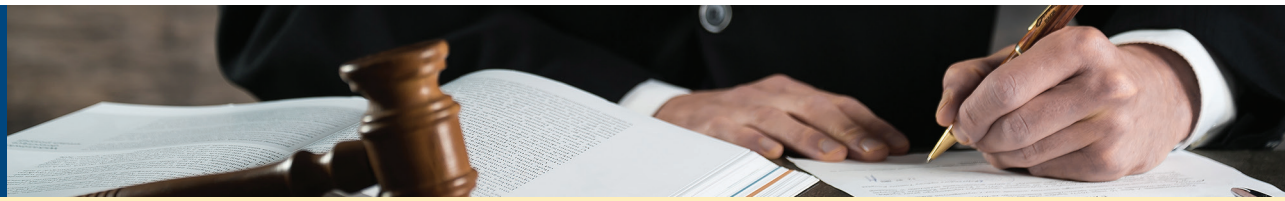

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In This Issue

From the Editor

One Small Step for *Daubert*

By Patrick J. Kenny

One interesting expert-related development in the recent weeks was a proposal in a non-*Daubert* jurisdiction to adopt, through legislation, what in effect has become one of the many *Daubert* "rules" commonplace in those jurisdictions that employ a *Daubert* approach to expert testimony. California has not adopted the *Daubert* approach to the admission of expert testimony. *See People v. Leahy*, 8 Cal. 4th 587, 591, 882 P.2d 321, 323 (1994) ("we conclude that the *Kelly/Frye* formulation (or now more accurately, the *Kelly* formulation) should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in this state").

One of the rationales for the state's retention of the "*Kelly/Frye*" approach over *Daubert* was the conclusion that state law as reflected in Sections 720 and 801 of the California Evidence Code "in combination, seem the functional equivalent of Federal Rules of Evidence, Rule 702, as discussed in *Daubert*." *Id.* at 598, 882 P.2d at 327.

Without weighing in on the real or imagined differences between the *Kelly/Frye* and *Daubert* standards, it is noteworthy that a California State Senator recently proposed a bill to amend Section 802 of the California Evidence Code so as to prohibit experts from providing testimony based on "circular reasoning." Cal. S.B. 938, 2019-2020 Legislative Session, §1 (2020). For reference I have set forth at the end of this column the current and proposed text of Section 802.

The rule proposed in this recent legislation should sound somewhat familiar. Not long after the Supreme Court decided *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), federal courts and states that adopted a *Daubert* approach quickly noted that expert testimony cannot be based simply on an expert's *ipse dixit*. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert").

To be sure, not all testimony based on an expert's "*ipse dixit*" necessarily involves "circular reasoning," or vice versa, but in practice it seems more likely than not that they will be found together. Since the Supreme Court's *Daubert* decision, the federal courts in California have addressed the alleged *ipse dixit* of expert testimony scores of times, whereas the California state courts, continuing to apply the *Kelly/Frye* standard, only rarely have addressed the concept when reviewing expert testimony.

More to the point, if California law as reflected in Sections 720 and 801 of the California Evidence Code does function as the "equivalent of Federal Rules of Evidence, Rule 702, as discussed in *Daubert*[,]" what then would be the motivation for California Senate Bill 938?

California Senate Bill 938 definitely is worth watching. Should it be enacted, it would appear to be one small step in the direction of *Daubert*. Discussions concerning the bill and amendments to it should be revealing, both as to the similarities (or the differences) between the *Kelly/Frye* and *Daubert* standards, now nearly 30 years post-*Daubert*, and the current appetite in California with respect to the *Kelly/Frye* standard.

As always, if you should have any thoughts or feedback on this column, please do not hesitate to contact me.

Current Text of Section 802 of the California Evidence Code

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Cal. Evid. Code §802.

Text of Section 802, if modified by Senate Bill 938 (new text italicized)

> *(a)* A witness testifying in the form of an opinion may state on direct examination the reasons for *their* opinion and the matter upon which it is based, unless *they are* precluded by law from using *those* reasons or *that* matter as a basis for *their* opinion. *In the case of an expert, this includes the expert's special knowledge, experience, training, and education. An expert opinion based on circular reasoning is not based on matter that is a type that reasonably may be relied upon by an expert in forming an opinion upon a*

subject to which the expert's testimony relates. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which *their* opinion is based.

