the defense expert relied have neither been tested nor subject to peer review, and because the analysis he provided was largely anecdotal and does not rely upon any particular type of expertise that would assist the trier of fact in rendering the ultimate determination in this action, the plaintiff's motion to strike the expert's report was granted. 97 F. Supp. 2d at 482.

Maurizio v. Goldsmith

2002 U.S. Dist. LEXIS 6032 (S.D. N.Y. Apr. 9, 2002)

Factual Summary

Plaintiff sued for a share of the author's credits, participation, and income from books written by defendant author. The defendant moved in limine to preclude a proposed expert witness from testifying. The plaintiff's expert witness' testimony included opinions that an individual's damages should include a proportionate share of 70 percent of the author's credits, participation, and income from books authored by defendant subsequent to the bestselling book. The expert's conclusion was based on a paperback and publishing industry formula and patterned on sales patterns for known authors whose future books featured the blurb "author of a previous bestselling book" and recent and accurate industry sources and knowledge of the best seller franchise formula. Plaintiff's counsel sought to support the expert's proposed testimony solely on the grounds that he was an expert in publishing with sufficient experience. The court found that the expert's statements were conclusions insufficient to demonstrate the general acceptance of the formula and pattern within the publishing community, and as such, the motion to preclude the expert witness's testimony was granted. Expert: Stanley Corwin (author).

Key Language

- The court applied the *Daubert* factors, none of which supported the admissibility of the plaintiff's expert witness.

Santalucia v. Sebright Transp., Inc.

184 F. Supp. 2d 224 (N.D. N.Y. 2002)

Factual Summary

Plaintiff's attorney sought contingency fees from underlying wrongful death action which settled subsequent to the dissolution of plaintiff counsel's law firm. Plaintiff counsel sought to introduce expert witness testimony regarding settlements for personal injury cases in Nevada. The testimony of experts was proffered for opinions as to the valuation of the case on the date of dissolution. The first expert never practiced law in Nevada and never handled a case involving Nevada law. The second expert, an insurance broker, had never adjusted a case originating in Nevada and had never worked on a case controlled by Nevada law. Additionally, the adjuster expert did not survey the statistics available through insurance organizations in order to compare the size of jury verdicts or settlement values for Nevada. Rather, he relied upon personal experience from other states. Experts: Ernest A. DelDuchetto (attorney); Richard Pagliara (insurance adjuster).

Key Language

- The testimony of both experts was held to be neither relevant nor reliable, and would provide no assistance in determining the value of the case at the time of dissolution. Accordingly, the experts' testimony was stricken.

Playtex Prods., Inc. v. Procter & Gamble Co.

2003 U.S. Dist. LEXIS 8913 (S.D. N.Y. May 28, 2003)

Factual Summary

The plaintiff manufacturer filed an action against defendant competitor for false advertising and unfair competition. Both parties made motions to exclude the testimony of expert witnesses. The court denied, in part, and granted, in part, defendant's motion to exclude the testimony of economist Dr. Matthew Lynde. Dr. Lynde was permitted to testify with regard to lost profits and corrective advertising costs and defendant's alleged illicit gains, but was barred from testifying concerning brand equity damages. The court denied the defendant's motion to exclude the testimony of economist Dr. Joel Steckel. Experts: Dr. Matthew Lynde (economist); Dr. Joel Steckel (economist).

Key Language

- The court found that Dr. Lynde's calculations were not lacking in causation. The jury could assess Dr. Lynde's theories behind his calculations, and Dr. Lynde was subject to cross-examination on those theories. 2003 U.S. Dist. LEXIS 8913, at *17.
- "…the reliability and credibility of an alternate method of determining profits is an issue ripe for jury consideration." *Id*.

Zaremba v. General Motors Corp.

360 F.3d 355 (2d Cir. 2004)

Factual Summary

Plaintiffs, a driver and two passengers, brought an action against defendant automobile manufacturer, alleging that the injuries they sustained in a roll over car crash were enhanced due to a design defect. The plaintiffs focused on two theories of design defect that they claimed enhanced the injures they sustained in the accident. In support of their theories of design defect, plaintiffs intended to call an engineer who would testify as to his reconstruction of the accident and as to an alternative safer design. The defendant challenged his proposed testimony as inadmissible under the *Daubert* principles. The District Court agreed with the defendant and precluded the engineer's testimony. The U.S. Court of Appeals affirmed the decision. Experts: Donald Phillips (engineer).

Key Language

- The Court found that Mr. Phillips (1) had not examined or tested the automobile, (2) had no measurements or calculations to support his theory of how the accident occurred, (3) had no drawing or model of his hypothetical alternative design, (4) did not conduct any test of his design, (5) offered no calculations in support of the safety of his design, (6) had not subjected his alternative design to peer review and evaluation, (7) presented no evidence that other designers or manufacturers in the automobile design community accepted the untested propositions underlying his opinions. 360 F.3d 355, 357.
- The Court concluded that "essentially the Phillips design has no concrete basis in reality." *Id*.

DeVito v. Smithkline Beecham Corp.

2004 U.S. Dist. LEXIS 27374 (N.D. N.Y. Nov. 29, 2004)

Factual Summary

The plaintiff, a former consumer of Paxil medication, asserted claims against the defendant manufacturer for fraud, negligence, strict liability, breach of express warranty, and breach of implied warranty. The manufacturer moved to exclude the testimony of three proffered expert witnesses, and moved for summary judgment, should the proffered testimony be held inadmissible. The manufacturer's motion to exclude the testimony of the three proffered expert witnesses was granted, and the motion for summary judgment was granted. Experts: John T. O'Donnell (pharmacist with a Master's Degree in nutrition), Dr. Kevin W. George (a former psychiatrist of plaintiff's); and Deborah Sweeney (plaintiff's treating nurse practitioner).

Key Language

- "[W]hether an expert witness' 'opinion is ultimately admissible depend on the reliability and relevance of the proffered testimony.'" 2004 U.S. Dist. LEXIS 27374, at *8–9 (quoting *Kass ex rel. Kass v. West Bend Co.*, 2004 U.S. Dist. LEXIS 22217, at *5 (E.D. N.Y. 2004)).
- Concerning the testimony of the nurse practitioner, "[p]laintiff did not bother to respond to this aspect of Glaxo's motion. This lack of response amounts to a concession by plaintiff that the court should exclude Ms. Sweeney's testimony." 2004 U.S. Dist. LEXIS 27374, at *13–14 (citing *Green v. Doukas*, 2001 U.S. Dist. LEXIS 8861, *8 (S.D. N.Y. June 22, 2001) (granting motion to preclude expert testimony because

"plaintiff's failure to oppose the motion suggests… it has merit[ ]")).
- "[Plaintiff's psychiatrist] is confining his opinions to how Paxil allegedly *effected* plaintiff DeVito—not whether Paxil is *capable generally* of causing the symptoms of which DeVito complains. Therefore, although the plaintiff did not specify the purpose for which he is offering [his] George's testimony, presumably it is being offered on the issue of specific causation." 2004 U.S. Dist. LEXIS 27374, at *17.
- The court emphasized that there was "no single factor which is dispositive of whether O'Donnell qualifies as an expert on the issue of general causation. Rather, it is the cumulative effect of the foregoing which convinces the court that [the pharmacist] lacks the lack of relevant "knowledge, skill, experience, training or education" to testify as an expert on the issue of general causation *vis-a-vis* the discontinuation of Paxil. As he admitted, O'Donnell is *not* a pharmacologist." *Id.* at *25.

WeddingChannel.com, Inc. v. Knot, Inc.

2005 U.S. Dist. LEXIS 991 (S.D. N.Y. Jan. 28, 2005)

Factual Summary

The plaintiff, WeddingChannel.com, Inc., alleged that the defendant, The Knot, Inc., infringed a United States patent owned by the plaintiff. In considering the issue of claim construction, the defendant infringer moved to strike the affidavit of a linguist which the holder submitted in support of the plaintiff's construction. The infringer's motion to strike the linguist's affidavit was denied.

Key Language

- "The Federal Circuit has stated that where an evidentiary ruling raises a procedural issue that is not unique to patent law, the law of the regional circuit applies. Since the admissibility of expert testimony is a procedural issue that arises in an array of substantive areas, Second Circuit law governs the admissibility of Professor Biber's declarations." 2005 U.S. Dist. LEXIS 991, at *10–11 (citing *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1276 (Fed. Cir. 1999); *WMS Gaming, Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1361 (Fed. Cir. 1999)).
- "Professor Biber's methodology—explicating sample text according to a stated set of linguistic rules—is a reliable form of textual analysis." 2005 U.S. Dist. LEXIS 991, at *17–18.
- The expert's "declaration demonstrates that he applied this methodology in a reliable manner: The declaration identified (1) the grammatical rules that Professor Biber applied, (2) textual authority for those grammatical rules, and (3) the alleged meaning of the text based on the application of these rules." *Id.* at *18.

Prof'l Consultants Ins. Co. v. Employers Reinsurance Co.

2006 U.S. Dist. LEXIS 24170 (D. Vt. Mar. 8, 2006)

Factual Summary

The plaintiff, Professional Consultants Insurance Company ("PCIC"), brought this diversity action for breach of contract and tortious bad faith against its reinsurer. The defendant, Employers Reinsurance Company ("ERC"), counterclaimed for breach of contract and breach of the duty of utmost good faith. ERC moved by three separate motions for partial summary judgment on all respective counts, as well as to strike certain expert evidence. ERC's motion to strike certain evidence was denied to the extent that evidence of industry custom would be admissible because the contract was ambiguous; denied as to *Daubert* concerns; denied in part and granted in part as to inadmissible legal conclusions; and denied without prejudice to renew at time of trial as to sufficiency of the expert testimony. Experts: Waterman, Stewart

Key Language

- "Although the parties disagree in conclusory fashion over whether the expert testimony at issue meets any of the four factors, the better focus is on the general principles of reliability and relevance, with reference to other reinsurance cases." 2006 U.S. Dist. LEXIS 24170, at *68 (citing *State v. Kinney*, 762 A.2d 833, 842 (Vt. 2000)).
- "As to relevancy, Mr. Waterman and Mr. Stewart appear to provide testimony that would help the trier of fact understand reinsurance and how the alleged customs may affect the contracts at issue. Despite the testimony's lack of reference to specific facts and sources, it may prove useful to the layperson. As the Second Circuit noted while interpreting an ambiguous contract, it is hard to imagine how such a reinsurance dispute could be decided without admitting evidence of custom and practice." 2006 U.S. Dist. LEXIS 24170, at *69–70. (citing *Travelers Indem. Co. v. Scor Reins. Co.*, 62 F.3d 74, 78 (2d Cir. 1995)) (affirming admission of expert testimony about reinsurance practice concerning notice of occurrence, where testimony was relevant to interpret ambigu-

ous contract provision and "not an effort to persuade the jury to ignore the contract").
- "Because the expert testimony appears to be reliable and relevant as compared to testimony in other reinsurance and insurance disputes, ERC's motion to strike the evidence is DENIED to the extent that the expert testimony meets the *Daubert* standard."

United States v. Monaghan
648 F. Supp. 2d 658 (E.D. Pa. 2009)

Factual Summary
The defendant in a criminal proceeding, regarding an indictment honest services mail fraud, moved to exclude an expert witness offered to testify regarding the ethics laws applicable to public officials and employees in Pennsylvania. The court undertook to determine admissibility of this evidence on a nonscientific basis, and determined that the testimony was not admissible. Experts: John J. Contino (ethics expert).

Key Language
- If a party seeks certification of an expert for nonscientific testimony the relevant reliability concerns will focus upon personal knowledge or experience. 648 F. Supp. 2d at 660.

Third Circuit

Roberson v. City of Philadelphia
2001 U.S. Dist. LEXIS 2163 (E.D. Pa. Mar. 1, 2001)

Factual Summary
Plaintiffs brought an action for intentional and reckless infliction of emotional stress, as well as violations of 42 U.S.C. §1983, alleging inaction by defendant city and its police officers following an assault by neighbors that plaintiff had warned police officers was impending. Plaintiffs retained a police practices expert, and defendant moved to preclude the testimony. A *Daubert* hearing was held, and the court precluded partial testimony of the expert and gave leave to the plaintiff to submit a revised expert report. Plaintiffs' expert, a former police officer who had supervised detectives and uniformed officers and directed investigations of alleged police misconduct, reached his conclusions by applying his experience, training and skills. The court held, based on his considerable experience, that his method was reliable; however, plaintiffs' expert could not testify as to legal conclusions or speculate as to other parties' states of mind or what would have occurred had the police defendants arrested the third party. The police expert could testify as to the content of police directives as they pertained to the alleged inaction of the police officers, and the expert's experience that some police officers failed to refer arrest warrants for execution in order to serve them themselves and obtain the associated overtime pay. Expert: Joseph C. Waters (policy practices).

