

EXPERT TESTIMONY

By: Kristina M. Kennedy and Leane Capps Medford; *Rose_Walker, L.L.P.*

Neurological Scientist Unqualified To Testify Regarding Cause Of Passenger's Stroke

In *Jordan v. Continental Airlines, Inc.*, No. 2020870, 2004 WL 43104 (Ala. Civ. App. Jan. 9, 2004), 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. Plaintiffs alleged the passenger's stroke began before he exited the aircraft and that the failure to provide a wheelchair caused or contributed to the stroke. The airline moved for summary judgment, arguing 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 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.

Plaintiffs countered with the expert testimony of a neurological scientist, who was not a medical doctor. The scientist reviewed the passenger's medical records and eyewitness testimony and concluded his 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, finding 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 as to the cause of death. The appellate court also held that the scientist's opinions regarding the potential effect of immediate treatment was too speculative.

Customer Service Manager Unqualified To Testify Regarding Cause Of Engine Damage

In *United States Aviation Underwriters, Inc. v. Yellow Freight System, Inc.*, 296 F. Supp. 2d 1322 (S.D. Ala. 2003), USAU filed suit against Yellow Freight System, Inc., to recover for the damage to a Pratt & Whitney PT6A jet engine transported by Yellow for USAU's insured from Mobile, Alabama, to Pratt & Whitney's service center in Bridgeport, West Virginia. Neither party disputed that the engine was shipped in Pratt & Whitney's shipping container and that the engine was undamaged when it left Mobile.

When the engine arrived in Bridgeport, the receiving clerk noted the engine was received in good condition. He testified it was his custom and practice to visually inspect the container for obvious damage, and then open the container to inspect for physical damage to the engine. The engines are typically moved from the receiving department to the teardown area by forklift, but there was no evidence in the record on how this particular engine was moved. The next day, the customer service manager

examined the engine in the tear-down area and observed that the exhaust duct port flange was crumpled and bent.

USAU moved for summary judgment. USAU offered the expert opinion of the customer service manager, who testified that the engine had to have been damaged by Yellow in transit, because a forklift could not have caused the specific damage to the engine. Yellow moved to strike the testimony of the manager on the ground that he was unqualified to offer any expert opinion on the cause of the damage to the engine. The district court agreed, finding that even though the manager had a mechanic's license and years of experience with aircraft engines, he had no specialized skill, training or knowledge regarding the force required to cause the specific damage to the engine.

Failure To Provide Expert Testimony On Airline Industry's DVT Standard In 2000 Distinguishes *Louie v. British Airways, Ltd.* From *Blansett v. Continental Airlines, Inc.*

In *Louie v. British Airways, Ltd.*, No. A01-0329CV, 2003 WL 22769110 (D. Alaska Nov. 17, 2003), the court followed the majority of jurisdictions and held that the cause of a passenger's stroke, alleged by plaintiff to have resulted from DVT, was not an "accident" within the Warsaw Convention. Plaintiff asserted that the airline's failure to warn its passengers of DVT deviated from established industry standards and therefore was an unexpected or unusual event.

In response to the airline's motion for summary judgment, plaintiff relied on *Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002), which held that an airline's failure to warn of the danger of DVT in violation of an alleged industry standard could be an accident within the Warsaw Convention. *Blansett* relied on the expert affidavit of Farrol Kahn and a 2001 airline industry association memorandum that discussed possible warnings regarding the risk of DVT. *Blansett* found Kahn's affidavit created a fact question as to whether there was a violation of an industry standard in 2001, when the *Blansett* injury occurred.

The plaintiff in *Louie* also submitted an expert affidavit by Kahn. But unlike Kahn's *Blansett* affidavit, Kahn's *Louie* affidavit merely discussed the general risks of DVT and asserted the airlines were aware of the risks in 2000, when Louie was injured. There was no evidence of an industry standard in 2000. The *Louie* court criticized the *Blansett* analysis and also emphasized the difference between the evidence presented in the two cases on the existence of an industry standard stating, "in [Kahn's] affidavit in this case, however, noticeably absent is any reference to an industry standard in place in 2000." Finding Kahn's additional opinion regarding the airline's knowledge of the general danger of DVT irrelevant, the court held the absence of any evidence of an industry standard in 2000 was fatal to the plaintiff's case.

Racism Expert Allowed To Testify Regarding Statements Made By Flight Attendant To Passengers

When the plaintiffs in *Sawyer v. Southwest Airlines Co.*, 243 F.

Supp. 2d 1257 (D. Kan. 2003, were unable to find seats after entering the aircraft and remained standing in the aisle, a flight attendant stated over the intercom "eenie, meenie, minie, moe, pick a seat, we gotta go." Plaintiffs recognized this comment was a reference to a racist nursery rhyme and filed suit against the airline asserting claims for violations of their rights and intentional and negligent infliction of emotional distress. Southwest asserted the phrase should not be interpreted as racist. The plaintiffs hired a racism expert to provide opinions on the origin of the nursery rhyme, whether African-Americans would find the rhyme racist and the sensitivities of African-American's born before 1960.

Southwest moved to exclude the testimony of plaintiffs' racism expert, but the district court found the racism expert's opinions on the genesis of the phrase was relevant to the dispute between the parties and outside the common knowledge of jurors. However, the district court held the expert could not offer the legal conclusion that African-Americans would consider the phrase racist or testify regarding the sensitivities of African-Americans born before 1960.