(b) For purposes of this article, "circular reasoning" refers to any portion of an expert's opinion that is solely based upon the premise that the expert seeks to conclude. It also includes any portion of the opinion or testimony that is based upon studies, literature, data, or other materials on which the expert relies that accepts the same unproven premise that the studies, literature, data, or other materials on which the expert relies seeks to conclude.

Cal. S.B. 938, 2019-2020 Legislative Session, §1 (2020).

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Third Circuit Report

"Leaps of Logic" Bury Testimony of Underground Pipeline Property Valuation Expert

By Mark Jicka and Caroline Ivanov


In this update, we review a recent Third Circuit opinion reversing the district court's admission of expert testimony in a bench trial, finding that the testimony was unreliable and did not fit the facts of the case. *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825 (3d Cir. 2020). Although the court framed its opinion in the context of the Natural Gas Act, it applied Federal Rule of Evidence 702, and its reasoning is applicable in the larger context of damages in bench and jury trials.

UGI Sunbury LLC is a pipeline company that acquired easements for an underground natural gas pipeline in Pennsylvania that crossed several landowners' properties. *Id.* at 1. Bench trials were held to determine the compensation owed to the landowners. *Id.* The landowners offered Don Paul Shearer to provide expert testimony as to the diminution in property value post taking. *Id.* at 830. To estimate the before-taking value, Shearer compared the property with similar properties in the area. To estimate post-taking value, Shearer developed a "damaged goods theory." Under his theory, property that could be environmentally contaminated carries a stigma, causing it to lose market value. *Id.* To develop this theory, Shearer studied the real estate impact of the Exxon Valdez oil spill and the Three Mile Island nuclear accident. *Id.* He also cited his experience working in an appliance shop, where he learned that even slightly damaged goods were less valuable than goods that were not damaged. *Id.* at 830, 834. Using this "damaged goods theory," Shearer concluded that one property had a 40 percent reduction in value and the other a 60 percent reduction in value.

UGI did not disagree with the methodology to determine the properties' before-taking value but moved in limine to exclude Shearer's testimony as to the post-taking value that was based on the "damaged goods theory." The

district court admitted all of Shearer's testimony, noting a strong preference for admission of expert testimony in bench trials where the court could assess flaws. *Id.* at 830. The district court stated it was "inclined to agree" that a "stigma" was attached to the properties and ultimately found one property value was reduced by 15 percent and the other by 30 percent—as opposed to Shearer's proposed 40 and 60 percent reductions in value. *Id.* at 831.

Even though the district court significantly reduced the damages from Shearer's valuation, the Third Circuit found the district court's admission of Shearer's testimony to be an abuse of discretion. The Third Circuit was troubled by the district court's citing of the "stigma" associated with the property, showing it had agreed with Mr. Shearer—"at least in part" and had relied on his testimony. *Id.* at 836. And Mr. Shearer's faulty analysis and conclusions should not have been considered by the district court.

In reversing, the court first explained that Federal Rule of Evidence 702 does apply to bench trials. *Id.* at 832. Rule 702 uses the term "trier of fact," not "jury," and though courts have wider latitude in applying Rule 702 in a bench trial, they cannot totally sidestep the rule in a bench trial. *Id.*

Next, the court found Shearer's testimony to be unreliable. *Id.* at 835. His "damaged goods theory" had not been subject to peer review, it did not enjoy general acceptance, and his report lacked any analysis of a potential rate of error or any standards controlling his theory's application. *Id.* at 834. Instead, his theories were based on his anecdotal experience selling appliances and "far-flung examples of environmental accidents involving nuclear power and oil transportation." *Id.* at 834–35. Shearer could not articulate whether his "damaged goods theory" was related to general buying preferences or the real estate market specifically. *Id.* And he conceded that the effect of the "stigma" on value "can't be proven." *Id.*

Last, the court determined that Shearer's theory did not fit the facts of this case. His report and testimony provided no examples of declining property values where a natural gas pipeline was involved. *Id.* His testimony—even if considered scientific knowledge—was not scientific knowledge "for the purposes of the case." Id. Shearer's blend of consumer appliance buying habits and significant environmental disasters to reach his conclusions in this case required too great a "leap of logic." *Id.* at 831. As such, the Third Circuit reversed the district court and remanded the case but instructed the district court to allow the landowners an opportunity to produce new valuation evidence. *Id.* at 836.