Key Language
- "Since the evidence sought to be precluded here is nonscientific in nature, the factors of *Daubert* and *In re Paoli* provide insufficient guidance for the court to perform its gate keeping function." In this instance, "the relevant reliability concerns will focus upon personal knowledge and experience." *Id.* at 10.
- The expert relied on his professional experience, training and skills to reach his conclusions, and the court tested the reliability of these opinions based on an examination of the expert's professional background and experience, training, methods used, and the nonjudicial uses of opinions derived from these methods; the *Daubert* and *In re Paoli* factors were used as applicable.

Rowan Parkinson v. Guidant Corp.
315 F. Supp. 2d 754 (W.D. Pa. 2004)

Factual Summary
This is a products liability case commenced against the defendants by plaintiffs seeking recovery for injuries sustained by plaintiff husband when a guidewire manufactured by one of the defendants fractured during the course of an angioplasty procedure. The plaintiffs planned to call as expert witnesses a metallurgist and a mechanical engineer on the issue of whether the subject wire was improperly prepared. The defendants challenged the proffered testimony of both of these expert witnesses as unreliable. Defendants' motion to preclude their testimony was denied. Experts: Ronald Crooks (metallurgist); Norman Johnson (mechanical engineer).

Key Language
- "…the fact that defendants and their expert may disagree with Crooks as to whether the asserted flaws actually were in fact flaws and whether such flaws contributed to the guideline fracture is a matter of weight not admissibility." 315 F. Supp. 2d 754 at 758.
- Since the proffered testimony was reliable and the conclusions fit the methodology employed, the proper means to attack their testimony was not by preclusion but through the use of "vigorous cross-examination and presentation of contrary evidence at trial." *Id.* at 758.

United States v. Davis

397 F.3d 173 (3d Cir. 2005)

Factual Summary

The defendants were tried together and found guilty by the jury of both possession of cocaine base or crack with intent to distribute and possession of a firearm during and in relation to an underlying drug felony. On appeal, the defendants argued that the district court erred when it admitted as expert testimony the responses of a police officer to a hypothetical question. The defendants contended that the government did not provide adequate discovery with regard to that testimony, and they argued that there was no scientific basis for the officer's opinion. The court found that the expert's testimony was admissible under both the Federal Rules of Evidence and *Daubert*, and the convictions of all three defendants were affirmed. Expert: Derrick Garner (police officer).

Key Language

- "[T]he factors enumerated in *Daubert* were intended to apply to the evaluation of scientific testimony, and they have little bearing in this case." 397 F.3d at 178.
- "Under *Daubert*, a trial court must evaluate such testimony and make sure it 'rests on a reliable foundation and is relevant to the task at hand.' Officer Garner's testimony fully satisfied both these requirements. *Id.* at 178–79 (citing *Daubert*, 509 U.S. at 597).
- The officer's "testimony concerned the methods of operation for drug traffickers in the South Philadelphia area, a topic which we have held is a suitable topic for expert testimony because it is not within the common knowledge of the average juror." 397 F.3d at 179 (citing *United States v. Theodoropoulos*, 866 F.2d 587, 590–92 (3d Cir. 1989)).

Engers v. AT&T (In re Engers)

2005 U.S. Dist. LEXIS 41693 (D. N.J. Aug. 10, 2005)

Factual Summary

The plaintiffs brought suit regarding amendments the defendant made to their employee pension plan. The defendant sought to exclude two of the plaintiffs' experts from testifying at trial. The first expert, Claude Poulin, had over 30 years experience as an actuary and had been a Fellow of the Society of Actuaries for over 32 years, and he also had performed Employee Retirement Income Security Act ("ERISA") consultations for the Internal Revenue Service and the Equal Employment Opportunity Commission and had testified in numerous ERISA cases as an expert. Poulin prepared a cost benefit analysis in which he used a year-by-year ratio to calculate the value of a fictitious employee's pension upon retirement. The analysis was first performed using the current plan and then the same analysis was performed using the previous plan. To illustrate the payout difference between current and previous pension plans, calculations were performed using each plan and the differences were then reported. The second expert, James Stratman, had a Ph.D. in Rhetorical Theory from Carnegie-Mellon and had 15 years of research experience. Stratman prepared a report based on information the defendant had given their employees regarding the plan amendments. He compared the "understandability" of the plan amendments as given to employees with Poulin's report to determine if the information that was communicated was consistent with the changes and he also assessed the language in the defendant's ERISA disclosure to ascertain its understandability. The court denied the defendant's motion to exclude the plaintiff's expert testimony at trial.

Key Language

- A trial court's rejection of expert testimony should be the exception rather than the rule. (citing Rule 702 Advisory Committee Note). 2005 U.S. Dist. LEXIS 41693, at *8.
- The defendant contended that Poulin's analysis is flawed and inconsistent with a treasury regulation because the analysis is of his own design. The court found that Poulin's analysis was the same methodology as the IRS employs and was within the guideline, and "[i]t is not consistent with controlling law to bar a qualified expert who is using a generally accepted methodology." 2005 U.S. Dist. LEXIS 41693, at *8. "[W]hen the method chosen by a qualified expert is questioned, cross-examination and the presentation of contrary evidence are the appropriate means of attacking the reliability of his opinion." *Id.* at *9.
- The defendant asserted that Stratman's conclusion were personal opinions not grounded in a scientific methodology. The court found his method was reliable because he used a generally accepted method based upon word patterns, grammar, ordering, and other factors. "If defendant does not agree with the methodology chosen by Stratman, cross-examination and the presentation of contrary evidence are the appropriate means of attacking the credibility of his opinion." *Id.*

Chatman v. City of Johnstown

2005 U.S. Dist. LEXIS 27769 (D. Pa. Nov. 14, 2005)

Factual Summary

The plaintiff arrestee brought a claim for use of excessive force in violation of 42 U.S.C. §1983 and the Fourth Amendment, assault and battery, and negligence against the defendants, a city and police officer. The city and officer filed a motion in limine to preclude the introduction of any evidence from the arrestee's liability expert, Dr. R. Paul McCauley. The court found the witness's method for evaluating police investigation was reliable and his testimony as to whether the officer failed to follow proper police procedure was allowable. However, testimony that the use of force was unreasonable under the factual circumstances, or that the officer unreasonably seized the arrestee was excluded, as it would become an instruction to the jury on what result to reach and would express a legal conclusion. The motion to exclude was granted in part; any testimony to establish a federal claim against the city, to establish deliberate indifference on the part of the city, and regarding the alleged failure of the city to investigate the incident of excessive force was excluded. The witness could testify regarding whether the officer failed to follow proper police procedures.

Key Language

- "The reliability of the proffered expert testimony is determined by a lower standard that the 'merits standard of correctness…' [A] judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' *i.e.*, if it is based on the methods and procedures of science…. [This standard may be met] even though the judge thinks the opinion to be incorrect.'" 2005 U.S. Dist. LEXIS 27769, at *7–8 (quoting *In re Paoli*, 35 F.3d at 744).
- "Since the evidence sought to be precluded here is nonscientific in nature, the factors of *Daubert* and *In re Paoli* provide insufficient guidance for the court to perform its gatekeeping function. In this instance, 'the relevant reliability concerns [will] focus upon personal knowledge [and] experience.'" (quoting *Kumho*, 526 U.S. at 149).
- The court observed that "although Dr. McCauley's method is 'not a formal, testable method, it is the one used by police practices experts and [is] accepted by the courts.' Therefore, the Court acknowledges Dr. McCauley's professional experience and skills, and the Court determines that Dr. McCauley's method is reliable." 2005 U.S. Dist. LEXIS 27769, *14–15 (quoting *Roberson v. City of Philadelphia*, 2001 U.S. Dist. LEXIS 2163, at *4).

United States v. Sosa

2006 U.S. Dist. LEXIS 2254 (D. Pa. Jan. 20, 2006)

Factual Summary

The defendants were each charged in a 26-count indictment, which included charges of conspiracy to participate in the affairs of a racketeering enterprise through a pattern of murder, kidnapping, maiming, drug trafficking, and robbery. The defendants moved to preclude admission of the testimony of a Philadelphia police officer, Robert Clark, a witness listed to be called by the plaintiff United States at trial. The defendants argued that the testimony of the officer did not meet the *Daubert* requirements because the proposed opinion evidence regarding a criminal organization did not involve any theory or technique that could, or ever had been, tested or subject to peer review. The court concluded that the proposed testimony of Officer Clark could meet the qualification, reliability and fit requirements to permit him to testify as an expert witness.

Key Language

- The court found that after considering the depth and breadth of the officer's experience, the officer had qualifications to testify as an expert with respect to gangs and gang structure and terminology, and that this type of testimony could assist the jury because this information involving specialized subject matter is not likely to be something a typical juror would know. 2006 U.S. Dist. LEXIS 2254, at *16.
- The court reasoned in part that the officer was qualified with special knowledge because he had worked on gang investigations since 1996 and had received "formal gang training" from the East Coast Gang Investigators Association and the Mid-Atlantic Great Lakes Organized Crime Law Enforcement Network. *Id.* at *14.
- The court found that the officer's expected testimony would not suggest to the jury that any single defendant had the requisite mental state to either join the alleged conspiracy or take part in any of the alleged criminal activities. *Id.* at *21.
- Finally, the court found that the probative value of the officer's testimony was considerable, outweighing any prejudicial effect. *Id.* at *24–25.

D&D Assocs. v. Bd. of Educ. of N. Plainfield

2006 U.S. Dist. LEXIS 16721 (D. N.J. Mar. 20, 2006)

Factual Summary

The plaintiff, D&D, was the general construction contractor for various school construction and renovation

projects in North Plainfield, New Jersey. The construction projects were delayed, and the defendant, the Board of Education of North Plainfield, issued a notice of default to D&D and terminated D&D from the project. The defendant filed a motion to preclude the expert report of an attorney submitted on behalf of D&D regarding legal malpractice of a defendant lawyer who had prepared the bid documents for the Board of Education. The magistrate judge granted the defendant's motion to preclude the admission of the expert. As articulated by the expert in his report, D&D "asked [him] to render an opinion as to whether the defendant, Robert Epstein, Esq., committed legal malpractice with regard to his representation of the North Plainfield Board of Education specifically in connection with… the preparation and review of bid documents." He concluded, "Mr. Epstein's advice should have been to delay the award of the contracts and/or the issuance of a notice to proceed," and because Epstein "failed to advise the Board against awarding the contracts and/or withholding the notice to proceed… his conduct deviates from the accepted standards within the legal profession." Epstein argued that the report should be precluded because (1) the expert was not qualified to render the opinion, and (2) the report was an inadmissible opinion. D&D argued that the report should not be precluded because (1) the expert was qualified, (2) discovery was not complete and it was premature to preclude the report at this time, and (3) the report satisfied the standards set out under New Jersey law for expert opinions in malpractice cases. The court affirmed the order of the magistrate precluding the expert report.

Key Language

- "To be admissible, expert testimony must be both relevant and reliable." (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993)). "The restrictions on the admissibility of expert testimony embody three concerns: (1) qualification, [*8] (2) reliability, and (3) fit." (citing *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000)). 2006 U.S. Dist. LEXIS 16721, at *7.
- "The expert, an attorney in the state of New Jersey for over thirty years, was asked to provide an opinion on the specifics of the entire contract bidding process. The Magistrate Judge determined that Vignuolo was not qualified to render such an opinion because he did not possess specialized knowledge or expertise in construction and public bidding law. The lack of specialized knowledge also cast doubt on the reliability of the report." 2006 U.S. Dist. LEXIS 16721, at *4.
- "The expert's opinion that Epstein provided bad advice to his client, the Board, did not 'fit' the underlying causes of action asserted by D&D for civil rights violations, tortious interference, libel, and slander." 2006 U.S. Dist. LEXIS 16721, at *4.
- The expert's report only reiterates the plaintiff's allegations, and fails to establish a "causal connection between the alleged wrongful acts and the resulting injury." 2006 U.S. Dist. LEXIS 16721, at *17.

Fifth Circuit

Sittig v. Louisville Ladder Group LLC

136 F. Supp. 2d 610 (W.D. La. 2001)

Factual Summary

In this products liability suit, the plaintiff alleged that he fell and injured himself while using an aluminum extension ladder manufactured by the defendant. The defendant manufacturer sought to exclude the testimony of two experts the plaintiff intended to use concerning the alleged defects and inadequate warnings of the ladder. The court precluded their testimony on the ground that the experts did not meet the requirements of reliability set forth in *Daubert*. The court also concluded that the experts' opinion, which involved a proposed alternative design that had not been subject to peer review and publication, was not relevant. Experts: Richard R. Scott (mechanical engineer); Gerald S. George (biomechanics).

