

**TRIAL TACTICS UPDATE--NEW ATTACKS BY  
PLAINTIFF'S COUNSEL ON YOUR EXPERTS  
AND COMPANY WITNESSES--DAUBERT DEVELOPMENTS**

**DRI DRUG AND MEDICAL DEVICE LITIGATION SEMINAR  
May 9-10, 1996**

**Tampa, Florida**

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## I. WHAT'S IT ALL ABOUT, DAUBERT?--AN INTRODUCTION

### A. The Federal Rules Of Evidence Supersede The Frye Test Of "General Acceptance"

For 70 years, all federal and most state courts had followed the so-called "Frye test" set forth in Frye v. U.S., 293 F. 1013, 1014 (D.C.Cir. 1923). Under the Frye test, scientific evidence was admissible only if the principle upon which it was based was sufficiently established to have gained "general acceptance" in the particular field to which it belonged. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. \_\_, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (7-2), the Supreme Court held that the Federal Rules of Evidence had superseded Frye's "general acceptance" standard.

### B. FRE 702 Requires That Scientific Evidence Must Be Both Reliable And Relevant

FRE 702 in particular provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Cf. Hartzell Mfg., Inc. v. American Chemical Technologies, Inc., 899 F.Supp. 405, 408-09 (D.Minn. 1995) (lay witness opinion under FRE 701). This rule contains two requirements:

#### 1. Reliability

First, the evidence must be reliable (i.e., trustworthy). "[T]o qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known." Daubert, 125 L.Ed.2d at 481.

#### 2. Relevance

Second, the evidence must be relevant. This criterion is sometimes described as one of "fit." The expert testimony must be sufficiently tied to the facts of the case that it will help the jury in

resolving a factual dispute. "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Daubert, 125 L.Ed.2d at 482.

C. The Trial Court Is The "Gatekeeper" And Must Make The Initial Determination Whether Proposed Scientific Evidence Meets The Dual Criteria Of Reliability And Relevance

The trial court is charged with the role of "gatekeeper" concerning the admissibility of scientific evidence, and must determine at the outset pursuant to FRE 104(a) whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. The court is not bound by the rules of evidence in making this determination, and the proponent of such evidence must establish these matters by a preponderance of the evidence.

1. Daubert's Nondefinitive Factors

The Daubert Court provided the following factors as nondefinitive examples of matters that trial courts might consider in determining whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue:

a. Can the theory or technique be tested? See Dukes v. Illinois Central R.R. Co., No. 94 C 4134, 1996 U.S. Dist. LEXIS 3362, at \*22 (N.D.Ill. Mar. 20, 1996) (testability is most important of four Daubert factors)

b. Has the theory or technique been subjected to peer review and publication?

c. What is the known or potential rate of error of a particular scientific technique?

- d. Has the theory or technique gained "general acceptance" within the relevant scientific community?

Daubert, 125 L.Ed.2d at 482-83. An excellent and thorough example of a district court's application of the Daubert principles is set forth in In re TMI Lit. Cases Consol. II, 911 F.Supp. 775 (M.D.Pa. 1996).

2. Miscellaneous Factors Other Than Wholesale Exclusion That Protect Against Unreliable Or Irrelevant Scientific Evidence

Miscellaneous safeguards other than wholesale exclusion, where the basis of scientific testimony meets the Rule 702 standards, include the following:

- a. FRE 703--expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."
- b. FRE 706--the court at its discretion may obtain an expert of the court's own choosing to assist the court.
- c. FRE 403--relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.
- d. Vigorous cross-examination at trial.
- e. Presentation of contrary evidence.
- f. Careful instruction on the burden of proof.
- g. Fed. R. Civ. P. 50(a)--directed judgment if the evidence presented is insufficient to permit a reasonable

juror to conclude that the position more likely than not is true.

- h. Fed.R.Civ.P. 56--summary judgment.

Daubert, 125 L.Ed.2d at 484.