Valuation opinions must have a clearly supported basis. Reliability in this context requires testimony to be based on scientific procedures, not unsupported speculation. Further the theory or opinion must be applicable to the property or other item being valued. Even in bench trials, the district court must serve as a gatekeeper to exclude unreliable testimony that is unrelated the facts of a particular case.

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Fourth Circuit Affirms in Class Action Vehicle Fault Case that *Daubert* Requires an Expert's Testing Rubber to Meet the Real Road

By Derek M. Stikeleather and Matthew H. Tranter


Class action litigants, relying on experts to show causation, can commit fatal error when those experts' tests rest on ungrounded assumptions. A recent Fourth Circuit opinion, while reminding practitioners of the great breadth trial courts enjoy under *Daubert*, pointed out the necessity of the experts' tests showing real-world proof of occurrence, instead of self-serving artificial demonstrations. *Belville v. Ford Motor Co.*, 919 F.3d 224 (4th Cir. 2019).

The *Belville* plaintiffs brought numerous state and federal claims against Ford Motor Company, asserting that Ford vehicles, manufactured between 2002 and 2010, that plaintiffs had purchased or leased had a defect: The electronic throttle control ("ETC") system in each vehicle could cause unintended acceleration ("UIA"). Specifically, flawed pedal sensors could produce voltage signals that would—due to the defective ETC systems not activating their failsafe—result in UIA. Plaintiffs added a claim that Ford failed to equip those vehicles with an alternate failsafe system to curb any resulting UIA.

In the district court, plaintiffs relied on opinions from three experts to show that ETC defect. The first expert opined that the ETC system failed to mitigate accelerator pedal faults, resulting in UIA. But he relied on a single peer reviewed article, whose theory had been discredited by the National Highway Traffic Safety Administration and NASA. Moreover, his testing, among other problems, reflected his unfounded assumptions of real-world conditions. For instance, he drew the voltages he "injected" into the ETC system from his own assumptions, and he did not reproduce those voltages in the plaintiffs' actual vehicles. *Id.* at 229. Indeed, he failed to test the plaintiffs' actual vehicles at all. The second expert simply opined that accelerator pedal wear could result in "failure and erratic vehicle behavior." *Id.* at 230 (quotation omitted). The third expert likewise concluded that an ETC design vulnerability resulted in UIAs. And like the first expert, his testing was an "artificial demonstration" lacking "real-world support." *Id.* at 231. Moreover, his testing had "profound inconsistencies" with the plaintiffs' descriptions of the UIAs they suffered. *Id.*

In the end, the district court excluded those expert opinions and, with no causation evidence, granted summary judgment to Ford.

At the Fourth Circuit, plaintiffs claimed the trial court erred by not considering certain *Daubert* factors, or that it improperly considered those factors. The Fourth Circuit quickly dispensed of those claims, reminding plaintiffs that trial courts are not required to consider a certain factor: The *Daubert* inquiry is a "flexible one" and trial courts enjoy "broad discretion" in considering "which *Daubert* factors to apply and how to consider them." *Id.* at 233.

Plaintiffs next contended that the trial court wrongly assessed their experts' opinions. The Fourth Circuit again disagreed, going through each of the three experts. It followed the trial court's lead.

The first expert's opinion was insufficient as he failed to test a vehicle in actual conditions. As the appellate court viewed it, "[h]is 'testing,' at least in part, seemed artificially induced to produce a desired result and did not reflect real-world results from any vehicle claiming a UIA." *Id.* at 234. So went the second expert because the plaintiffs conceded that he was not offered for defect opinions. But even on substance, the court found, his opinion lacked merit, due to his failure to perform any inspections or surveys to support his claims.