Key Language

- The experts' proposed opinions were not reliable given their "lack of qualifications in the field of ladder design." 136 F. Supp. 2d at 616.
- One of the experts was "unfamiliar with the particular tests that ladders were subjected to in order to be [American National Standards Institute] approved, nor did [he] consider himself a ladder design expert." *Id.* at 617.
- Further, "the validity of the methodology utilized by the experts is also questionable" and amounted to speculation given the lack of "scientific basis to establish that ladder separation was the most likely cause" of the plaintiff's fall. *Id.*
- The number of assumptions which one of the experts made in conducting his "limited tests precludes the possibility that his expert opinion is based upon a rigorous scientific inquiry which meets the necessary standards." *Id.* at 618.

- One of the experts' "alternative design has only been tested by [him] and it has not been subject to peer review and publication." *Id.* at 620.

Firroozeh H. Butler v. MBNA Tech., Inc.

2003 U.S. Dist. LEXIS 19017 (N.D. Tex. Oct. 23, 2003)

Factual Summary

The plaintiff commenced a wrongful termination suit claiming that management "engaged in a calculated and deliberate effort to malign her job performance, to target her for termination, and to ostracize her from her fellow employees." The plaintiff also alleged that employees ridiculed her religious beliefs and national origins (Iranian descent) by inquiring whether she was to blame for terrorist activity and by referring to her as a camel jockey. After exhausting her administrative remedies by filing a charge of discrimination with the EEOC, the plaintiff initiated this action in federal court. Her complaint asserted a variety of claims, including alleged violations of Title VII of the Civil Rights Act of 1964, civil rights violations under 42 U.S.C. §1981 and negligent supervision, hiring and retention, and intentional infliction of emotional distress. The plaintiff retained a damages expert, Dr. James T. McClave, whom the defendant sought to exclude from testifying. Dr. McClave, an economist, was expected to testify regarding the plaintiff's lost wages, specifically that she would have earned an additional $20,477.60 from 2001 through 2003 but for her demotion by the defendant. Dr. McClave also points out that the plaintiff's average salary increase from 1993 to 2001 was only 3.3 percent, whereas the national average annual increase in initial salaries for job candidates with degrees in computer science was 6.7 percent during that same period. The defendant, without specifically addressing the factors set forth in *Daubert*, maintained that Dr. McClave premised the testimony on faulty underlying facts and it should therefore be excluded. The court disagreed with the defendant, holding that Dr. McClave's testimony on the issue of lost wages was admissible. However, the court reached a different conclusion with respect to the comparison of the plaintiff's average annual salary increases with those of job candidates who hold degrees in computer science. The court found that the plaintiff's lost wages were not comparable to a group of workers with computer science degrees.

Key Language

- "Expert opinion must be founded on facts and data that are capable of independent verification." 2003 U.S. Dist. LEXIS 19017, at *13.
- "Although defendant disputes the accuracy of information relied upon by plaintiff's expert, there is no doubt that Dr. McClave's opinion is traceable to a specific and identifiable source." *Id.*
- "Expert opinion is inadmissible if it is in essence an apples and oranges comparison." Therefore, unless the plaintiff can show that her degree is comparable to a computer science degree, Dr. McClave would not be permitted to offer this comparison at trial. *Id.* at 15.

Cirilia Perez Librado v. M.S. Carriers, Inc.

2004 U.S. Dist. LEXIS 12203 (N.D. Tex. June 30, 2004)

Factual Summary

This case stems from a motor vehicle accident in which one individual died and another was severely injured. Among other things, the defendants moved to exclude or limit the testimony of one of the plaintiff's experts. Similarly, the plaintiffs moved to strike one of the defendant's experts. While driving a large tractor-trailer rig for the defendant, M.S. Carriers Inc., the driver, Michael Keith Nichols, ran a stop sign and collided with a vehicle in which the plaintiffs, Perez and Cipriano, were passengers. Nichols was lost at the time and looking at a roadmap instead of the road. According to the plaintiff's expert, there was a period of 14 seconds during which Nichols could have responded to several visual cues that indicated the approaching intersection. He nevertheless failed to stop, colliding with the plaintiff's vehicle.

The plaintiffs sought to introduce their expert's opinion to evaluate the cause of the accident, including driver fatigue as a potential cause, and to review driver log entries. The defendants objected to the proposed testimony and sought to limit and/or exclude it. The defendants' motion presented the question under *Daubert* as to whether the proposed testimony was "reliable." The court held in favor of the plaintiff and found that the plaintiff's proposed expert testimony was reliable, and therefore admissible.

Key Language

- The defendants contend that the plaintiff's expert did not perform an adequate reconstruction of the accident and did not independently measure all aspects of it. However, the evidence indicates that the plaintiff's expert did independently measure the distance between various warning signs and the intersection, and that the expert's work was "within the accepted meth-

odology of accident reconstructionists." 2004 U.S. Dist. LEXIS 12203, at *33.

- The defendants also argue that the plaintiff's expert's opinion that fatigue may have contributed to the accident is not based on scientific analysis or independent testing. The defendants essentially argue that the plaintiff's expert's opinion on this matter is not an expert opinion. However, the plaintiff's expert based his opinion on Nichols' record of hours-of-service violations and his failure to see the warning signs before entering the intersection. Based on the violations and analysis of the driver's logs, and considering his familiarity with the effects of fatigue, the plaintiff's expert can opine that fatigue may have been a factor. Therefore, the plaintiff's expert's testimony was found to be reliable under *Daubert* and the defendants' motion to exclude and/or limit the testimony was denied. *Id.* at 34.

Thomas v. Deloitte Consulting LP

2004 U.S. Dist. LEXIS 17761 (D. Tex. Sept. 2, 2004)

Factual Summary

The plaintiff, a 41-year-old female, was hired as a senior manager at the defendant, Deloitte Consulting LP. One year later, she was terminated, allegedly as part of a reduction in force due to her substandard performance. The employee claimed sex and age discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* The defendant, Deloitte Consulting LP, filed a motion to exclude the expert testimony and expert reports of a statistician retained by the plaintiff to help prove that age and gender were factors in her termination and other employment actions involving senior managers at DC.com. The employee sought to introduce a report prepared by the statistician that showed that a disproportionate number of female senior managers had been terminated during a 22-month period and the correlation between performance scores of male and female senior managers. A second report prepared by the expert showed that men were more likely than women to be promoted to partner or director. In granting the employer's motion, the court held that the expert, in a portion of the first report, failed to test for statistical significance. The court held that, where the expert did test for statistical significance, the deviation of 7 to 10 percent was not statistically significant. The court also held that the second report was irrelevant because the employee did not allege a failure to promote. The defendant's motion to exclude expert testimony and reports was granted. Expert: Dr. Marion G. Sobol (statistician).

Key Language

- "Here, Dr. Sobol's statistics are little more than a list of numbers that are not probative of discrimination or helpful to a jury in determining disparate treatment. Consequently, those portions of Report I which fail to test for statistical significance must be excluded under *Daubert*." 2004 U.S. Dist. LEXIS 17761, at *14.
- "Notwithstanding the absence of a 'bright line' test for statistical significance, *Daubert* instructs that a court should consider the known or potential rate of error when assessing the scientific validity or reliability of expert testimony." *Id.* at *16 (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594 (1993)).

Lane v. Target Corp.

2006 U.S. Dist. LEXIS 23573 (S.D. Tex. 2006)

Factual Summary

In a slip and fall action arising when the plaintiff slipped on liquid that had leaked from a bottle of cleaning fluid that had fallen to the floor from one of the defendant's product displays. The plaintiff retained Dr. Gary S. Nelson, a safety engineer and manager, to do an "accident cause analysis" of the plaintiff's fall. The defendant filed a motion to exclude the expert's testimony on the grounds that it was both unreliable and irrelevant. The court held a *Daubert* hearing at which the expert testified. The court found that the plaintiff failed to meet her burden of proving that the expert's testimony was both reliable and relevant. Therefore, the expert's testimony was found to be inadmissible and was excluded.

Key Language

- "All that Plaintiff offered to the Court in this case was Dr. Nelson's own repeated assurances that his methodology is 'well-established' in his field. The Court, however, cannot accept Dr. Nelson's representations standing alone. The Fifth Circuit has explicitly required that a litigant provide 'some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient.' (citing *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998)). Because Plaintiff failed to provide the Court with anything other than Dr. Nelson's 'say-so' to establish the reliability of his methods, Plain-

tiff has not met her burden of proof under *Daubert*." 2006 U.S. Dist. LEXIS 23573, at *11–12.

- "Both the Fifth Circuit and Supreme Court have noted that there must be an adequate 'fit between the data and the opinion proffered.' (citing *Moore*, 151 F.3d at 276). Nothing "requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." (citing *General Electric v. Joiner*, 522 U.S. at 136, 146–47 (1997))". *Id.* at *14.
- "The jury… will not need Dr. Nelson to know how to use 'reason' to evaluate the dangerousness of a product display. Therefore, Dr. Nelson would only serve as an advocate before the jury and would not bring 'the jury more than the lawyers can offer in argument.' (quoting *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986)). As such, his testimony is not helpful and must be excluded." *Id.* at *18–19.

Children's Med. Ctr. of Dallas v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.

2006 U.S. Dist. LEXIS 9752 (D. Tex. Mar. 10, 2006)

Factual Summary

In a trademark infringement action brought under the Lanham Act, 15 U.S.C. §1051, *et seq*., both the plaintiff, Children's Medical Center of Dallas, and the defendant, Columbia Hospital at Medical City Dallas Subsidiary, L.P., filed motions to exclude the testimony of each other's experts. The plaintiff is a not-for-profit hospital located in Dallas, Texas that specializes in providing medical services to children. For more than 17 years, the plaintiff owned a federally registered service mark depicting the words "Children's Medical Center of Dallas." The defendant, a for-profit hospital located in Dallas, Texas, provides a variety of medical services to patients of all ages, including specialized services to children. The defendant changed the name of its pediatric unit from "North Texas Hospital for Children at Medical City" to "Medical City Children's." The plaintiff believed that the name "Medical City Children's" created confusion with respect to both its registered and common law marks. When the defendant refused to abandon its marketing campaign using the "Medical City Children's" name and logo, the plaintiff filed suit in federal district court. The plaintiff moved to exclude the testimony of: (1) a pediatric oncologist to testify that parents would tend to select a hospital for their children based on the advice of their doctor and insurance companies; and (2) an attorney and law professor who reviewed the results of a search conducted by a trademark search firm, of the term "Children's" as used in the healthcare industry. The defendant objected to the testimony of: (1) the president of a survey research firm who interviewed more than 200 adults in the Dallas area to determine whether a hospital known as "Children's" had acquired secondary meaning; and (2) an economist who attempted to quantify the amount of damages allegedly sustained by the plaintiff due to the defendant's use of the "Children's" mark. The court determined that none of the challenged experts should be excluded prior to trial.

Key Language

- "[T]he *Daubert* analysis focuses on the reasoning or methodology employed by the expert, not the ultimate conclusion." 2006 U.S. Dist. LEXIS 9752, at *7 (citing *Watkins v. Telsmith, Inc*., 121 F.3d 984, 989 (5th Cir. 1997)).
- "The purpose of such an inquiry is 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 2006 U.S. Dist. LEXIS 9752, at *8 (citing *Skidmore v. Precision Printing & Packaging, Inc*., 188 F.3d 606, 618 (5th Cir. 1999), quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999)).
- "Where, as here, expert opinion testimony is based solely on experience or training, application of the *Daubert* factors is unwarranted." *Id.* at *13. (citing *First Savings Bank, F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1083 (D. Kan. 2000), citing *Compton v. Subaru of Am., Inc*., 82 F.3d 1513, 1518 (10th Cir. 1996)).
- "[E]vidence should be excluded prior to trial only if it is clearly inadmissible for any purpose. The better practice is to defer evidentiary rulings until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in the proper context… Without the context of a trial and additional briefing by the parties, the court is unable to make a final ruling on this issue." 2006 U.S. Dist. LEXIS 9752, at *14.

Kinnison v. City of San Antonio

2010 U.S. Dist. LEXIS 18549 (W.D. Tex. Mar. 2, 2010)

Factual Summary

Plaintiff filed suit against the City of San Antonio and various city officials alleging defendants demolished

structures on his property without prior notice to him or the preceding owner. The property was situated in a historic district. Defendants moved to disqualify plaintiff's expert who provided an opinion regarding the market value of the property to determine damages. Expert: Richard L. Dugger (market value expert).