Fifth Circuit Upholds The Admission Of "Grief Expert" Testimony

The Fifth Circuit held in *Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003), that the district court did not abuse its discretion by admitting the testimony of plaintiff's "grief expert" to establish the plaintiff's future mental anguish and loss of society as a result of the death of his wife and three-year-old daughter. In addition to the husband's testimony, plaintiff's counsel offered the testimony of an

expert in thanatology, the scientific study of death, its causes and related phenomena. The jury awarded the husband \$1.5 million for his future suffering resulting from the loss of his wife and \$1.3 million for future damages for the loss of his daughter.

The Fifth Circuit recognized that the admissibility of expert testimony on grief was an issue of first impression. The defendants challenged the proffered evidence as irrelevant, arguing the testimony would not assist the jury because grief is a universal emotion within the common understanding of all jurors and that its admission could unduly influence the jurors with its scientific appearance or serve as surrogate testimony for the plaintiff. Although the court recognized these dangers "lurk in the relatively untested area of grief expert testimony," it held that since the expert testimony was relevant, the district court did not abuse its discretion by admitting the testimony.

Mississippi And Pennsylvania Reconsider Frye

The highest courts of Mississippi and Pennsylvania took the opportunity to reconsider whether they would continue to follow *Frye's* general acceptance test or adopt the more expansive *Daubert* factors for the admission of scientific expert testimony, and arrived at opposite conclusions.

In *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003), the Supreme Court of Mississippi abandoned *Frye* and adopted *Daubert/Kumho Tire* as the standard for admissibility of expert witness testimony in Mississippi. The court recognized that Mississippi had continued to apply *Frye's* "general acceptance test," after the

Supreme Court's 1993 *Daubert* decision, which found the "general acceptance" test too rigid and the 1999 *Kumho Tire* decision, which recognized the trial court's gate-keeping responsibility applies to all expert testimony based on scientific or specialized knowledge. Finding *Daubert*, as modified by *Kumho Tire*, "proves the superior analytic framework for evaluating the admissibility of expert witness

testimony," the court abandoned *Frye* and adopted the more recent standards for the admission of expert testimony.

In *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003), the Supreme Court of Pennsylvania considered whether to retain *Frye* as its rule on the admissibility of scientific evidence. After discussing the differences between *Frye* and *Daubert*,

the court determined that it would continue to apply *Frye*, finding the general acceptance test a "proven and workable rule." In support of its decision, the court explained that it preferred *Frye* because it assures that judges rely on scientists, who are in a better position to evaluate a theory or technique, and that *Frye's* general acceptance test is more likely to produce uniform results. ▽ ▽

A SURVEY OF RECENT JUDICIAL TREATMENT OF CLAIMS FOR FEAR OF IMPENDING DEATH

By: Eugene Massamillo, Jeremy I. Hager, Angela Savino; *Biedermann, Hoenig, Massamillo & Ruff, P.C.*

In *Stecyk v. Bell Helicopter Textron, Inc.*, No. 94-CV-1818, 1998 U.S. Dist. LEXIS 16772 (E.D. Pa. Oct. 23, 1998), the court considered, and rejected, the notion that the Pennsylvania survival statute permits recovery for emotional distress caused by fear of impending death without proof of physical manifestation necessary to corroborate such fear. *Stecyk* involved the crash of an experimental V-22 Osprey aircraft after an engine failure. The plaintiffs argued that they had a right to recover for the fright decedents allegedly suffered prior to death under both the Pennsylvania survival statute and common law principles. The court denied the plaintiffs recovery under both theories.

As a statutory matter, *Stecyk* noted that Pennsylvania measures recovery for pain and suffering from the moment of injury until the moment of death, provided that the victim remains — or regains — consciousness. The evidence in *Stecyk* indicated that the victims died instantly upon impact and, therefore, the court held there could be no recovery for pain and suffering. The court tacitly defined, for

the purposes of the survival statute, the injury from which damages should be measured *i.e.*, the injury which ultimately causes death. Furthermore, the court declared the impossibility of ever recovering these damages for this type of injury as plaintiffs could neither aver nor prove any physical manifestation caused by the alleged mental anguish.

After *Stecyk*, other jurisdictions have continued to recognize the validity of "fear of impending death" as a quantum of damages in tort cases. The interpretation of this category of damages is by no means consistent among the different states and, depending upon the jurisdiction in which a claim is brought, recovery for "fear of impending death" may arise from claims for mental anguish, emotional distress and conscious pain and suffering on the part of a plaintiff or, by way of a survivor action, on the part of a plaintiff's decedent. The issue, or course, is not limited to aviation accident cases and, generally, has not arisen in many decisions over the past quarter. The following represents a survey of cases within the past three months which

address the issue of damages for so-called "fear of impending death."

Fraudulent Misrepresentation To A Buyer Concerning The Airworthiness Of An Aircraft May Sustain A Cause Of Action Sounding In Fear of Impending Death

Thomas v. Henderson, No. 01-0479-WS-L, 2003 U.S. Dist. LEXIS 23988 (S.D. Ala. Nov. 3, 2003), involved a claim for intentional infliction of emotional distress (sounding in fear of impending death), known in Alabama as the tort of "outrage," arising from the sale of a Cessna 172E aircraft. In *Thomas*, plaintiff purchased the aircraft from Henderson and retained a second defendant, Sky King Aviation, to perform a pre-purchase inspection. Plaintiff's purchase was, in part, based upon the verbal and written representations made by Henderson and Sky King concerning the airworthiness of the aircraft. While flying from Alabama to New York, plaintiff discovered numerous mechanical and structural problems with the aircraft, including corrosion of the