D. Although Some Federal Courts Have Questioned Whether Daubert Applies To Technical Or Other Specialized Knowledge, The Overwhelming Majority Of Federal Courts Have Held That The Daubert Analysis Applies To All Evidence Subject To FRE 702

A footnote in the Daubert opinion points out that because the evidence under review was scientific evidence within the meaning of FRE 702, it was not necessary for the Court to discuss the other types of evidence subject to FRE 702 (i.e., technical or other specialized knowledge). Daubert, 125 L.Ed.2d at 481 n.8. Nevertheless, with rare exception, the federal courts that have faced this question have determined that the Daubert analysis applies to all FRE 702 evidence. See Sorenson by and through Dunbar v. Shaklee Corp., 31 F.3d 638, 647 & n.15 (8th Cir. 1994) (citing numerous examples); U.S. v. Thomas, 74 F.3d 676 (6th Cir. 1995); Pomella v. Regency Coach Lines, Ltd., 899 F.Supp. 335 (E.D.Mich. 1995) But see U.S. v. Sinclair, 74 F.3d 753, 757 & n.1 (7th Cir. 1996) (Daubert has no direct relevance to questions about the admissibility of testimony by a witness claiming legal expertise).

II. DISCLOSURE OF EXPERTS THROUGH RULE 16 SCHEDULING ORDERS AND JUDICIAL ABROGATION OF FED.R.CIV.P. 26(b)(4)

A. Drafting The Scheduling Order With Experts In Mind

In any lawsuit where experts may testify on any issue, the prudent practitioner should consider providing for an in limine Daubert hearing on the admissibility of expert testimony in the Fed.R.Civ.P. 16 scheduling order. See Fed.R.Civ.P. 16(b)(4), (5). Since the Supreme Court issued its Daubert opinion, courts have encouraged litigants to request an in limine hearing pursuant to FRE 104(a) on the admissibility of proposed expert testimony. See Holbrook v. Lykes Bros. Steamship Co., No. 94-2148, 1996

U.S. App. LEXIS 5354, at \*17-18 (3d Cir. Mar. 21, 1996); U.S. v. Pettigrew, No. 94-50182, 1996 U.S. App. LEXIS 4235 (5th Cir. Mar. 11, 1996); Wettlaufer v. Mt. Hood R.R. Co., No. 95-35016, 1996 U.S. App. LEXIS 4776 (9th Cir. Jan. 8, 1996); Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 973 n.3 (8th Cir. 1995); Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995); In re TMI Lit. Cases Consol. II, 911 F.Supp. 775 (M.D.Pa. 1996). But see Liriano v. Hobart Corp., No. 94 Civ. 5279 (SAS), 1996 U.S. Dist. LEXIS 864 (S.D.N.Y. Jan. 30, 1996) (Daubert hearing may not be needed where evidence is incontrovertibly reliable and relevant). See also Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083 (10th Cir. 1994) (suggests that district courts carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions in films or animations illustrative of such opinions).

This technique alerts the trial judge to potential disputes concerning experts and requires the court to recognize its obligations under Daubert and FRE 104(a) to make any preliminary determinations concerning the admissibility of expert testimony. In addition, scheduling the Daubert hearing at the outset of the litigation reduces the risks of evidentiary ambush because of late disclosed (or undisclosed) experts.

The Daubert hearing also provides counsel with a preview of the opponent's case. In many drug and product cases, the plaintiff wins or loses based exclusively on the testimony of the plaintiff's experts. If the plaintiff's expert on an essential element of the plaintiff's burden of proof, such as causation or foreseeability, is precluded from testifying, defendant should move for summary judgment. As suggested below, it is not unusual for a defendant to move for summary judgment prior to the Daubert hearing so that the trial court can simultaneously take up both the admissibility of the plaintiff's expert testimony and whether any genuine issues of material fact exist for trial. See, e.g., Grimes v. Hoffman-LaRoche, Inc., 907 F.Supp. 33, 34 (D.N.H. 1995).

Under FRE 706, the district court may appoint its own expert. Joiner v. General Elec. Co., No. 94-9131, 1996 U.S. App. LEXIS 5590, at \*26-27 (11th Cir. Mar. 27, 1996) (Birch, J., specially concurring).

B. When Should Experts Be Disclosed?

Fed.R.Civ.P. 26(a)(2)(C) requires that in the absence of other directions from the court or stipulation of the parties, experts must be disclosed at least 90 days before trial, and rebuttal experts no later than 30 days thereafter. Counsel should attempt to determine as early as possible based upon the complexity of the issues and the anticipated expert testimony that may be presented by the parties, whether the default deadlines in Rule 26 come too late in the case. If, for example, rebuttal experts are not even designated until 60 days before trial, opposing counsel is faced with the formidable task of conducting additional discovery, obtaining transcripts of additional depositions on an expedited basis, consulting with his or her own experts, preparing for trial, and preparing for the in limine Daubert hearing. In some jurisdictions, it may be impossible to file timely dispositive pretrial motions.