Key Language

- The Court will consider the relevant reliability of the testimony of the expert witness using the wording of Rule 702 in light of the fact that the testimony concerns both a nonscientific technique as well as personal knowledge or experience. 2010 U.S. Dist. LEXIS 18549, 5–6.
- The Court previously assessed Mr. Dugger's qualifications and found that he was qualified to assess a property's market value. *Id.*
- Plaintiff's expert provided testimony on the prospective value of the residential property assuming a hypothetical condition. 2010 U.S. Dist. LEXIS 18549, 8.
- Plaintiff's expert failed to provide a basis by which the Court can ascertain whether the refurbished value is remote, speculative, or conjecture and therefore the testimony will not assist the trier of fact in determining the predemolition value of the property. 2010 U.S. Dist. LEXIS 18549, 8–9.

Roussell v. Brinker Int'l, Inc.

2008 U.S. Dist. LEXIS 52568 (S.D. Tex. July 9, 2008)

Factual Summary

Plaintiffs are over 3,500 servers at Chili's restaurants who maintain that Defendant unlawfully required them to share tips with Quality Assurance ("QA") employees in violation of the Fair Labor Standards Act. Plaintiffs have asked the Court to exclude the testimony of Defendant's expert. Defendants intended to proffer the expert testimony to address two issues: 1) Whether QA employees should be eligible to participate in mandatory tip pools; 2) Whether the tipping of QA employees at Chili's is voluntary. The expert opined that QA employees should be eligible to participate in mandatory tip pools because their job tasks are akin to those performed by employees in tip-eligible positions like servers and bussers. He also opined that servers voluntarily tip QA employees at most Chili's locations. Expert: Professor Michael Lynn (social psychologist, consumer tip expert).

Key Language

- The Court found that Dr. Lynn's testimony as to whether expeditors are eligible to participate in a mandatory tip pool and whether the tipping of Chili's expeditors is voluntary should be excluded. 2008 U.S. Dist. LEXIS 52568, 104–105.
- The Court recognizes that Dr. Lynn has considerable expertise in the field of consumer tipping. It is not at all clear, however, that the opinions he offers on the issues in this case, which are not about consumer tipping, meet any of traditional measures of reliability. Dr. Lynn's opinions as to whether QAs are eligible to participate in mandatory tip pools or whether server tip sharing is voluntary have not been published or subjected to peer review, nor has his theory been tested. 2008 U.S. Dist. LEXIS 52568, 105.
- Although social science expertise may be admissible under certain circumstances, 63 the Court finds that Dr. Lynn's testimony is not based on a reliable methodology and is inconsistent with the factors set forth in *Daubert*. 2008 U.S. Dist. LEXIS 52568, 107.

Sixth Circuit

Cowan v. Treetop Enters., Inc.

120 F. Supp. 2d 672 (M.D. Tenn. 1999)

Factual Summary

In this action brought under the federal Fair Labor Standards Act, the plaintiffs, current or former unit managers at Treetop's restaurants, alleged that the defendants deemed them *bona fide* executive employees exempt from the Act's overtime pay requirements. The plaintiffs moved to strike the report of the defendants' expert, which opined that the unit manager position at Treetop's restaurants is a management position in conception, perception, and practice. The court granted the motion to strike on the ground that the expert's methodology rendered the proposed opinion unreliable. Expert: Dr. Deivanayagami (professor of industrial engineering).

Key Language

- The expert's report did not reflect "statistical and empirical analyses" and accordingly, "his methodology leaves the court unconvinced as to the reliability of his findings." 120 F. Supp. 2d at 683–84.
- The expert's opinion as to whether the unit manager was "primarily responsible" for the profitable operation of the restaurant improperly rendered an opinion on a legal issue, given that the term "primary responsibility" "has a distinct legal meaning under applicable regulations." *Id.* at 684.

- The court concluded that "admission of this expert's opinions would not alter the conclusions reached" by the jury in the matter. *Id.*

Champion v. Outlook Nashville Inc.
380 F.3d 893 (6th Cir. 2004)

Factual Summary
The plaintiffs, the father and sister of a deceased arrestee, sued the defendants under 42 U.S.C. §1983 for excessive force and failure to render medical assistance which led to the arrestee's death. The decedent was a 32-year-old individual suffering from autism, who was nonresponsive and unable to speak. The plaintiffs claim that the defendant police officers used unnecessary force in attempting to restrain the decedent, who was having an autistic fit at the time of his arrest. The parties disagreed during trial, and continued to diverge, in their respective understandings of how much force the defendant officers used after the decedent was incapacitated on the ground. At trial, the plaintiff called an expert, Geoffrey Alpert, to testify regarding the actions of the police officers, namely the use of excessive force. On appeal, the defendant officers claim that the District Court erred in permitting Alpert's testimony. However, the appellate court held that the district court did not abuse its considerable discretion in permitting Alpert's testimony.

Key Language
- The defendant officers argue that Alpert did not present any "specialized knowledge that was reliable or of any assistance to the jury." 2004 U.S. App. LEXIS 17422, at *39. The officers relied principally on a prior Sixth Circuit case, *Berry v. City of Detroit*, 25 F.3d 1342, in which the court held that the plaintiff's expert, a so-called specialist in the field of "police policies and practices," was not qualified to speak about the City's policy of disciplining officers for alleged uses of excessive force. However, in *Berry*, the basis for the court's decision was that the expert's credentials demonstrated that he had no specific expertise about police activities. By contrast, the plaintiff's expert in the instant matter testified about a discrete aspect of police practices, namely use of excessive force, based upon his particularized knowledge of that area. Furthermore, and again in contrast to the expert in *Berry*, expert Alpert's credentials are much more extensive and substantial. *Id.* at 43.
- In sum, the court held that, based on Alpert's considerable experience in the field of criminology and because he was testifying concerning a discrete area of police practices about which he had specialized knowledge, his testimony was properly found to be admissible. *Id.* at 44.

Nemir v. Mitsubishi Motors Corp.
381 F.3d 540 (6th Cir. 2004)

Factual Summary
Appellant, injured driver, sought review of a decision of the lower court which entered judgment for appellee, automobile manufacturers in the driver's products liability action, alleging that he was injured due to a defectively designed seatbelt. Plaintiff-Appellant alleged that at the time of the accident he had been wearing his seatbelt (Takata 52), but that it had only partially latched such that it appeared to be properly fastened when in fact it was still prone to unlatching. Prior to trial, Plaintiff-Appellant retained an expert witness, Dr. Thomas Horton, the former Director of Engineering for Takata Inc., the seatbelt's manufacturer. Horton planned to testify that plaintiff's seatbelt suffered from a design defect, known as "partial-latching" which caused the seatbelt to unlatch during the accident. However, the District Court ruled that Horton was unqualified to testify as an expert witness due to purported deficiencies in his methodology. The Court of Appeals for the Sixth Circuit disagreed and held that his testimony should have been admissible.

Key Language
- The District Court found that Horton's method—which manipulated the buckle at varying speeds and angles—was scientifically unsound, because "no reasonable driver purposefully manipulates the buckle at different speeds and angles to achieve a state of partial latch as Horton does." 201 F. Supp. 2d 779. However, the Court of Appeals recognized that the point of the purposeful manipulation was to show that partial latch could occur under certain circumstances, not to show directly that the plaintiff's buckle partially latched during the accident—given the infinite possible variations, it would have been virtually impossible to determine the velocity and angle with which the plaintiff actually buckled his belt on the day in question. "That most of the combinations did not produce partial latching might affect how heavily the jury weighs the evidence, but not whether it should be admitted." 2004 U.S. App. LEXIS 17658, at *25.

Harman v. Sullivan Univ.
2005 U.S. Dist. LEXIS 12186 (D. Ky. June 20, 2005)

Factual Summary

The plaintiff, a former student, filed suit against the defendants, a college, an admissions counselor, a director of admissions, the president of the college corporation, and other individuals, alleging claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, violation of the Kentucky Consumer Protection Act (KCPA), and infliction of emotional distress. The plaintiff moved to exclude certain testimony of the defendant's expert on accreditation and the defendants moved to exclude all testimony of the plaintiff's expert on the same. The plaintiff challenged the expert's qualifications to testify regarding the accuracy of the representations made by the defendants in marketing and advertising materials. While the plaintiff argued that the expert was attempting to testify regarding false advertising standards, the defendants represented, and the expert's deposition testimony reflected, that his opinions dealt with accreditation, not advertising or marketing. The parties agreed at the pretrial conference that a hearing on these motions was unnecessary. The defendant's expert was allowed and the plaintiff's motion to exclude the testimony was denied. The plaintiff's expert testimony was allowed, but limited to his opinions about the accreditation process as set forth by the court and the defendants' motion to exclude the testimony was granted in part and denied in part.

Key Language

- "The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." 2005 U.S. Dist. LEXIS 12186, at *5–6 (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)).
- The court found that Dr. Taylor was qualified to offer his opinion on the issue of accreditation "by virtue of his specialized knowledge, skill, experience, training, or education… This information will assist the trier of fact in understanding the evidence, and any weaknesses in his background will go to the weight to be accorded to his opinion." 2005 U.S. Dist. LEXIS 12186, at *5–6 (citing *First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001) (noting that unfamiliarity with certain aspects merely affects the weight and credibility of the expert's testimony)).
- The court held that "[l]ike Dr. Taylor, Dr. Mazze is qualified to offer his opinion on the issue of accreditation by virtue of his specialized knowledge, skill, experience, training, or education." *Id.* at *8. However, "Dr. Mazze 'may not testify regarding the defendants' intent when making representations or on what the students relied when making a decision to enroll. Such testimony is not helpful to the fact finder as a jury is capable of determining whether the acts were intentional without expert testimony on the subject.'" 2005 U.S. Dist. LEXIS 12186, at *10.

Rees v. Target Corp.

2008 U.S. Dist. LEXIS 112255 (E.D. Mich. Mar. 31, 2008)

Factual Summary

Plaintiff alleges that she visited a Target store when a box fell from a shelf and hit her head, causing injuries. She denies that she touched the shelf before the box fell. Defendant moved to preclude plaintiff from introducing expert testimony regarding Target's zoning practices. Zoning refers to a retailer's "restraightening of all of the things on the shelves that the customers mess up when they are selecting merchandise during the day." Defendant argued that Mr. Grisim's testimony is not based upon scientific method and should therefore be excluded. Expert: Terrence Grisim (retail safety)

Key Language

- If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. 2008 U.S. Dist. LEXIS 112255, 10.
- The Court concludes that Mr. Grisim's proffered testimony is reliable, taking into account his expertise in the field of retail safety practices. *Id.*
- While Grisim's statements may arguably be tenuous, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking them. *Id.*
- The Court concludes that the opinions of Mr. Grisim are relevant and will assist the jury with disposing of this case. 2008 U.S. Dist. LEXIS 112255, 10–12.

Seventh Circuit

United States Equal Employment Opportunity Comm'n v. Cambridge Indus.

2000 U.S. Dist. LEXIS 14753 (N.D. Ill. Aug. 29, 2000)

Factual Summary

The plaintiff alleged violation of Americans with Disabilities Act of 1999, arguing that the defendant corporation rejected qualified work applicants based on

results of a preemployment test. An issue of expert testimony was raised in the context of a summary judgment motion, concerning the defendant manufacturer's administering of a nerve conduction test to test susceptibility to certain conditions. The plaintiff relied on a report of a vocational expert to establish that the defendant had perceived the claimant as substantially limited from employment generally. This expert opined that the defendant's perception of the plaintiff resulted in a substantial loss of each claimant's access to the relevant labor market. The court found that the plaintiff could not establish that the defendant regarded the claimants as disabled, and that the expert testimony offered to show that the defendant considered that these claimants were substantially limited in major life activity of working was not relevant or reliable. Expert: Michael Brethaver (vocational expert).

Key Language

- The report of the vocational rehabilitation expert failed to meet reliability requirements. 2000 U.S. Dist. LEXIS 14753, at *8.
- Expert's testimony clearly establishes "that he failed to follow the methodology and principles normally applied by vocational experts, and that he himself normally applies in performing his function as a vocational expert." The court further determined that the report was "too general to be of use to the jury." *Id.*
- The court determined that it has "no confidence in [the expert's] ability to bring reliable, scientifically based testimony to the instant matter. In any event… the report… fails to meet *Daubert*'s relevancy requirements." *Id.* at 9.
- The court further rejects testimony of a labor market sociologist on the basis of relevance. *Id.* at 15.

Maguire v. Amtrak

2002 U.S. Dist. LEXIS 5226 (N.D. Ill. Mar. 28, 2002)

Factual Summary

Plaintiff alleged her employer, Amtrak, negligently failed to provide her with a reasonably safe work place, claiming she was assaulted by a passenger while she was working as a train conductor. Plaintiff retained an expert in industrial and premises security to testify that the defendant was negligent by failing to implement and enforce proper crowd control safety procedures. The court granted the defendant's motion to preclude the plaintiff's expert testimony. Expert: John Kennish (industrial and premises security).

