

Courts Discuss Expert Testimony

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NEUROLOGICAL SCIENTIST UNQUALIFIED TO TESTIFY ON CAUSE OF PASSENGER'S STROKE

A sixty-eight-year-old passenger suffering from hypertension and a prior leg injury requested a wheelchair to exit the aircraft, but the wheelchair never arrived. The passenger walked with assistance from the aircraft to the parking lot. The passenger suffered a stroke and died one week later. The plaintiffs alleged that the passenger's stroke began before he exited the aircraft and that the failure to provide a wheelchair caused or contributed to the stroke. *Jordan v. Continental Airlines, Inc.*, __ So.2d __, 2004 WL 447348 (Ala. Civ. App. March 12, 2004). The airline contended that the passenger's stroke resulted from pre-existing conditions and that the failure to provide a wheelchair did not cause or contribute to the stroke. The airline moved for summary judgment on all the plaintiffs' claims. The airline's motion relied on the affidavit of a board certified neurologist, who testified that walking off the plane and through the airport did not cause, or contribute to, the passenger's stroke.

The plaintiffs relied on the expert testimony of a neurological scientist, William J. Ray, Ph.D., who was not a medical doctor, but a senior research biochemist at Merck and Co., Inc. Ray reviewed the passenger's medical records and eyewitness testimony. He concluded that the passenger's stroke began before exiting the aircraft and that the exertion of walking "exacerbated an already critical emergency cerebral situation." The trial court struck the scientist's affidavit, and found him unqualified to provide expert testimony on the medical cause of the passenger's death. Although the appellate court recognized that expert medical testimony is not limited to persons licensed to practice medicine, it affirmed the trial court's decision that the scientist lacked the necessary qualifications to testify on the cause of death. The appellate court also held that the scientist's opinions on the potential effect of immediate treatment were too speculative.

FIFTH CIRCUIT REVERSES SUMMARY JUDGMENT, TRIAL COURT IMPROPERLY WEIGHED CONFLICTING TESTIMONY

In *Murray v. Airborne Express/ABX Air, Inc.*, __ So.2d __, 2004 WL 2387540 (La. App. October 26, 2004), Murray, an aircraft mechanic, brought a workers' compensation claim for injuries to his head. Although he could not remember the event, he believed a metal pan on a belt



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loader machine struck him on the head, causing him to be thrown onto the belt loader. Airborne contended that Murray was not injured at work and moved for summary judgment. It relied on the expert testimony of Robert Sterns, who testified that based upon "photography and appropriate measurements...followed up by mathematical reconstruction of impact forces," the incident could not have happened as Murray alleged.

Murray relied on the testimony of his wife. She stated that her husband came home from work with a blackened eye, he was disoriented and nauseated, and his shirt had distinctive markings on the right shoulder. She took the shirt to

Airborne that evening to find the origin of the markings. At that time, a freight handler pointed out that the markings on the shirt appeared to match markings on the plane left by the rubber pad from the belt loader.

As a result of Sterns' testimony, the trial court granted summary judgment finding it did not believe Murray could show his injuries occurred at work. The Louisiana Court of Appeals for the Fifth Circuit reversed the decision. The court confirmed that the trial judge cannot make credibility determinations when it determines the merits of a motion for summary judgment. It held that the trial court improperly weighed the credibility of the evidence before it:

[b]y granting summary judgment, the trial court made credibility calls and factual determinations which are not appropriate in considering the merits of the motion. A summary judgment is not a substitute for a trial on the merits.

ALABAMA SUPREME COURT TWICE AVOIDS FORMALLY ADOPTING DAUBERT.

In a pair of recent cases, the Alabama Supreme Court twice avoided requests to formally adopt *Daubert* as the standard for admissibility of expert witness testimony in Alabama. In *Martin v. Dyas*, __ So.2d __, 2004 WL 1802979 (Ala. August 13, 2004), Martin filed a medical malpractice lawsuit against two physicians and a medical group. She retained Dr. Clark, a board-certified orthopedic surgeon, as her medical expert.