On the other hand, if experts are designated too early in the lawsuit, the chances are good that their opinions will have to be supplemented as discovery progresses. Nevertheless, from a defense perspective, knowing the identity and number of plaintiff's experts, and the general subject matters on which those experts may testify, can provide invaluable assistance in retaining consulting experts, evaluating the case for settlement, and preparing for trial. The simultaneous designation of experts by both plaintiff and defendant should be avoided unless exceptional circumstances exist that might justify such a procedure. Simultaneous designation could negatively affect the defendant's ability to prepare, especially in a complex case.

One alternative is staggered discovery, in which the case is broken into parts. Factual discovery on certain issues may be cut off at agreed upon times, with expert designations to follow shortly thereafter concerning that particular topic. This approach might be especially conducive where determination of a particular issue would be dispositive of the case.

C. Which Experts Should Be Disclosed?

1. Fed.R.Civ.P. 26(b)(4)

Fed.R.Civ.P. 26(b)(4), at least on its face, appears to answer this question. Experts testifying at trial must be disclosed,

while consulting experts retained in anticipation of litigation or in preparation for trial do not have to be disclosed, except upon a showing of exceptional circumstances that it is impracticable to obtain facts or opinions on the same subject by other means. See Zarecki v. National R.R. Passenger Corp., No. 95 C 1075, 1996 U.S. Dist. 798, at \*15-17 (N.D.Ill. Jan. 26, 1996) (discussion of when treating physician must be designated as expert).

2. The FRE do not apply to the Daubert hearing

At the Daubert hearing on the admissibility of expert witness opinion, the rules of evidence do not apply, except with respect to privileges. See FRE 104(a). Thus, the trial court may consider a broad array of evidence, including offers of proof, affidavits, stipulations, learned treatises, testimonial or other documentary evidence, and legal argument. The trial court may also consider testimony presented to other courts addressing the same evidentiary issues, and the opinions of those courts on the same subject. In re Paoli R.R. Yard PCB Lit., 35 F.3d 717, 739 n.4 (3d Cir. 1994) (quoting U.S. v. Downing, 753 F.2d 1224, 1241 (3d Cir. 1985)). The trial court may also take judicial notice of well established scientific facts or techniques. See, e.g., U.S. v. Booker, 70 F.3d 488, 490 n.5 (7th Cir. 1995) (expert testimony unnecessary because court may take judicial notice of chemical composition of cocaine).

3. May experts who are not trial experts testify either in person or by affidavit at the Daubert hearing?

Despite the provisions of Rule 26, Daubert and its progeny have upset, if not completely abrogated, the testifying-nontestifying dichotomy envisioned in Rule 26, at least for purposes of the Daubert hearing. As the cases discussed below reflect, courts can and should require disclosure of all experts whose testimony will be submitted to the trial court, whether at trial or at the Daubert hearing.

a. In re Paoli R.R. Yard PCB Litigation

The trial court in In re Paoli R.R. Yard PCB Lit., 35 F.3d 717 (3d Cir. 1994), had entered a pretrial scheduling order requiring the defendants to

designate all of their trial experts by a date certain, and had set a cut off date of three months later for the plaintiffs to depose those experts. At the in limine Daubert hearing, the defendants submitted expert affidavits in opposition to the admissibility of the opinions of plaintiff's experts. These defense affidavits, however, were from experts that the defendants had not previously disclosed in discovery. When plaintiffs objected, defendants replied that the court's scheduling order required the designation of defendants' trial experts only. None of the defense experts whose affidavits were submitted for the court's consideration at the Daubert hearing in opposition to the plaintiffs' experts would testify for the defendants at trial.