Key Language

- The expert's conclusions do not meet Rule 702 standards of reliability, as he did not rely on sufficient relevant facts and data, nor were his conclusions the product of reliable principles and methods. The expert did not review all of the factual evidence available to him before reaching his conclusions. The expert did not review photographs of the scene, did not visit the same platform, or any platform at the same time as the incident occurred, and apparently read only portions of defendant's security procedures. Accordingly, any conclusions he may have based upon the data he reviewed are of questionable reliability. 2002 U.S. Dist. LEXIS 5226, at *14.
- The expert's experience may be sufficiently reliable to develop opinions about premises liability in general, but it did not explain how the expert's previous experience in crowd control is reliable in the context of boarding a train, which common sense dictates involves different issues of crowd control than exist at another public event. The expert's failure to review relevant literature and studies is particularly unjustifiable in light of his admission that he was aware that such studies existed. *Id.* at *16.
- Even if the expert's conclusions were found to be reliable under Rule 702, they would not necessarily help the trier of fact to understand the evidence or an issue of fact in the case. The expert's unsupported and unquantified conclusions would not add to the jury's understanding. *Id.* at *18.

Kikalos v. United States of America

2003 U.S. Dist. LEXIS 24567 (N.D. Ind. Jan. 7, 2003)

Factual Summary

Plaintiffs, who are charged with underreporting income to the Internal Revenue Service, sought to exclude defendant's expert's testimony on the grounds that his opinions were based almost exclusively on guesses, estimations, and speculation instead of the factual information available. The District Court disagreed and held that the defendant's expert's opinion was both reliable and likely to assist a jury and therefore denied plaintiff's motion seeking to exclude said testimony

Key Language

- The court found that the defendant's expert's analysis was drawn on the "relevant economics literature, relevant government and trade publications…, and his knowledge of economics, retail pricing and advertising behavior." 2003 U.S. Dist. LEXIS 24567, at *7.

- The court found that this was not a case where the defendant's expert merely provided an ultimate conclusion without any analysis. Instead, he surveyed relevant literature, government statistics, and applied generally accepted theories of economics and pricing to determine the most likely markup the plaintiff's used in selling liquor in their stores. The defendant's expert's analysis was detailed and could therefore be tested for its reliability. As an example, he used evidence of a competitor of the plaintiff's for which the actual percentage markups were known as a control for his conclusions. *Id.* at 8.
- The defendant's expert economist's testimony was also found to assist the jury in understanding the evidence and determining the facts in issue. The United States offered the expert's opinion to demonstrate the percentage markup used by the Commissioner to estimate the plaintiff's tax was reasonable and not arbitrary or excessive. *Id*.

Allen v. LTV Steel Co.

68 F. App'x 718 (7th Cir. 2003)

Factual Summary

Plaintiff, a crane operator, was moving steel slabs on the premises of defendant, L.T.V. Steel Company when a large rubber tire on a passing tractor vehicle exploded in the plaintiff's vicinity, causing him to fall forward into the windshield of the crane. Plaintiff claims that the lower District Court erroneously rejected the testimony of the tire expert he had retained. Plaintiff further alleges that had his expert's testimony been admitted, he would have been able to establish that the tire defect was the proximate cause of plaintiff's injuries. Plaintiff's expert, Morris Dingman, was hired well after the tire in question had been destroyed. Accordingly, he was not able to examine the tire itself, but rather was only able to examine reports of other similar tire failures, as well as a video tape of the particular accident. In reaching its conclusion that Dingman's testimony failed the "reliability prong of *Daubert*," the District Court noted the methods of plaintiff's expert had neither been "verified by testing, subjected to peer review, nor evaluated for its potential rate of error." On appeal, the Seventh Circuit Court of Appeals affirmed the lower court's holding.

Key Language

- The lower court correctly determined that expert Dingman's report/testimony was inadmissible, as his methods had not been verified by testing, subjected to peer review, or evaluated for a rate of error. Specifically, plaintiff's expert provided no support for the proposition that a defect in a specific tire can be established based solely on an examination of reports describing the failure rates of other tires. Furthermore, the Court also faulted Dingman for failing to establish a connection between the incident tire and those failed tires that were the subject of the reports. Finally, even if such a connection had been established, Dingman made "absolutely no attempt" to account for other alternative explanations for the tire explosion. 68 F. App'x 718.

Naeem v. McKesson Drug Co.

444 F.3d 593 (7th Cir. 2006)

Factual Summary

In an action by a former employee for sexual discrimination and intentional infliction of emotion distress under state law, the defendant employer and employee appealed an adverse finding of liability at trial, in part arguing that the district court erred in allowing the testimony of two of the plaintiff's expert witnesses. At trial, a professor of management testified for the plaintiff as a human resources expert and gave his opinion as to whether the defendant followed its own human resources policies in dealing with the plaintiff. In a pretrial motion in limine, the defendant sought to exclude the professor's testimony regarding whether the defendant followed accepted human resource policies. The court granted the motion in part, disallowing testimony on the whether the defendant followed accepted human resource policies, but allowed testimony regarding whether defendant followed its own policies. At trial, an expert on DOT regulations testified for the plaintiff regarding post-accident drug testing. He testified that the plaintiff's failure to have Barden tested for drugs after his December 29, 1995, accident was not a violation of DOT regulations. The defendants' challenges to expert witnesses failed, and the district court's judgment was affirmed.

Key Language

- "So long as the district court adhered to *Daubert*'s requirements, we shall not 'disturb the district court's findings unless they are manifestly erroneous.'… While the *Daubert* standard does not have to be recited mechanically, 'it is nonetheless crucial that a *Daubert* analysis of some form in fact be performed.'" 444 F.3d at 608 (citing *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 534–35 (7th Cir. 2005)).
- "In ruling on the defendants' motion *in limine*, the district court simply stated that '[Prof.] Anthony has sufficient expertise to be able to assist the jury in

understanding the meaning of a company's employment policies.'… [T]he district court's one sentence, stating that Prof. Anthony has sufficient expertise, is not enough to show that the district court applied the *Daubert* standard; the court provided no analysis of Prof. Anthony's methodology. Therefore, the admission of Prof. Anthony's testimony should not be given the deference normally afforded to a district court under the 'manifestly erroneous' standard." 444 F.3d at 608.

- When a district court fails to consider an essential *Daubert* factor, such as reliability, it has abused its discretion. *Id.* (citing *Smith v. Ford Motor Co.*, 215 F.3d 713, 717 (7th Cir. 2000)).
- "Given that the objectionable testimony by Prof. Anthony was corroborated by other witnesses, elicited on cross-examination or otherwise discredited on cross-examination, there was no reversible error in the admission of Prof. Anthony's testimony." 444 F.3d at 609.
- "When a defendant does not object to the admission of evidence during the trial, the objection is waived and cannot be raised for the first time in a motion for new trial or on appeal. In this case, the defendants did not raise their current objection to LaPorte's testimony in either their motion *in limine* or during the testimony itself. The defendants therefore waived their current objection to LaPorte's testimony." *Id.* at 610 (citing *United States v. Hack*, 205 F.2d 723, 727 (7th Cir. 1953)).

Martin v. Phillips

2007 U.S. Dist. LEXIS 96144 (S.D. Ill. Nov. 5, 2007)

Factual Summary

Plaintiffs allege use of excessive force as well as an unlawful search and seizure by the police defendants. Defendants moved to preclude the testimony of Plaintiffs' expert regarding the custom or practice of using excessive force in making arrests. Defendants do not object to Dr. Bowman's qualifications as an expert witness, they simply argue that some of his opinions are inadmissible. Expert: Dennis Bowman (Police Procedures)

Key Language

- The Court finds that Dr. Bowman's testimony regarding whether the Sauget police had a pattern and practice of using excessive force will not assist the jury. 2007 U.S. Dist. LEXIS 96144, 6.
- The Court precluded Dr. Bowman from testifying "concerning what amounts to the use of excessive force." *Id.*
- The Court will, however, allow Dr. Bowman to testify concerning when it is proper to use a Taser. This is a matter that the average juror would need help with. For instance, a Taser might be more appropriate than a night-stick or less appropriate than a chokehold. Expert testimony will be helpful to the jury in making such judgments. 2007 U.S. Dist. LEXIS 96144, 6–7.

Eighth Circuit

United States v. Blackwolf

1999 U.S. Dist. LEXIS 20736 (D. S.D. Dec. 7, 1999)

Factual Summary

In a criminal proceeding alleging that the defendant willfully and maliciously set fire to certain residences, the defendant filed a motion in limine to exclude testimony from a state fire marshal who led the investigation into the cause and origin of the fire. The court denied motion to exclude trial testimony. Expert: Daniel Carlson (Fire Marshal).

Key Language

- Admissibility of expert testimony under Fed. R. Evid. 702—whether based on "scientific," "technical" or "other specialized knowledge"—is governed by the Supreme Court's upholding in *Daubert*, which requires a trial court to exercise a gate-keeping function to insure that such testimony is both reliable and relevant. 1999 U.S. Dist. LEXIS 20736, at *5.
- In fulfilling its gate-keeping obligations, the trial court must "make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 6. The *Daubert* criteria such as "whether [the expert's] proffered expert opinions have been subject to peer review, whether there is a known error rate, and whether his theory or technique enjoy general acceptance within the relevant scientific community are not particularly appropriate and useful considerations, especially in a case such as this one where orthodox scientific methodology is involved." *Id.* at 11.
- Court was satisfied that opinions and conclusions concerning cause and origin of the fire "are reliable enough to be admitted. [Expert] has extensive background in firefighting and fire cause and origin investigation… the investigative protocol he utilized, albeit somewhat individualized in nature, was consistent with the basic methodology and procedures

recommended by the National Fire Protection Association (NFPA)." *Id*. at 12.
- In court's view, the expert employed "the requisite level of 'intellectual rigor' that is demanded of experts in the field of fire cause and origin investigations." *Id*. at 13.

J.B. Hunt Transp. v. Gen. Motors Corp.

243 F.3d 441 (8th Cir. 2001)

Factual Summary

J.B. Hunt Transport, Inc. ("J.B. Hunt") appealed from an adverse jury verdict in a products liability contribution action, where the district court excluded certain expert testimony from its accident reconstructionist. During the trial, J.B. Hunt's expert testified that he was unable to scientifically reconstruct the accident because he had insufficient information, but offered opinions based on examination of photographs taken of the vehicles involved. The district court excluded the expert's testimony because eyewitness testimony contradicted the findings and the photographic analysis was inadmissible under *Daubert*. Expert: Jerry Wallingford (accident reconstructionist).

Key Language

- The court stated, "[B]ecause of the deficiencies at the core of his opinion, including his own admission concerning his inability to scientifically reconstruct the accident, Wallingford's resulting conclusion… was mere speculation and conjecture." 243 F.3d at 444.
- The court held that "[E]xpert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *Id*.

Hartley v. Dillard's, Inc.

310 F.3d 1054 (8th Cir. 2002)

Factual Summary

The plaintiff, a former employee of the defendant, a mall department store, sued for age discrimination after he was terminated. The jury returned a verdict in favor of the plaintiff awarding him $237,669.00 in front pay. Defendant moved the court for a new trial for several reasons including that the plaintiff's economist should have been excluded. Plaintiff's economist testified that the defendant's financial problems were consistent with other department stores in malls around the country. Defendant argued that the expert failed to consider only the "economic realities" applicable to the store at issue. The court applied *Daubert* and ruled that the district court was within its discretion in allowing the testimony. Expert: Dr. Charles Venus (economist).

Key Language

- The court noted that the expert had "performed similar comparison for more than fifteen years, including analysis of retail establishments." 310 F.3d at 1061.
- Although the expert's opinions did not directly address the financial conditions of the defendant, "the jury could consider this evidence on the profit questions relating to the discharge." *Id*.

Melberg v. Plains Mktg., L.P.

332 F. Supp. 2d 1253 (D. N.D. 2004)

Factual Summary

The plaintiff's vehicle collided with a tractor trailer driven by an employee of the defendant, Plains Marketing, L.P. The plaintiff filed a motion in limine to exclude the testimony of the defendant's accident reconstructionist. Although the plaintiff conceded that the expert had sufficient facts and data and used an accepted and reliable method, he argued that there were "serious problems" with the expert's opinions relating to the speed of the plaintiff's vehicle prior to braking and the plaintiff's "ability to react" to the danger based on the speed calculation. Specifically, the plaintiff argued that the expert did not apply the method to the facts of the case in a reliable manner. The expert, himself, admitted that "there is some uncertainty" in his calculations. The court found that the expert's findings were "suspect" but, nonetheless, held that the findings were admissible at trial. Expert: Jerry Wallingford (accident reconstructionist).