As for the final expert, there was "a considerable gap between [his] theory and" evidence of causation. *Id.* That expert's testing, much like the first, relied on faulty voltages that he failed connect to the real-world. That is, he failed to show how those voltages—and the accompanying faults—could be reproduced outside of his artificial demonstration. Moreover, the Fourth Circuit made sure to note that none of the experts tested the plaintiffs' own vehicles or even any of the thousands of vehicles in the purported class that allegedly suffered from an ETC defect resulting in UIA. Accordingly, the Fourth Circuit affirmed the district court's exclusion of those three experts, and the resulting judgment in Ford's favor.

Belville reminds practitioners to attack the predicates of an opposing expert's tests and conclusions. By targeting those assumptions—and showing that the expert's self-se-

lected and self-serving tests stand apart from real-world use—counsel and the court closed Belville's potentially sprawling and costly class action.

Derek M. Stikeleather is a partner at Goodell, DeVries, Leech & Dann LLP in Baltimore, Maryland. He practices primarily in the areas of appellate advocacy and complex litigation with an emphasis on product liability, antitrust, medical malpractice, and class action defense. He has represented Maryland's most prominent medical institutions and several medical device and pharmaceutical manufacturers, including Pfizer Inc, Dentsply International, Eisai Inc., DePuy Orthopaedics, and Hanger Prosthetics & Orthotics in federal and state court proceedings. He has argued appeals in the Fourth Circuit Court of Appeals and Court of Appeals of Maryland and authored several winning briefs there and in the District of Columbia Court of Appeals. He is an editor and frequent contributor to the Maryland Appellate Blog. After graduating from law school, Mr. Stikeleather served as a Law Clerk to the Hon. William M. Nickerson in the United States District Court for the District of Maryland.

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Sixth Circuit Report

CRNA's Expert Witness on the Standard of Care Did Not Tell Jury What Result to Reach in Sixth Circuit Employment Discrimination Suit

By Diana M. Comes

In a recent published decision, the Sixth Circuit reminded district courts and litigants not to throw the baby out with the bathwater—simply because portions of an expert's testimony may be excludable does not mean the entirety of the proposed testimony is.

In *Babb v. Maryville Anesthesiologists, P.C.*, 942 F.3d 308 (6th Cir. 2019), Paula Babb was a Certified Registered Nurse Anesthetist (CRNA) who worked at Maryville Anesthesiologists, P.C. ("Maryville"). Babb, at one point, told one of Maryville's physician-owners that she had a "degenerative retinal condition" that made it hard for her to read certain screens and medical records, but did not affect her ability to do her job. But Maryville's physician-owners apparently believed that Babb would be blind in ten years.

In the fall and winter of 2015, there were several discussions at Maryville concerning Babb's eyesight and whether she could do her job. Concerns about Babb's vision even appeared on her annual evaluations. Separately, one physician-owner learned that Babb had committed an error unrelated to her vision during a surgery, in which Babb allegedly began to wake the patient up too early, and the patient nearly fell off the operating table (which was also called a "fracture table"). And during a "robotic arm" surgery, one of Babb's patients had an unusually high number of "twitches," suggesting that Babb had not sufficiently paralyzed the patient.

Maryville's physician-owners then decided to fire Babb, allegedly solely because her "clinical errors" demonstrated her inability to provide safe and appropriate patient care. Babb, believing she was fired because the physician-owners thought she was losing her vision (she said she wasn't), sued under the provision of the Americans with Disabilities Act (ADA) prohibiting discrimination against employees who are "regarded as" disabled.

Babb produced an expert report from Jennifer Hultz, an experienced CRNA, who opined that, even if the fracture table incident and the robotic arm indicate happened as the physicians contended, Babb did not violate the standard of care applicable to CRNAs in the area. Maryville moved for summary judgment, arguing, in its reply brief, for exclusion of Hultz's expert testimony. Maryville did not dispute Hultz's qualifications or the reliability of her testimony, but it argued that Hultz's testimony was improper because (1) the facts surrounding the two incidents were "simple" and did not warrant expert explanation, and (2)

Hultz intended to tell the jury "what result to reach" on the legal issue of pretext.