The 3d Circuit noted that the trial court "certainly had the power to provide that the experts who were to testify at the in limine hearing be subject to discovery," but did not do so, directing its order instead to disclosure of trial experts only. As a matter of fairness, depositions should generally be allowed in connection with a Daubert exercise, 35 F.3d at 739 & n.4. Nevertheless, the trial court did not abuse its discretion in allowing experts who had provided affidavits to testify at the in limine hearing without first being deposed. Id. at 739. Defendants had submitted the affidavits at least four weeks prior to the hearing so that plaintiffs had ample time to prepare. Plaintiffs were also given ample leeway at the in limine hearing to consult with their experts concerning any new arguments.

b. In re TMI Lit. Cases Consol. II

To prevent this very scenario from occurring, at least one court has prohibited the parties from offering the affidavits of any experts who were not disclosed and made available for deposition, regardless of whether those experts would testify at trial. See In re TMI Lit. Cases Consol. II, 911 F.Supp. at 829.

c. Closing the loophole with the scheduling order

Because the rules of evidence do not apply to the Daubert hearing, parties arguably may offer the testimony of experts who will not testify at trial. To close this loophole, which could effectively prevent a party from cross-examining an opponent's expert on vital issues, the scheduling order should require that all experts whose testimony will be submitted either at trial or in any motion must be disclosed and made available for deposition. As the TMI case illustrates, in certain cases the parties may also want to ask the court to order that any experts whose research or data a party's testifying experts plan to rely on must be disclosed and made available for deposition.

4. Rebuttal experts

In Bowers v. Northern Telecom, Inc., 905 F.Supp. 1004, 1008 (N.D.Fla. 1995), plaintiffs endorsed six rebuttal experts, including two persons whom plaintiffs had previously identified as initial expert witnesses. Defendant moved for summary judgment on the issue of causation, arguing that the opinions of plaintiff's experts on causation failed the Daubert requirement of reliability. Defendant argued that the court should disregard the rebuttal testimony of plaintiffs' experts and limit its consideration to evidence plaintiffs might introduce in their case-in-chief. The court rejected this argument because neither Rule 26 nor the parties' stipulated discovery plan defined "rebuttal expert." The court would not be bound by the label the parties placed on the evidence during discovery, and would not preclude plaintiffs from using this evidence during their case-in-chief. (This ruling, of course, only encourages the unscrupulous to stonewall the disclosure of expert opinions until rebuttal when it becomes difficult if not impossible for the opposing side to rebut the rebuttal.) "[D]ue to the ambiguous use of the term 'rebuttal experts' in the pretrial order, the court cannot find Plaintiffs acted in bad faith by interpreting it differently than [defendant]." Id.

### III. MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment are especially appropriate in connection with the Daubert admissibility hearing. If the court determines that expert testimony is inadmissible, and the proponent of the expert testimony has no other evidence to support one or more of the required elements of its cause of action, summary judgment should be granted. See, e.g., Grimes, 907 F.Supp. at 39. In Shaklee Corp., 31 F.3d 638, the district court granted summary judgment in favor of defendant Shaklee Corp. Plaintiff's experts on causation were unable to testify to a reasonable degree of medical certainty that ethylene oxide (EtO) allegedly present in alfalfa health food tablets produced and distributed by defendant had caused the minor plaintiffs' mental retardation, or even that EtO was present in the tablets. To the contrary, defendant's experts unanimously testified that to a reasonable degree of scientific certainty, based on the facts and scientific methodology appropriate to their respective disciplines, the parents' ingestion of the Shaklee alfalfa tablets could not have caused their children's mental retardation. See Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996) (plaintiff's sole causation expert witness disallowed and summary judgment granted for defendant); Porter v. Whitehall Labs., Inc., 9 F.3d 607 (7th Cir. 1993) (summary judgment granted in favor of defendant pharmaceutical companies when plaintiff's causation expert disallowed under Daubert analysis).

#### A. Summary Judgments Involving Expert Testimony Must Demonstrate That The Expert Opinion Meets All Of The Daubert Criteria.

A party moving for or opposing summary judgment on the basis of expert testimony must demonstrate through deposition testimony, affidavits, or otherwise that the expert opinion meets all of the Daubert criteria. That is to say, the party must adduce facts demonstrating that the expert is (or is not) qualified to render the opinion, that the opinion is (or is not) reliable (i.e., based on scientific methodology), and that the opinion is (or is not) relevant (i.e., the opinion will help the trier of fact determine a disputed fact in the particular case). See Dukes v. Illinois Central R.R. Co., No. 94 C 4134, 1996 U.S. Dist. LEXIS 3362, at \*7-8, \*16-38 (N.D.Ill. Mar. 20, 1996). "Qualifications alone are insufficient to satisfy the rule's requirements if the expert's testimony is based on unreliable methodology or if it cannot reliably be applied to the

facts in issue." Grimes, 907 F.Supp. at 34-35 (citing Daubert, 43 F.3d at 1319)).