Key Language

- The court questioned whether the expert's findings as to the speed of the plaintiff's vehicle were "derived from an application of scientific or technical methods that are acceptable in the field of accident reconstruction." 332 F. Supp. 2d at 1258.
- The expert's findings were based "on sufficient facts and data, are the product of reliable principles and methods, and Dr. Smith has arguably applied the principles and methods to the facts of this case." *Id*.
- The court cited *Daubert*, stating that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id*.

Engineered Prods. Co. v. Donaldson Co., Inc.

313 F. Supp. 2d 951 (N.D. Iowa 2004)

Factual Summary

This patent infringement action arose from the creation and sale of two air filter indicator devices. The defendant moved in limine to exclude the plaintiff's expert from testifying as to lost profits alleging that his findings were inadmissible pursuant to *Daubert*. In support of its motion, the defendant argued that the expert's opinions were unreliable, as they lacked "sound economic proof" and he "did not account for the law of demand in his lost profits calculation." Further, the defendant argued that the expert was not qualified to testify as to lost profits because he was an accountant and not an economist. After applying the *Daubert* standard, the court allowed the expert to testify. Expert: Bruce W. Burton (accountant/economist)

Key Language

- The court allowed the expert testimony because his "reasoning and methodology underlying [his] testimony are scientifically valid and that [his] reasoning and methodology can be applied to the facts at issue." 313 F. Supp. 2d at 1011.
- The court stated that the expert's "testimony will provide information beyond the common knowledge of the trier of fact regarding the workings of the purportedly narrow market for air filter restriction indication devices." *Id*. at 1012.

Storie v. Duckett Truck Ctr., Inc.

2007 U.S. Dist. LEXIS 92083 (E.D. Mo. Dec. 14, 2007)

Factual Summary

Plaintiff claimed that defendants made misrepresentations and omissions of fact in connection with the sale of the truck, which had been involved in a serious accident. Plaintiff's proposed expert owned a business that appraised the cost of repairing damaged vehicles and he had extensive experience in repairing vehicles. The expert rendered four opinions. The court limited the opinions that were permissible at trial. Expert: Robert Carmon (Vehicle Appraisals)

Key Language

- Nonscientific experts should receive the same degree of scrutiny regarding reliability as their scientific counterparts. 2007 U.S. Dist. LEXIS 92083, 8.
- While expert testimony must be reliable and grounded in a proper methodology, the testimony need not be determined correct before received into evidence. 2007 U.S. Dist. LEXIS 92083, 9.
- Observation coupled with expertise generally may form the basis of an admissible expert opinion. 2007 U.S. Dist. LEXIS 92083, 19.

Ninth Circuit

United States v. Saelee

162 F. Supp. 2d 1097 (D. Alaska 2001)

Factual Summary

Defendant was indicted on three counts of violating federal drug laws. Defendant sought to preclude the testimony of the government's expert concerning the similarities and differences between handwriting on exemplars provided by defendant and the address labels on the packages in which the defendant allegedly smuggled the drugs in question. After holding a *Daubert* hearing, the court excluded the expert's opinion, based on the lack of empirical testing of the theories and techniques used in the handwriting comparison. Expert: John W. Cawley III (forensic document analyst).

Key Language

- The court stated that, although the expert referred to "significant identifying characteristics" as the basis for his conclusions, he did not explain in the report submitted to the court "nor at the *Daubert* hearing how one identifies such characteristics, what they mean, or how many are necessary for a positive opinion." 162 F. Supp. 2d at 1101.
- The court concluded that although "the theories and techniques used in handwriting comparison could be empirically tested… there has been an overall lack of such testing." *Id.* at 1102.
- Referring to a study that tested the ability to determine whether a signature is genuine, the court deemed significant the study's conclusion "that experts and lay persons had similar ability to detect forgeries" and that "experts incorrectly found forgeries to be genuine less often than lay persons, and experts incorrectly found genuine signatures to be forgeries less than lay persons." *Id.*
- The court also concluded that "there had been little empirical testing done on the basic theories upon which the field [of handwriting analysis] is based," including "that no two persons write alike and that no one person writes the same all the time." *Id.*
- The court also based its holding on the fact that there is "little known about the error rate of forensic document examiners," and that "the little testing that has been done raises serious questions about the reliability of methods currently in use." *Id.* at 1103.
- Finally, the court opined that "it proves nothing" that "there is general acceptance of the theories and techniques involved in the field of handwriting analysis among the close universe of forensic document examiners." *Id.* at 1104.

- Court is not swayed by the fact that handwriting analysis testimony has been admissible in the past; "the fact that this type of evidence has been generally accepted in the past by courts, does not mean that it should be generally accepted now after *Daubert* and *Kumho*." *Id.* at 1105.

Hangarter v. Provident Life & Accident Ins. Co.

373 F.3d 998 (9th Cir. 2004)

Factual Summary

The plaintiff sued the defendant insurance company for bad faith because the insurer terminated her disability benefits after its medical examiners opined that she was not "totally disabled." Defendant contested the admissibility of testimony from plaintiff's expert, a claims adjuster, for many reasons, including the reliability of his testimony and the district court's failure to apply the *Daubert* analysis. In finding that the testimony from the expert was admissible, the district court ruled that *Daubert* did not apply to nonscientific testimony. The circuit court affirmed the district court's ruling but ruled that the lower court erred in finding that *Daubert* did not apply.

Key Language

- The court stated that a formal *Daubert* hearing is unnecessary as long as the district court satisfied its gatekeeping role by probing the knowledge and experience of the expert. 373 F.3d at 1018.
- The court held that the district court did not abuse its discretion in finding the expert's testimony reliable based on his knowledge and experience because "unlike scientific or technical testimony, the reliability of [the expert's] testimony was not contingent upon a particular methodology or technical framework." *Id.*

United States v. Prime

431 F.3d 1147 (9th Cir. 2005)

Factual Summary

The defendant was charged with, and convicted of, one count of conspiracy to commit wire fraud, one count of conspiracy to manufacture counterfeit securities, and three counts of possessing, manufacturing, and uttering counterfeit securities. The prosecution elicited the expert opinion of a forensic document examiner with the Secret Service. She testified that the defendant was the author of as many as thirty-eight incriminating exhibits, including envelopes, postal forms, money orders, Post-it notes, express mail labels and postal box applications. The defendant moved in limine to exclude the expert's testimony, which was denied. On appeal, defendant contended that the admission of expert testimony regarding handwriting analysis was unreliable under *Daubert*, and thus the court abused its discretion by allowing the expert to testify. The court found that the district court properly performed its gatekeeping role before admitting testimony of an expert handwriting analyst, and it affirmed all of the district court's orders and decisions.

Key Language

- "In accordance with *Kumho Tire*, the broad discretion and flexibility given to trial judges to determine how and to what degree these factors should be used to evaluate the reliability of expert testimony dictate a case-by-case review rather than a general pronouncement that in this Circuit handwriting analysis is reliable." 431 F.3d at 1152.
- "[T]he court noted that Storer's training credentials in the Secret Service as well as her certification by the American Board of Forensic Document Examiners were 'impeccable.' The court also believed that Storer's analysis in this case was reliable given the "extensive" 112 pages containing Prime's known handwriting." *Id.* at 1153.
- "[T]he Kam study… which evaluated the reliability of the technique employed by Storer of using known writing samples to determine who drafted a document of unknown authorship, was both published and subjected to peer review." *Id.*
- "Handwriting analysis need not be flawless in order to be admissible. Rather, the Court had in mind a flexible inquiry focused 'solely on principles and methodology, not on the conclusions that they generate.' As long as the process is generally reliable, any potential error can be brought to the attention of the jury through cross-examination and the testimony of other experts." *Id.* (quoting *Daubert*, 509 U.S. at 595).
- "The court reasonably concluded that any lack of standardization is not in and of itself a bar to admissibility in court." 431 F.3d at 1154.
- "The court recognized the broad acceptance of handwriting analysis and specifically its use by such law enforcement agencies as the CIA, FBI, and the United States Postal Inspection Service." *Id.* at 1154.
- The "district court's thorough and careful application of the *Daubert* factors was consistent with all six circuits that have addressed the admissibility of handwriting expert testimony, and determined that it can satisfy the reliability threshold." *Id.*

United States ex rel. Poong Lim/Pert Joint Venture v. Dick Pacific/Ghemm Joint Venture

2006 WL 5230015 (D. Alaska Mar. 2, 2006)

Factual Summary

The defendant, Dick Pacific/Ghemm Joint Venture ("DPG"), was selected as the prime contractor on the Bassett Hospital replacement project, a public works construction project at Fort Wainwright, an Army post near Fairbanks, Alaska. DPG subcontracted certain work on the project to the plaintiff, Poong Lim. The plaintiff brought and action for breach of the subcontract. The plaintiff moved to exclude the testimony of certian experts retained by the defendant to analyze the quality and adequacy of the structural steel, shop drawings, and detailing work performed by the plaintiff and its subcontractors, and to analyze the time and cost impacts caused by the allegedly faulty and defective fabrication and late delivery of structural steel that affected overall completion of the construction project. The plaintiff's motions to exclude expert testimony were denied.

Key Language

- "'Concerning the reliability of nonscientific testimony such as [Tide's/Jens'], the *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it.'" 2006 WL 5230015 at *2. (citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (quoting *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1059 (9th Cir. 2002) (emphasis in original)).
- "First, testimony of an expert need not be based upon facts within the expert's personal knowledge and is commonly based upon facts assumed to be true (hypothetical questions). Second, experts may testify based upon controverted facts or one party's or the other's version of the facts. Indeed, it would be error for the court to exclude the testimony of an expert on the grounds that it is based upon one version of disputed facts. That an expert relied upon a particular source for his opinion is not evidence of the truth of that source." *Id.*
- "In cases where the subject of the expert testimony is nonscientific, as the case at bar, education, training and experience, not necessarily methodology or theory, are more appropriate benchmarks for determining reliability." *Id.* at *3.
- "In this case, both Dr. Tide and Jens have set forth in considerable detail the information that each reviewed, the source of that information, and the steps they took, if any, to verify the information. That is all that is necessary… The reasonableness of the assumptions underlying the experts' opinions and criticisms of an expert's methods are for consideration by the trier of fact in weighing the evidence, *i.e.*, in the so-called 'battle of experts,' the power to determine the victor lies with the jury." *Id.*

26 Beverly Glen, LLC v. Wykoff Newberg Corp.

2007 U.S. Dist. LEXIS 39629 (D. Nev. May 22, 2007)

Factual Summary

This dispute arises out of efforts by the plaintiff to purchase undeveloped real property. Plaintiff alleges there were an offer, counteroffer, increased offer and then verbal acceptance of the purchase price, thereby forming a contract for sale of the property. Defendants deny that an agreement to sell the subject property was reached. Plaintiff proposed an expert to testify as to the fair market value of the property. Defendants moved to preclude his testimony. Expert: Keith Harper (Licensed Appraiser).

Key Language

- The reliability of nonscientific testimony such as Harper's "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." 2007 U.S. Dist. LEXIS 39629, 12.
- The Court must weigh or consider an expert's knowledge and experience when determining whether his testimony is admissible. *Id.*

Tenth Circuit

United States v. Allerheiligen

2000 U.S. App. LEXIS 18529, 2000 C J C.A.R. 4599 (10th Cir. 2000)

Factual Summary

The defendant was charged with and entered a conditional plea of no contest to charges of possession with intent to distribute marijuana in violation of federal law. The United States sought to preclude the testimony of plaintiff's expert, who was prepared to testify concerning the differences between marijuana grown for personal use and marijuana grown for distribution. Finding that there was insufficient evidence concerning the reliability of the expert's opinions on that topic, the

district court precluded the experts from testifying. The Tenth Circuit affirmed. Experts: Ed Rosenthal (author and alleged botanist); William Logan (criminal defense attorney); Walt Caroll (drug enforcement officer).

Key Language

- Defendant presented no evidence that "any of [the expert's] writings on marijuana have been recognized as a valid research effort or reference book in the field of botany." 2000 U.S. App. LEXIS 18529, at *29.
- Nothing in the record supported the position that "the court should rely on readers of *High Times* magazine or others having an interest in growing marijuana as a valid indicator of reliability." *Id.*
- The expert's reported qualifications were "largely a matter provable only through his own opinion," given that he "lacks any academic background, formal education or training, and experience that would qualify him as an expert on the subject of growing, harvesting, and processing of marijuana." *Id.* at 30.
- Given the "considerable leeway" given to trial judges "in deciding in a particular case how to go about determining whether particular expert testimony is reliable," the district court did not abuse its discretion in precluding the testimony. *Id.* (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152).

Anderson v. The Boeing Co.

222 F.R.D. 521 (N.D. Okla. 2004)

Factual Summary

The plaintiffs sued The Boeing Company ("Boeing") alleging several labor and employment related violations. Boeing moved the court to render the opinions of the plaintiffs' expert inadmissible for class certification purposes. In support of its position, Boeing argued that the expert's analysis of compensation and overtime are not relevant to class certification and the overtime studies were "patently unreliable." The court ruled that the opinions of the plaintiff's expert were admissible for purposes of class certification. Expert: Bernard R. Siskin (statistical expert).