The defendants attempted to exclude Dr. Clark's testimony on the grounds that: (1) his expertise was not similar to that of the Defendants; (2) his proposed testimony was outside his area of knowledge, experience, and expertise;

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and (3) his testimony was inadmissible under *Daubert*. The trial court excluded Dr. Clark without specifying its reason for doing so, and Martin appealed. The Alabama Supreme Court reversed and remanded the case, but in doing so, the court rejected the defendants' request that it formally adopt *Daubert* as Alabama law. It noted however, that the application of *Daubert* would have had no effect on the case since Dr. Clark's testimony would pass both the reliability and relevance prong of the *Daubert* test.

In *Vesta Fire Insurance Corporation v. Milam & Company Construction, Inc.*, __ So.2d __, 2004 WL 1909458 (Ala. August 27, 2004), a fire destroyed a video rental store. The store's insurers sued various contractors and subcontractors responsible for the construction or maintenance of the store. The insurers retained Jim Jones, an electrical engineering professor at the University of Alabama at Birmingham. The trial court granted the defendants' summary judgment and the insurers appealed. The contractors asserted on appeal that Jones' testimony should not have been considered by the trial court because his conclusions were "improperly speculative and without evidentiary support." The contractors asked the court to apply the tests for admitting expert testimony set out in *Daubert* and *Frye*, but the Alabama Supreme Court refused:

[W]e decline to adopt *Daubert* under the circumstances of this case. Our review of the record and of the arguments advanced by the defendants does not support the conclusion that the defendants are challenging the validity of the scientific principles relating to electrical engineering, nor do we read the defendants' arguments as attacking Jones's qualifications as an expert. Rather, the defendants assert that Jones's conclusions are improperly speculative and without evidentiary foundation. These are arguments that invoke a consideration of the admissibility of the evidence under the Rules of Evidence.

The court concluded that the issue could be determined based upon Alabama's current rules of evidence, without application of the *Daubert* test.

DOCTOR'S OPINION PROPERLY ADMITTED EVEN THOUGH PEER-REVIEWED STUDIES CONTRADICTED HIS CONCLUSIONS.

In *Roach v. PPG Industries, Inc., et. al.*, , 2004 WL 2239806 (Ark. Ct. App. October 6, 2004)(not designated for publication), Roach was exposed to products containing benzene throughout his more than twenty years' experience

as an auto body repairman. Roach was diagnosed with acute myelogenous leukemia ("AML"), and eventually died from this illness. Roach's estate sued a number of manufacturers of products containing benzene. The estate alleged that Roach's AML was caused by his exposure to those products. In support of its claims, the plaintiff retained Dr. Philip Guzelian to testify on cytogenetics and the five and seven chromosome.

The manufacturers argued that Dr. Guzelian's testimony should be excluded because his testimony was based upon "unreliable science." For example, Dr. Guzelian said that his testimony was based upon peer-reviewed studies, but admitted there were other peer-reviewed studies he did not rely upon that supported an opposite conclusion. The trial court refused to strike Dr. Guzelian's testimony, and the Arkansas Court of Appeals affirmed. It held that Dr. Guzelian's testimony was supported by peer-reviewed studies, and the fact that there were other peer-reviewed studies that he ignored upon supporting an opposite conclusion went to the weight to be given to Dr. Guzelian's testimony and not to the admissibility of his opinion.

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MICHIGAN SUPREME COURT OVERTURNS RECORD VERDICT BECAUSE EXPERT IS UNQUALIFIED.

In *Gilbert v. DaimlerChrysler Corporation*, 685 N.W.2d 391 (Mich. 2004), Linda Gilbert was the first female millwright to work at Chrysler's Jefferson North Assembly Plant in Detroit. Gilbert alleged that she was sexually harassed and suffered severe damages as a result. Gilbert retained Steven Hnat, a certified social worker and substance abuse counselor. Hnat testified that the harassment Gilbert endured caused irreversible changes to her brain chemistry, causing a relapse into alcoholism and development of a major depressive disorder. Hnat also testified that he reviewed Gilbert's medical records and the records read "like a preview of [Gilbert's] death certificate." After a six-week trial, the jury returned a verdict of \$21 million dollars.