The district court granted Maryville's motion for summary judgment, agreeing that Hultz's expert testimony was inadmissible in its entirety and could not be considered in deciding the motion. Its decision was based on its conclusion that Hultz (1) improperly questioned the credibility of other witnesses; and (2) was improperly telling the jury what result to reach with respect to pretext. Having excluded Hultz's testimony, the district court found that although a reasonable juror could conclude that Maryville regarded Babb as disabled (due to her impaired vision), Maryville was entitled to summary judgment because there was no evidence that Maryville did not honestly believe that Babb's clinical errors rendered her unfit to practice nurse anesthesiology.

On appeal, the Sixth Circuit reversed and remanded. The Sixth Circuit stated that the only question was whether Hultz's testimony was relevant. The district court, it held, erred in excluding Hultz's proffered testimony in its entirety based solely on the issues of Hultz opining on the credibility of other witnesses and purporting to testify on an ultimate legal question. Instead of using a "scalpel," the district court had used a "sledgehammer."

The Sixth Circuit noted that the district court correctly identified some statements in Hultz's proposed testimony that were attacks on the physician-owners' credibility, but this was not reason enough to exclude her entire testimony. At times, Hultz had assumed the truth of these witnesses' testimony, but still explained why Babb's actions were still not "clinical errors" under the relevant standard of care. This testimony was relevant to the questions of pretext and did not improperly attack credibility.

Additionally, with respect to whether Hultz told the jury what result to reach, the Sixth Circuit said that there was a "subtle but nonetheless important distinction" between opining on the ultimate question of liability and stating opinions that suggest an answer to the ultimate issue or give the jury all the information from which it can draw inferences on the ultimate issue. In this case, Hultz did not opine on the ultimate question of liability, and she didn't use specialized legal language of discrimination law—she did not even use the words "pretext" or "discrimination" in her report. Her "standard of care" opinion simply questioned the factual assertion grounding Maryville's defense—that Babb had committed "clinical" errors and displayed "terrible clinical judgment" during the fracture-table incident and the robotic-arm incident. Hultz's testimony was not inadmissible in toto. And with that, the Sixth Circuit went on to analyze the grant of summary judgment for Maryville and reversed it.

Babb contains lessons for all litigants: if faced with an exclusion motion, to avoid a court taking a "sledgehammer" to the expert's testimony, help the court understand how most of the (helpful) testimony can be admitted, even if certain portions must be excised with a "scalpel," and can support the advocated-for position.

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Seventh Circuit Report

Courts Say No to Expert Say-So

By Elaine M. Stoll

In several recent decisions, district courts within the Seventh Circuit excluded expert testimony that amounted to speculation, personal judgment, or unsupported say-so.

An engineer's untested theory of sudden, unintended acceleration amounted to unreliable speculation, requiring rejection of the opinion under *Daubert* and resulting in summary judgment for the defendant car manufacturer in a product-liability action. *Kesse v. Ford Motor Co.*, No. 1:14-cv-06265, 2020 WL 832363 (N.D. Ill. Feb. 20, 2020). A retired officer's conclusions about the complaint and disciplinary process used to terminate a police officer rested on personal judgment, rendering them inadmissible in retaliatory-discharge litigation. *Bogathy v. Union Pac. R.R.*, No. 1:17-cv-04290, 2020 WL 419406 (N.D. Ill. Jan. 24,

2020). A social psychologist's assertion that she used an accepted methodology could not establish the reliability of her opinions about the prevalence of sexual harassment at two manufacturing plants, contributing to denial of the plaintiffs' motion for class certification in hostile-workplace litigation. *Van v. Ford Motor Co.*, 332 F.R.D. 249 (N.D. Ill. 2019).

In each case, the expert's opinions failed to satisfy Rule 702's reliability requirement.

The plaintiff in *Kesse*, a taxi driver, blamed unintended acceleration for his collision with poles and a pedestrian in a product-liability action against the car's manufacturer. *Kesse*, 2020 WL 832363, at *1. The car burned in the collision, and both parties' experts relied on a post-accident examination of the car by a master technician, who found no problems with the braking system or the electronic-throttle-control system and found no mechanical failures. *Id.* at *2. The plaintiff's expert faulted the use of an electronic-throttle-control system, which he said was susceptible to electromagnetic interference. *Id.* The plaintiff's expert opined that electromagnetic interference could cause the throttle to open and thereby cause sudden acceleration, and he opined "to a reasonable degree of engineering certainty" that the car the plaintiff was driving experienced a sudden acceleration event caused by electromagnetic interference. *Id.* at *2, 7.