B. Parties Engaged In Summary Judgment Practice Should Comply Strictly With The Requirements Of Fed.R.Civ.P. 56(e)

The cases reflect a number of instances where parties have lost summary judgment motions because they failed to comply with Rule 56(e), which requires "experts to set forth facts and explain the reasoning they used in reaching their conclusions rather than simply providing naked conclusions." Zarecki v. National R.R. Passenger Corp., No. 95 C 1075, 1996 U.S. Dist. 798, at \*21 (N.D.Ill. Jan. 26, 1996). See Rosen v. CIBA-GEIGY Corp., No. 95-3064, 1996 U.S. App. LEXIS 4285, at \*7 (7th Cir. Mar. 11, 1996) (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bk., 877 F.2d 1333, 1339 (7th Cir. 1989)).

In Zarecki, the plaintiff submitted a nine-paragraph affidavit from her treating physician in support of her motion for summary judgment. Plaintiff brought an FELA claim against her employer, Amtrak, alleging that Amtrak's negligence in failing to provide her with proper equipment resulted in her developing carpal tunnel syndrome. The affidavit stated that the doctor had been retained as an expert, was board certified in orthopedic surgery in Illinois, and had examined plaintiff and had reviewed her medical records. The doctor then opined as follows:

It is my opinion based upon a reasonable degree of medical certainty that the Bilateral Carpal Tunnel Syndrome sustained by [plaintiff], was caused by her work duties as assigned by the Defendant [].

It is also my opinion that the nature of the work duties at the Defendant [] was such that it was reasonably foreseeable that [plaintiff], could sustain Bilateral Carpal Tunnel Syndrome in her hands or wrist or sustain some other hand/wrist injury.

Zarecki, 1996 U.S. Dist. LEXIS 798, at \*6-7. While this affidavit might be sufficient in some state courts, the federal courts have made clear that conclusory affidavits without setting forth an adequate foundation for the conclusions reached do not comply

with Rule 56(e) and will not suffice for a Daubert review in the context of a summary judgment proceeding. "Rule 56(e) . . . provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence. They shall 'set forth facts' and by implication in the case of experts (who are not 'fact witnesses') a process of reasoning beginning with a firm foundation." Mid-State Fertilizer Co., 877 F.2d at 1339. "[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." Id.

The Zarecki court made the following pertinent observations:

Dr. Farrell's affidavit does just that gives a bottom line opinion, but provides no explanation of the facts or reasoning used in formulating that opinion. He merely states that his conclusion is based on his examination of Zarecki, her medical records, and his professional experience. The Court is left in the dark as to what facts he derived from Zarecki's examination and medical records, or the reasoning used to conclude that Zarecki's work duties caused her injury. . . .

Moreover, Dr. Farrell's affidavit, even if deemed admissible, does not indicate that Zarecki's equipment or her manner of using that equipment was unsafe; rather, he only claims that her condition was caused by her job activities. Zarecki attempts to use this affidavit to prove that Amtrak somehow breached its duty, but causation does not equal breach, they are separate elements each of which must be proven.

Zarecki, at \*22-23 (footnote omitted).

#### IV. MEDICAL EVIDENCE: RECENT CASES

##### A. Is The Medical Expert Qualified?

Under FRE 702, the proffered witness must be an expert. In Holbrook, 1996 U.S. App. LEXIS 5354, the Third Circuit reversed the trial court's disqualification of the plaintiff's treating

physician to testify as an expert concerning the physician's diagnosis of mesothelioma. The trial court reasoned that the doctor was not qualified to make such a diagnosis because he was not an oncologist, but an internist. The physician had made his diagnosis in reliance on a pathology report analyzing a tissue sample from the plaintiff's lungs. The physician relied on this report in treating the plaintiff. The court of appeals found that the trial court had abused its discretion in disallowing the proposed expert because he did not have the specialization the trial court deemed most appropriate or best in the circumstances. The appellate court added that opinions by doctors who have neither examined nor treated a patient have less probative force than they would have if they had examined or treated the patient. Holbrook, at \*3 (citing Paoli, 35 F.3d at 762).