On appeal, the Michigan Supreme Court held that the verdict was excessive and could not be affirmed. In order "to provide guidance for the new trial," the court provided an in-depth analysis of the trial court's gatekeeping function under Michigan Rule of Evidence 702, *Daubert*, and *Frye* and concluded that Hnat was unqualified to render these opinions. In doing so, the court rejected the idea that Hnat's qualifications should go to the weight of his testimony instead of admissibility:

[W]e reject the Court of Appeals' argument that "the 'mere fact' that Mr. Hnat 'is not a medical practitioner does not render him unqualified as an expert

witness” because “[a]ny limitations in” Mr. Hnat’s “qualifications are relevant to the weight, not the admissibility, of his testimony.” The Court of Appeals’ observation that one need not be a medical practitioner to testify as an expert is little more than a truism. And we do not disagree with the proposition that, in some circumstances, an expert’s qualifications pertain to weight rather than to the admissibility of the expert’s opinion. That is not to say, however, that *any* issue of qualification relates to weight rather than admissibility.

... Here, according to plaintiff’s counsel, Mr. Hnat gave plaintiff a “prognosis” on the basis of his interpretation of records from medical and treatment facilities. The medical “prognosis” of a social worker who has no training in medicine and lacks any demonstrated ability to interpret medical records meaningfully is of little assistance to the trier of fact.

The court directed the trial court “to ensure that expert opinion testimony meets the purpose expressed in MRE 702—that of assisting the trier of fact through the introduction of reliable ‘scientific, technical, or other specialized knowledge.’”

THE TEXAS SUPREME COURT HOLDS OBJECTION TO EXPERT TESTIMONY MADE AFTER CROSS EXAMINATION OF EXPERT IS TIMELY.

In *Kerr-McGee Corporation v. Helton*, 133 S.W.3d 245 (Tex. 2004), certain oil and gas lessors brought suit against a lessee for breach of the implied covenant to protect the leasehold against drainage. The lessors argued that the lessee should have drilled a well on their leasehold to protect against drainage from a well on an adjacent property. The lessors retained Michael Riley, a petroleum engineer, to provide expert testimony to establish the amount of gas a hypothetical offset well would have produced.

At trial, Riley testified that the hypothetical offset well would have yielded the lessors a profit of \$2,149,299.60. During cross-examination, Riley admitted that he had no factual basis for the projection of the hypothetical well’s production. After cross-examination, the defendants moved for the first time to exclude Riley. The trial court denied the motion. The Texas Supreme Court found that a motion to strike made after cross-examination is sufficient to preserve a no-evidence complaint on appeal and that the trial court erred in allowing Riley to testify.

NEW YORK LOWER COURT APPLIES DAUBERT EVEN THOUGH ITS STANDARD NOT FORMALLY ADOPTED BY APPELLATE COURT

In *Frankson v. Brown & Williamson Tobacco Corp.*, 2004 WL 1433068 (N.Y. Sup. Ct. June 22, 2004) (not designated for publication), Brown & Williamson sought to introduce a 1950s document known as the “Brooks Memo” in sup-

port of its “state of the art” defense. It argued that the article, which contained quotations from distinguished scientists of the time regarding the absence of a link between smoking and health issues, should be admissible. The trial court found the document was offered as expert testimony and was inadmissible because there was no evidence that the scientists’ opinions were based upon work that “had been tested, peer reviewed, and published in peer-reviewed journals.” In a footnote, the court explained its reliance upon *Daubert*:

FRANKSON: The trial court noted that the *Daubert* standard was particularly important in this case because the manufacturers were in the best position to eliminate whatever dangers might be present in their products and consequently are expected to conduct themselves like experts in their field.

This Court is aware of the fact that the *Daubert* test has not been formally embraced by our Court of Appeals, however, it believes that it is within its discretion to apply it where, as here, the document contains the rankest of hearsay and its admission was sought on the ground that it provided a kind of “negative” notice to the defendants, that is, notice of the lack of a defect in their product, excusing their vigilance in correcting any flaws.

The trial court noted that the *Daubert* standard was particularly important in this case because the manufacturers were in the best position to eliminate whatever dangers might be present in their products and consequently are expected to conduct themselves like experts in their field. “The manufacturers are thus obligated to rely upon well found information ... [and] it behooved them to establish that their information was based upon solid, peer reviewed science rather than ‘off the cuff’ surmises, though the ‘cuffs’ may have adorned some distinguished wrists.”

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