Key Language

- "Courts do not conduct a [*Daubert*] inquiry into the merits at the class certification stage." 222 F.R.D. at 526–27 (internal citations omitted).
- The court did not apply the *Daubert* standard during class certification and "looks less at the relevance of the analyses and more at whether they are so fatally flawed as to be inadmissible as a matter of law." *Id.* at 528.

Holt v. Wesley Med. Ctr.

2004 U.S. Dist. LEXIS 13814 (D. Kan. July 19, 2004)

Factual Summary

In plaintiff infant's medical malpractice action against the defendants, a medical center and doctors, the infant alleged that she was brain damaged due to improper nursing care her mother received while in labor. She presented two experts on the issue of nurse understaffing, a nurse and a doctor. The defendant medical center moved to exclude the infant's expert witnesses' testimony under Fed. R. Evid. 702 and for partial summary judgment under Fed. R. Civ. P. 56(c). The medical center's motion to exclude the infant's expert witnesses' testimony was denied.

Key Language

- "In order to determine whether an expert's opinion is admissible, the court must undergo a two-step analysis. First, the court must determine whether the expert was qualified by 'knowledge, skill, experience, training or education' to render an opinion. The dispositive question with regard to qualification is whether the opinion is 'within the reasonable confines' of the expert's subject area. Second, if the expert is so qualified, the court must determine whether his opinions were 'reliable' under the principles set forth under *Daubert* and *Kumho Tire*." 2004 U.S. Dist. LEXIS 13814, at *9 (citing *Burton v. R.J. Reynolds Tobacco Co.*, 183 F. Supp. 2d 1308, 1313–14 (D. Kan. 2002)).
- "[T]he Tenth Circuit has rejected the argument that a physician must be a specialist in a field to testify about subjects related to that field.[n12] Instead, the dispositive issue is whether Nurse Lundstrom 'testified within the reasonable confines of… her subject area.'" 2004 U.S. Dist. LEXIS 13814, at *12 (citing *Burton v. R.J. Reynolds Tobacco Co.*, 183 F. Supp. 2d 1308, 1312 (D. Kan. 2002)).
- "Given that the exclusion of expert evidence is the exception rather than the rule, the Court denies Wesley's motion to exclude Nurse Lundstrom's expert opinions." 2004 U.S. Dist. LEXIS 13814, at *16.
- "The fact that Dr. Phelan is most familiar with staffing relating to critically ill women, does not render him unqualified to testify as to staffing issues on the labor and delivery floor.[n16] Any alleged insufficiencies in Dr. Phelan's qualifications may be adequately addressed on cross examination." *Id.* at *17–18.

Hutton Contracting Co., Inc. v. City of Coffeyville

2004 U.S. Dist. LEXIS 19580 (D. Kan. Sept. 24, 2004)

Factual Summary

The plaintiff contractor filed suit against the defendant city alleging breach of contract. The City filed a motion for summary judgment and a motion to exclude testimony of the contractor's expert who was set to testify to norms in the contracting industry in support of the plaintiff's argument that construction had been substantially completed. The City objected to the expert opinion on two grounds. First, the city argued that the expert employed an incorrect legal standard of liability, by focusing not on the Contract, but instead on industry custom, which fails to meet *Daubert*'s "fit" requirement and therefore his opinion was irrelevant. In addition, the City suggested that the expert opinion was in essence a legal opinion, outside the scope of "scientific, technical, or other specialized knowledge," and not helpful to the trier of fact. The defendant's motion to exclude testimony of plaintiff's expert witness granted.

Key Language

- "An expert may offer an opinion even if it 'embraces an ultimate issue to be determined by the trier of fact.' (citing Rule 702) Even after *Daubert*, rejection of expert testimony has been the exception rather than the rule. 'Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' Nonetheless, an expert may not simply tell the jury what result it should reach." 2004 U.S. Dist. LEXIS 19580, at *36.
- "Testimony as to a standard industry practice may be admissible to interpret an ambiguous contract provision. However, where the contract is clear and complete, it cannot be changed or supplemented by evidence of prevailing industry practice. In addition, 'absent any need to clarify or define terms of art, science or trade, expert opinion testimony to interpret contract language is inadmissible.' (citing *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1401 n.4 (D. Kan. 1998)). Thus, in the absence of an ambiguous contract provision, evidence of industry custom is simply irrelevant and properly excluded pursuant to Rule 702 and *Daubert*." *Id.* at *37–38.
- It is settled that an expert may not apply the law to the facts of the case to form legal opinions. *Id.* at *42.

BNSF Ry. Co. v. Bd. of County Comm'rs of Sumner County, Tex.

2005 U.S. Dist. LEXIS 42249 (D. Kan. Aug. 12, 2005)

Factual Summary

The plaintiff, BNSF Railway Company, brought this action against the Board of County Commissioners of Sumner County, Kansas, for alleged negligence of the defendant's employee, Richard Sprout. The plaintiff's freight train was approaching a railroad grade crossing in Sumner County when it struck the decedent's road grader. Mr. Sprout died as a result of the accident. The plaintiff alleged that the defendant and the defendant's employee negligently operated the county's leased road grader in the path of the plaintiff's train. In preparation for trial, the defendant sought to introduce the testimony of an accident reconstructionist with more than thirty years experience in traffic engineering and expertise including sight distance requirements. The parties disputed whether the expert witness testimony comported with the standard of Federal Rule of Evidence 702 and *Daubert*. The court denied the plaintiff's "Objection/Memorandum as to Defendant's Expert Witness Disclosure" motion and granted in part and denied in part the plaintiff's "Motion to Strike Defendant's Expert" and requested further submissions on the expert's testimony.

Key Language

- "Mr. Burnham's education and work experience adequately qualifies him for the issues to which he intends to testify. His testimony is relevant, likely to assist the trier of fact, and states more than just lay observations." 2005 U.S. Dist. LEXIS 42249, at *10.
- "To assist the court in determining the reliability of the methods employed by Mr. Burnham, the court asks that defendant's counsel submit the underlying studies upon which Mr. Burnham relies. If the data would be difficult for the court to decipher, the court recommends that counsel include a summary or explanation of the studies and how the expert incorporated the particular studies. The court will review this material to determine whether Mr. Burnham's methods comport with the standard established in *Daubert* and whether any part of Mr. Burnham's findings should be struck." *Id.* at *10.
- "Since accident reconstruction is a relatively common type of expert testimony, the court does not anticipate the need for a more formal *Daubert* hearing at this time." *Id.* at *10–11.

Layman v. Gutierrez

2007 U.S. Dist. LEXIS 11606 (D. Colo. Feb. 20, 2007)

Factual Summary

This is an employment discrimination case. Plaintiff asserts that his former employer, Defendant United States Department of Commerce, National Oceanic and

Atmospheric Association, Mountain Administrative Support Center, Human Resources Division, discriminated against him on the basis of his sex, race, age, and/or disability. Defendant moved to exclude the testimony of plaintiff's personnel expert at trial. Expert: Katz (personnel management).

Key Language

- The Court found that plaintiff put forth sufficient evidence to show Mr. Katz's opinion is the product of reliable principles and methods. 2007 U.S. Dist. LEXIS 11606, 9–10.
- Defendant presented no evidence contradicting Plaintiff's assertion that merit promotions within the civil branch of the federal government are controlled by a regulatory process that, particularly at the objective phase, is designed to be quantifiable and verifiable. 2007 U.S. Dist. LEXIS 11606, 10.
- The relevant *Daubert* factor satisfied here is that, according to Mr. Katz, the system for merit promotion is based on objective criteria laid out in Federal rules, regulations, and statutes, and, therefore, is not simply a subjective, conclusory approach that cannot reasonably be assessed for reliability. *Id.*
- However, the touchstone of admissibility of expert testimony is its helpfulness to the trier of fact and plaintiff has presented insufficient evidence to show that Mr. Katz's testimony would supplement the jury's ability to understand the selection process. 2007 U.S. Dist. LEXIS 11606, 11.

Eleventh Circuit

Shepherd v. Michelin Tire Corp.

6 F. Supp. 2d 1307 (N.D. Ala. 1997)

Factual Summary

In a product liability action, defendant tire manufacturer moved in limine to preclude the trial testimony of plaintiff's expert witness, an administrator of the estate of the deceased. Plaintiff had died when a tire exploded while he was mounting it on too large a rim. The expert's proffered testimony was that the warnings on the tire and inflating device were inadequate and that more adequate warnings might have reduced the likelihood of the tire exploding while being inflated. After the *Daubert* hearing, the court granted the motion in limine, finding that the expert's conclusions were speculative and not based on adequate data. The expert, a professor in psychology, proposed to testify that the tire did not have an adequate warning; that persons who encountered the hazards inherent in the subject tire did not have sufficient "hazard awareness" to avoid accidents; and that the chances of averting the accident would have been increased if the expert's proposed or "candidate" warning had been affixed to the tire. Expert: Dr. Kenneth Loughery (professor of psychology).

Key Language

- The expert's proposed testimony may be "reliable" in the sense that he is an intelligent and sincere witness. These personal traits do not, however, add up to the "reliability" intended by *Daubert*. *Id.* at 1312.
- Where a theory is untested except by having submitted it to comment by other professors, it is not thereby elevated to the degree of "reliability" that an empirically tested theory reaches. *Id.*
- This court is unwilling to make a sharp distinction between physical science and social science for *Daubert* purposes, but the court does note that it is easier to drift into speculation where the social sciences are implicated. *Id.*

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.

326 F.3d 1333 (11th Cir. 2003)

Factual Summary

The plaintiff, a developer of fanjet engine "hush kits," sued defendant designer for, inter alia, breach of contract. The hush kit developer alleged that the designer's thrust reverser proved to be worthless. The designer's expert witness was an aerodynamics specialist. The developer argued that he was not qualified, that his methodology was unreliable, and that his testimony was irrelevant. The U.S. Court of Appeals for the 11th Circuit affirmed the district court's ruling denying the plaintiff's motion and permitting the defendant's expert witness to testify. The court concluded that the expert was properly qualified as an expert and the evidence he offered was reliable and helpful. Experts: Joel Frank (aerodynamics specialist)

Key Language

- "Although there is some overlap among the inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion, these are distinct concepts that courts and litigants must take care not to conflate." 326 F.3d 1333 at 1340.
- "As for the reliability of CFD generally, this discipline was repeatedly used to assess internal flows and the results generated from those tests were had been critically evaluated in peer-reviewed articles and studies." *Id.* 1343.

Edic ex rel. Edic v. Century Prods. Co.
364 F.3d 1276 (11th Cir. 2004)

Factual Summary
This case arises out of an automobile collision during which eighteen-month old Dylan Edic was ejected from his child restraint system (CRS). Dylan's parents, Dennis and Melissa Edic, filed a product liability suit, under Florida law, against the manufacturers of the CRS claiming that Dylan's ejectment was due to a defect in the CRS. They asserted that this defect had caused secondary injuries to Dylan beyond that which he would have endured from the primary collision alone. The plaintiffs motion to exclude the testimony of defendants' expert witnesses, including the testimony of accident reconstructionist Kevin Breen was denied at the district court level and affirmed by the U.S. Court of Appeals for the Eleventh Circuit. Mr. Breen's testimony focused on misuse of the CRS by the plaintiffs. Specifically, he testified that if the straps were properly adjusted on this type of CRS a child of Dylan's size in that type of collision should have been restrained. Experts: Kevin Breen (accident reconstructionist).

Key Language
- The Court need not give a comprehensive review of its *Daubert* analysis in ruling on a motion in limine. 364 F. Supp.3d 1276 at 1286.

United States v. Frazier
387 F.3d 1244 (11th Cir. 2004)

Factual Summary
The defendant was convicted of kidnapping his victim from a parking lot and sexually assaulting her. The defendant appealed, arguing that the district court abused its discretion by excluding the opinion of his expert, a forensic investigator and former police officer. The government argued in limine that the expert provided no foundation or support, either from the relevant literature or from his own experience, for his specific opinion that the recovery of hair or fluid evidence "would be expected" in a case like this one. The government also objected to the expert's proffered medical opinions based on the lack of any medical training and the fact that he had not personally examined the victim. The district court ruled that the expert was qualified to testify and could explain the standard procedures employed in investigating the crime scene of a sexual assault, that the expert could recount that no hair or fluid matching the defendant's was found on the scene, and that "the forensic evidence most commonly found during the analysis of a rape investigation is the transfer of hairs." However, the district court ruled that the expert would not be permitted to opine that, based on the sexual activities described by the victim, "it would be expected that some transfer of either hairs or seminal fluid would occur." On appeal, the court held that the district court did not abuse its discretion by excluding portions of the defendant's expert's testimony because he failed to establish that his opinion that the recovery of hair or seminal fluid would be expected after a sexual assault was methodologically reliable. He presented no evidence concerning the rates of transfer of hair or fluids during sexual conduct. Because the expert's opinion was imprecise and unspecific, the jury could not readily determine whether the expectation of finding hair or seminal fluid was a virtual certainty, a strong probability, a possibility more likely than not, or even just a possibility, and therefore the opinion could confuse or mislead the jury. The court affirmed the defendant's conviction.