The court found that the expert's decision to "rule in" electromagnetic interference as a potential cause of the plaintiff's accident was not the product of a reliable method. *Kesse*, 2020 WL 832363, at *8. The expert had "done none of the things that would suggest his opinion his reliable." *Id.* He had never performed any testing on a vehicle with electronic throttle control, including for the plaintiff's case, did not rely on testing by anyone else, and was unaware of anyone able to use electromagnetic interference to open a throttle in a vehicle with electronic throttle control. *Id.* A proponent for more than twenty years of his theory that electromagnetic interference could cause unintended acceleration, the expert had never published a peer-reviewed article on unintended acceleration, electromagnetic interference in automobiles, or electronic throttle controls. *Id.* Rather than achieving widespread acceptance, the theory was rejected as meritless by the National Highway Transportation Safety Administration. *Id.* Instead of using any scientific method to rule in electromagnetic interference as a possible cause, the expert had relied on anecdotal evidence of two instances he did not investigate where drivers reported sudden acceleration in vehicles with an electronic-throttle-control system. *Id.* His theory remained "a mere hypothesis, and hypotheses alone are not admissible." *Id.*

Nor did the expert have a reliable basis for his decision to rule out driver error as a cause of the plaintiff's accident, the court found. *Kesse*, 2020 WL 832363, at *8. To reach his conclusion that the plaintiff's accident was caused by electromagnetic interference, the plaintiff's expert ruled out the possibility of other mechanical failure based on the master technician's findings, and he ruled out the possibility of driver error because the plaintiff "had no logical or sane reason to slam the accelerator pedal . . . for the driving maneuver that he was doing." *Id.* at *2. The expert did not consider studies finding pedal misapplication the most likely cause of sudden acceleration and identifying risk factors for pedal application errors, including driving an unfamiliar vehicle. *Id.* at *5, 8. The plaintiff's accident occurred on only his second day driving the vehicle, and his expert ruled out driver error without knowing how many times he had driven the vehicle. *Id.* at *1, 8.

The court concluded that the expert's opinion that the accident resulted from sudden acceleration due to electromagnetic interference was "not reliable" and amounted to "mere speculation," rendering it inadmissible. *Kesse*, 2020 WL 832363, at *9. As a result of the exclusion, the plaintiff failed to put forth evidence from which a reasonable jury could conclude that his accident was caused by a defect, and the court granted the manufacturer's motion for summary judgment. *Id.* at *9–11.

Speculation, among other grounds, similarly required exclusion of proposed expert testimony in *Bogathy*. The plaintiff had been a non-union police officer employed by a private railroad company. *Bogathy*, 2020 WL 419406, at *1. Terminated for tampering with fuses to disable video cameras monitoring the office where he worked, the plaintiff sued the railroad on retaliatory-discharge, whistleblower, and invasion-of-privacy theories. *Id.* at *1–2. He retained a police officer retired after 48 years from two municipalities to opine on "the complaint and disciplinary process" used by the railroad that resulted in the plaintiff's termination. *Id.* at *2–3. His opinions covered two categories: a narrative of events that led to the plaintiff's termination, and certain Illinois laws and their application to the plaintiff. *Id.* at *3. Neither met the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702, the court determined. *Id.*

Proposed opinions in the first category failed to meet several admissibility prerequisites. *See Bogathy*, 2020 WL 419406, at *3–6. Opinion must be "expert opinion" informed by the witness' expertise rather than "simply an