Key Language
- The court reaffirmed "the basic principle that an appellate court must afford the district court's gatekeeping determinations 'the deference that is the hallmark of abuse-of-discretion review.'" 387 F.3d at 1248 (quoting *General Electric v. Joiner*, 522 U.S. 136, 142 (1997)).
- "Because of the powerful and potentially misleading effect of expert evidence, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Rule 403. Exclusion under Rule 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury, or if the expert testimony is cumulative or needlessly time consuming." 387 F.3d at 1263 (citing *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)).
- "While some expert testimony will be so clearly admissible that a district court need not conduct a *Daubert* hearing in every case, in this case, the district court's decision to evaluate the admissibility of Tressel's opinions in the context of a pretrial hearing was a perfectly reasonable one." 387 F.3d at 1264 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150–52 (U.S. 1999) (11th Cir. 1985)).
- The court found that "because Tressel's opinion was imprecise and unspecific, the members of the jury could not readily determine whether the 'expectation' of finding hair or seminal fluid was a virtual certainty, a strong probability, a possibility more

likely than not, or perhaps even just a possibility." 387 F.3d at 1266.

Cadwell v. GMC

2005 U.S. Dist. LEXIS 25574 (D. Ga. Oct. 27, 2005)

Factual Summary

The plaintiff was driving a 1995 Chevrolet Blazer when she allegedly applied the brakes to avoid hitting another vehicle, lost control of her vehicle and hit a tree. The resulting accident totaled the plaintiff's vehicle and she suffered injuries to her neck, hip, hand and foot. The plaintiff filed this products liability suit against General Motors alleging that her vehicle was defectively designed. The plaintiff's only expert witness, Michael "Kerry" Jackson, proposed to testify that the airbag system in the vehicle should have deployed in the accident and if the airbag had deployed, that the individual would not have suffered the injuries she did. The defendant automobile manufacturer moved to strike the plaintiff's expert. The court found that Jackson's testimony, both in his deposition and from the *Daubert* hearing, showed that he met none of the *Daubert* factors for admissibility and concluded that the expert should be stricken.

Key Language

- Although the expert was "by trade an automotive mechanic who had received some training on the repair of airbag systems, in his deposition he showed an inability to answer vital engineering questions on the design of the vehicle because he had not had any engineering or design training." 2005 U.S. Dist. LEXIS 25574, at *6.
- The expert "did not form his opinions based on a methodology that had been tested, or on any articulable methodology whatsoever. There had been no 'peer review' of his opinions. Based on the type of testimony given, there were very likely error rates to his 'methodology.' Finally, there was no evidence that the 'relevant community' had accepted his proposed opinions." *Id.* at *8–9.
- Although the *Daubert* factors are "a flexible test," the court was "certain that the expert's testimony would not employ in the courtroom the same level of intellectual rigor that characterized the practice of an expert in the relevant field, the design of braking and airbag systems." *Id.* at *9.

United States v. Masferrer

367 F. Supp. 2d 1365 (S.D. Fla. 2005)

Factual Summary

The defendants, who were indicted on charges predicated on a number of financial transactions conducted by a bank, filed a motion in limine to exclude expert testimony, or in the alternative for a *Daubert* hearing. The government sought to call three witnesses for the purpose of giving opinion testimony on the validity of the financial transactions engaged in by the bank and the reporting of those transactions by the defendants, including a professor of international finance law, an investment banker, and an accountant. The defendants contended that the proffered testimony of the government's expert witnesses raised serious concerns about the reliability of that testimony, whether it would assist the trier of fact. Defendants' motion was granted.

Key Language

- Based on the professor of international finance law's testimony at the *Daubert* hearing, the court found that his proposed testimony was "merely conclusory, unreliable, and failed to specifically identify the methodology or reasoning he used to conclude" and that it "will not assist the trier of fact, but merely tell the jury the result it should reach." 367 F. Supp. 2d at 1375–76.
- Based on the investment banker's testimony at the *Daubert* hearing, the court found that his proposed testimony would not assist the trier of fact. "It is simply his opinion of what he would do if he were a juror considering the facts which need no interpretation by an 'expert.'" *Id.* at 1378.
- Based on the accountant's testimony at the *Daubert* hearing, the court found that his testimony was "merely conclusory and failed to specifically identify the methodology or reasoning he used to conclude that Hamilton Bank was engaged in an adjusted price trade/ratio swap. Further, his testimony (opinion) are not matters upon which the jury cannot easily understand without the services of an expert." *Id.* at 1380.

J & V Dev., Inc. v. Athens-Clarke County

387 F. Supp. 2d 1214 (M.D. Ga. 2005)

Factual Summary

The plaintiff, J & V Development, Inc., applied for a special land use permit (SLUP) to develop a subdivision of land in Athens-Clarke County. The county's mayor and commission denied the SLUP application. The company claimed the denial of the permit violated the company's and its prospective home purchasers' rights under the Fair Housing Act, 42 U.S.C.S. §3601 *et seq.* The plaintiff and the defendant filed motions in limine, seeking

to exclude certain expert testimony, and the court held a *Daubert* hearing. The county's motion was granted as to certain testimony, but it was denied as to other testimony. The company's motion was denied as moot. Experts: Dr. Douglas C. Bachtel (professor in the Department of Housing and Consumer Economics), Dr. Roger Tutterow (economist and statistician).

Key Language

- "The Court will not exclude his opinions that rely on weak… because the Court finds that this weakness goes to the weight of [the expert's] opinions, not their admissibility." 387 F. Supp. 2d at 1225.
- "Applying the *Daubert* test to Bachtel's testimony, the Court finds that Plaintiff offered very little testimony to satisfy any of these tests." *Id.* at 1225
- "Because Defendants have informed the Court that Tutterow was merely acting as a rebuttal or counter-expert witness to Bachtel, no need exists for the Court to rule on Plaintiff's Motion *in limine* on Tutterow." *Id.* at 1228.

Davis v. City of Loganville, Ga.

2006 WL 826713 (M.D. Ga. Mar. 28, 2006)

Factual Summary

The plaintiffs, all current or former firefighters for the defendant, the City of Loganville, Georgia, filed a collective action complaint under the Fair Labor Standards Act against the City alleging that the City failed to compensate them for all overtime and nonovertime hours worked. The defendant moved to exclude the testimony of the plaintiffs' expert, Daniel Wayne Bremer, and his expert report under Federal Rule of Evidence 702. The parties waived a *Daubert* hearing and asked the court to decide the issues on the briefs and the evidence submitted. The court granted the defendant's motion in part and denied it in part. Specifically, the court excluded all expert opinions by Bremer that Loganville firefighters are due compensation at their regular rate of pay for certain nonovertime hours worked and all expert opinions that the defendant acted with reckless disregard in violating the Fair Labor Standards Act because the opinions were based on a flawed methodology. On the other hand, the court allowed Bremer to testify about the defendant's failure to avail itself of the 7(k) exemption and its failure to pay overtime to Loganville firefighters.

Key Language

- "To properly analyze Bremer's expert opinions considering that he is a nonscientific expert, the Court must use this broad leeway to decide which tests to use to assess his methodology. Because he is nonscientific expert, the tests outlined in *Daubert* offer little help." 2006 WL 826713, at *7.
- The court found that Bremer was qualified to testify about the opinions he offers to support the plaintiffs' claims. The court recognized that Bremer's "testimony about his qualifications… raises questions about his experience with the issues in this case; however, a jury should decide those questions because they go to his credibility, not to the threshold issue of his qualifications. Plaintiffs have offered enough evidence of Bremer's qualifications to let his opinions go to the jury." *Id.* at *6 (citing *Daubert*, 509 U.S. at 596 (suggesting that the jury is the ultimate arbiter of an expert's credibility, and stating that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.")).
- *Daubert* "requires neither perfection from an expert nor that he demonstrate a flawless methodology." *Id.* at *7.

United States v. Campbell

2006 U.S. Dist. LEXIS 7442 (D. Ga. Feb. 13, 2006)

Factual Summary

One week before trial, the defendant filed a motion to exclude the testimony of the government's handwriting examiner or, in the alternative, for a *Daubert* hearing. Following its review, the court found the reliability of the handwriting analysis by Mr. Moore to be sufficiently reliable. The court denied the defendant's motion and found that a *Daubert* hearing on the matter would be unnecessary.

Key Language

- The court relied on *United States v. Paul*, 175 F.3d 906, 909–11 (11th Cir. 1999), which "reject[ed] [the] argument that the expert's 'handwriting analysis failed to meet the reliability requirements of *Daubert*' as 'without merit[,]' and h[eld] that district court did not abuse its discretion in permitting expert testimony as to authorship.'" 2006 U.S. Dist. LEXIS 7442, *8–9.

District of Columbia Circuit

Groobert v. President & Dirs. of Georgetown Coll.

219 F. Supp. 2d 1 (D. D.C. 2002)

Factual Summary

In this negligence, wrongful death and survival action, plaintiff alleged that the defendant medical center failed to properly diagnose or treat his wife, resulting in her death, after she entered the center's emergency room with complaints of shoulder and neck pain and lesions on her right arm. The plaintiff offered three experts to testify in support of his claim concerning how much his deceased wife would have earned from her stock photography business if she had survived, which defendant sought to preclude. Two of the proposed experts owned their own photography companies, and the first expert was an economist with extensive experience testifying at trials as an economic consultant. The court found the testimony of each proposed expert to be reliable, and held it to be admissible. Experts: Jonathan Feingersh (stock photography businessman); James Pickerell (stock photographer); Richard Lurito, Ph.D. (economist).

Key Language

- In matters where the *Daubert* factors do not apply, "reliability concerns may focus on personal knowledge or experience." 219 F. Supp. 2d at 6.
- Federal Rule of Evidence 702 "allows for experience such as employment in the field as well as experience in performing tests or studies," and on that basis the court permitted the two experts who owned photography businesses to testify on what decedent's future earnings would have been. *Id.* at 8.
- Additionally, "General acceptance in the community is an important factor in evaluating an expert's methodology and courts particularly emphasize this *Daubert* factor when reliability focuses on experience." *Id.* at 17. The court deemed it significant that one of the experts used "the same methodology as other stock photography 'experts' in the field." *Id.* at 9.
- The court concluded that there was a "valid connection between [one of the expert's] methodology and his conclusions in this case since he simply compared [decedent's] portfolios to that of other photographers and calculated her income according to the earnings of others with similar work." *Id.* at 10.
- "The court cannot penalize the plaintiff for the lack of scientific or academic studies and published reports on the topic of stock photographer incomes because if it did, no plaintiff could ever present their own tests or recover damages relating to this industry." *Id.* at 11.
- Finding the economist's expert testimony to be "clearly reliable and admissible," the court stated that "the absence of reports or studies on stock photography leaves [the expert] no choice but to base his calculations on the personal experience of stock photographers as well as the only recent survey available." *Id.* at 12–13.

Twin Cities Bakery Workers Health & Welfare Fund v. Biovail Corp.

2005 U.S. Dist. LEXIS 5570 (D. D.C. Mar. 31, 2005)

Factual Summary

Consumer drug purchasers alleged that the defendant drug manufacturer unlawfully interfered with a competitor's attempts to bring a generic version of the manufacturer's drug to market. The defendant moved to strike the plaintiffs' experts, including an attorney, a former employee of the FDA, and an employee of the competitor, on *Daubert*/*Kumho Tire* grounds, which the court denied. On the defendant's motion for summary judgment, the court found that the purchasers' expert testimony as to causation was too speculative as a matter of law to be admissible. The manufacturer's summary judgment motion was granted.

Key Language

- The court found that the expert testimony was not "sufficiently reliable to 'assist the trier of fact to understand the evidence or to determine a fact in issue,' and that in any event their value is substantially outweighed by the danger of unfair prejudice or misleading the jury." 2005 U.S. Dist. LEXIS 5570, at *11–12 (citing Fed. R. Evid. 702, 703).
- The experts opinions were "little more than [his] *ipse dixit*, prepared, incidentally, especially for this litigation (not his regular line of work)." 2005 U.S. Dist. LEXIS 5570, at *13.
- The court found that the experts' declarations were "too speculative to forge the chain of causation plaintiffs' proof of damages requires." *Id.* at *14 (citing *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977)).