opinion broached by a purported expert," and the expert must be qualified to opine on the subject matter of his proposed testimony. *Id.* at *3 (quoting *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991), amended on unrelated grounds, 957 F.2d 301 (7th Cir. 1992); and *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999)). But the court concluded that in the face of legal and practical differences between union and non-union employees and between government and private employers, the plaintiff failed to present sufficient evidence that the expert's experience with union employees of government entities matched the subject of his opinions in a non-union, private employer context. *Id.* at *4. The district court must ensure that a proposed expert's methodology is "scientifically valid" and that conclusions are "based on sufficient facts or data." *Id.* (quoting *Daubert*, 509 U.S. at 592–93; Fed. R. Evid. 702(b)). But the plaintiff failed to demonstrate that his expert, whose reliance on his years of experience and personal thoughts suggested that "he either had no method or could not describe one," used a reliable method or applied it to reliable facts and data. *Id.* at *4–5 (quoting *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418 (7th Cir. 2005)). The expert's application of personal judgment or substitution of his own judgment for that of railroad employees who disciplined the plaintiff was not a proper methodology. *Id.* at *5. His "speculation about the thoughts, feelings, and motivations of witnesses" did not constitute "sufficient or reliable facts and data on which to form expert opinions." *Id.* (citing *Trustees of Chicago Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Tr. Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 787 (7th Cir. 2007)). Rule 702 also requires that evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue," but the expert's proposed opinions, which were "full of credibility determinations," would invade the jury's function of assessing witness credibility. *Id.* at *5–6 (quoting *Daubert*, 509 U.S. at 591, and citing several cases). Accordingly, the court excluded the expert's proposed narrative opinions, which "would, at best, be his personal thoughts on the events at issue in the case, which risks turning into 'a gratuitous interpretation of the factual record.'" *Id.* at *6 (quoting *Cage v. City of Chicago*, 979 F. Supp. 2d 787, 834 (N.D. Ill. 2013)).

Opinions in the second category, in which the plaintiff's expert quoted certain Illinois laws on law enforcement officers, asserted that they may have applied to the plaintiff in his job with the railroad, and alleged that the railroad "violated" the laws, met "none of Rule 702's requirements," the court determined. *Bogathy*, 2020 WL 419406, at *6. The expert was not a legal expert, and nothing in his background qualified him to opine on legal issues. *Id.* The plaintiff provided no explanation of the methodology the expert used to arrive at his legal conclusions, whether the methodology was reliable, or how the expert applied the methodology to the facts of the case. *Id.* And legal conclusions are not an appropriate subject of expert testimony, because it is for the judge, not witnesses, to instruct the jury on applicable principles of law. *Id.* (citing *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 294 (7th Cir. 1981); and other cases).

Van is another recent decision in which a district court rejected unsupported say-so. *Van*, 332 F.R.D. at 259–72. The plaintiffs were female current and former employees of a motor vehicle manufacturer at one of two plants. *Id.* at 259. They alleged that they and other female employees were subjected to a pervasively sexual, hostile, intimidating, and abusive work environment, and in some cases, to unwelcome physical contact, and they sought to represent a class. *Id.* at 259–60. In their motion for class certification, the plaintiffs relied in part on proposed opinions from an expert on social psychology on the prevalence of sexual harassment at the plants. *Id.* at 265–66, 270. The expert purported to employ a "social framework" methodology to reach conclusions that both plants exhibited high levels of every indicator of risk for harassment known to social science, that sexual harassment was so pervasive at the plants as to have inevitably exposed every female employee, and that the defendant knew about but chose to ignore and downplay the situation. *Id.* at *265–66.

The plaintiffs failed to demonstrate that the expert's opinions were the product of a reliable methodology. *Van*, 332 F.R.D. at 266–70. Though she purported to employ a "social framework" methodology, such a methodology is intended to offer general information and context with which a finder of fact can interpret case-specific evidence, not to prove that discrimination or harassment occurred in a particular case. *Id.* at 265–67. The plaintiffs identified no evidence apart from the expert's own "unsupported testimony" to support the conclusion that she properly applied the methodology. *Id.* at 267. Moreover, the court was unable to determine any process by which the expert reached her opinions. *Id.* at 267–68. *General Electric Co. v. Joiner* "expressly requires proposed experts to supply that connective reasoning before obtaining judicial permission to present their conclusions in a courtroom." *Id.* at 268 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). The court could not "satisfy its gatekeeping function by simply accepting an expert's conclusory assertion that she

reached her conclusions by using methods and relying on concepts and information generally accepted as reliable by other experts in her field." *Id.* (citing *Robinson v. Davol, Inc.*, 913 F.3d 690, 696 (7th Cir. 2019)).

In addition to their inadmissibility on reliability grounds, the opinions relied upon would be unhelpful to a jury, the court found, because they amounted to inadmissible legal conclusions, inadmissible opinions on corporate state of mind, and opinions on matters that did not require or draw upon expertise. *Van*, 332 F.R.D. at 270–71. The court did not rule out the possibility that the expert could offer admissible testimony on procedures to prevent and respond to harassment and on whether and to what extent the defendant's procedures and responses were consistent with proper procedures, but limited her to that scope. *Id.* at 271–72. The court denied the plaintiff's motion for class certification. *Id.* at 293.

Each of these recent decisions reflects a refusal to accept an expert's speculation or unverified say-so as a substitute for a demonstration that he or she reached opinions via reliable methodology. Untested hypothesis, speculation, personal judgment, and conclusions without "connective reasoning" do not suffice.

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Eighth Circuit Report

Ruling Notes the Problems with Hedonic Expert Testimony, and Provides a Reminder *Daubert*-Check Your Own Experts

By Patrick J. Kenny

One of the more interesting decisions from the Eighth Circuit in the last few months was in *Jennings v. Nash*, No. 18-3261-CV-C-WJE, 2020 WL 770325 (W.D. Mo. Feb. 17, 2020). There, the court provides a succinct summary of the general rules governing expert testimony, demonstrates the application of those rules to experts on hedonic damages, and illustrates the risks of failing to conduct a *Daubert* review of your own experts.

The suit involved civil rights claims by a plaintiff alleging that he wrongfully was convicted and imprisoned for the murder of his wife. According to the plaintiff, after he spent approximately nine years of in prison, his attorneys discovered exculpatory evidence leading to his release from prison and the dismissal of all charges.

Plaintiff filed suit shortly thereafter, advancing various civil rights claims against law enforcement personnel and one county involved in his arrest and trial. Plaintiff disclosed several experts including an expert on economic damages. In its order, the court notes that the expert in question planned to testify on multiple topics, including "on hedonic damages, including the reduction in value of life or loss of enjoyment of life[.]" *Id.* at *2. Defendant challenged the expert's methodology on those damages as unreliable, and the court agreed.

Had the court stopped there, the opinion would far less helpful. However, in concluding that the expert's methodology was unreliable the court first provides a succinct summary of the rules bearing on the admission of expert testimony, noting that plaintiff could not meet his burden of establishing reliability. *Id.* It then cites to decisions from around the country that raised questions as to testimony on the supposed reduction in value of life. *See id.* at *2–3 & n.3.

Finally, and providing a palpable reminder of the importance of checking your own expert's *Daubert* history, which presumably had not been done in this case. Demonstrating the importance of that task, the court proceeds to observe that "numerous circuit and district courts" previously have excluded that particular expert's "testimony on hedonic damages that were based on his 'willingness to pay' model." *Id.* at *3. Review of the briefs filed in connection

with the challenge to the expert suggests that some, but by no means all, of the expert's *Daubert* history was included in the briefing on the motion. Apparently, once the expert's history was called legitimately into question, the court did its own independent research of court rulings involving the expert and his testimony on hedonic damages.

Finally, the court includes in a footnote an added practice pointer. Apparently, the defendant did not file a timely *Daubert* motion challenging the expert's hedonic damage testimony. *See id.* at *1 n.1. Nevertheless, shortly before trial defendant filed a "notice of intent to object" to the testimony. The plaintiff correctly noted that the "notice" was, in effect, an untimely *Daubert* motion. *See id.* The court nevertheless exercised its discretion to consider the "notice" and then to exclude the expert's hedonic damage testimony. *See id.*

Thus, this very short opinion provides a wealth of guidance. First, it collects substantial authority on the topic of hedonic testimony and the application of *Daubert* to the same.

Second, the opinion provides a reminder, if one was needed, that it is dangerous to proceed with an expert without first conducting a *Daubert* check on the expert's prior testimony.

Third, the decision demonstrates that, in the end, *Daubert* issues pertain simply to the admissibility of evidence at trial. In this case, the court would have been well within its rights to strike the defendant's "notice of intent to object" but, apparently perceiving such a ruling as delaying the inevitable, the court made the expedient ruling of excluding the testimony based on essentially an untimely *Daubert* motion.

As always, if you should have any thoughts or feedback on this column, please do not hesitate to contact me.

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