In Muzzey v. Kerr-McGee Chemical Corp., No. 93 C 3623, 1996 U.S. Dist. LEXIS 3746 (N.D.Ill. Mar. 26, 1996), defendants moved to bar several doctors that the plaintiff had designated as experts. Plaintiff alleged that she had a disease called polycythemia vera (PV) as the result of exposure to thorium tailings dumped in a park in Chicago. Dr. Harry Demopoulos did not provide his credentials to the court, but from his deposition, the court gleaned that he was an associate professor at NYU but did not teach classes or conduct research there. He conducted no research on PV, never acted as a primary care physician for a person with PV, and outside of the case, had never been asked to provide an expert opinion about PV. Dr. Demopoulos was not an expert in hematology. Dr. Edward Radford was an environmental epidemiologist, but he, too, had no expertise in hematology. He had not treated a patient in over 40 years. The court also noted that the Ohio Court of Appeals had ruled in another case that Dr. Radford was not qualified to give competent medical testimony. The court found that both Drs. Demopoulos and Radford were unqualified to testify that plaintiff had PV because neither of them was a hematologist.

The district court in Dukes v. Illinois Central R.R. Co., No. 94 C 4134, 1996 U.S. Dist. LEXIS 3362 (N.D.Ill. Mar. 20, 1996), did not determine whether the plaintiff's expert, a neurosurgeon, had sufficient credentials to testify to a reasonable degree of medical certainty that plaintiff's job caused his carpal tunnel syndrome. Nevertheless, the court noted that the doctor was not an expert on carpal tunnel or the causes of carpal tunnel, and had no experience in the field of ergonomics.

Wettlaufer v. Mt. Hood R.R. Co., No. 95-35016, 1996 U.S. App. LEXIS 4776 (9th Cir. Jan. 8, 1996), involved a claim by a railroad passenger that the sudden braking of the train when the engine decoupled from the passenger cars caused multiple injuries, including thoracic outlet compression. The railroad's expert was a biomechanical engineer who reconstructed the accident. Based upon the accident reconstruction and his reading up on the causes of thoracic outlet syndrome, the expert concluded that the kind of impact in the accident was not consistent with the plaintiff's thoracic outlet syndrome. The court of appeals held that the trial court erred in admitting this testimony because the expert's qualifications in mechanical and biomechanical engineering and accident reconstruction did not, in themselves, qualify him to testify about what forces could produce thoracic outlet syndrome. The district court should have determined whether there was any valid scientific connection between biomechanical engineering and the expert's testimony on what forces could cause thoracic outlet syndrome. The 9th Circuit concluded, however, that because the jury had not found in favor of the plaintiff on any of the other alleged physical injuries he had sustained as a result of the accident, the trial court's admission of the expert testimony was harmless error.

B. Is The Medical Testimony Reliable?

1. Factors supporting the reliability of medical evidence:
  - a. The expert was the plaintiff's treating physician. Holbrook, at \*12-13.
  - b. The expert examined the plaintiff. Joiner, at \*12-13; Wilson v. Petroleum Wholesale, Inc., 904 F.Supp. 1188, 1190 (D.Colo. 1995).
  - c. The expert reviewed the plaintiff's medical records. Joiner, at \*13; Wilson, 904 F.Supp. at 1190.

d. The expert took the plaintiff's medical history. Joiner, at \*13-14; Wilson, 904 F.Supp. at 1190.

e. The expert performed objective tests. Joiner, at \*13; Wilson, 904 F.Supp. at 1190.

f. The expert studied peer reviewed literature. Joiner, at \*13, 15; Liriano, at \*8 n.1.

g. The expert read all the depositions in the case. Joiner, at \*14, \*15.

h. The expert used traditional medical assessment technology. Joiner, at \*13, 16.

i. The expert performed differential diagnosis. Wilson, 904 F.Supp. at 1190.

j. The expert looked for and ruled out possible alternative causes. Holbrook, at \*24; Joiner, at \*15.

k. The expert developed a working diagnosis. Wilson, 904 F.Supp. at 1190.

l. The expert considered a diagnosis in light of current scientific theory, including a consideration of all materials concerning the final diagnosis and course of treatment. Wilson, 904 F.Supp. at 1190.

2. Factors that do not support the reliability of an expert's opinion:

a. The expert was not the treating physician.

b. The expert did not personally examine the plaintiff. Muzzey, at \*33.

c. The expert had no prior familiarity with the plaintiff's injury or illness until becoming involved in the litigation.

d. The expert's theory or technique has not been published or otherwise subjected to any peer review. Dukes, at \*34-35.

e. The expert's theory or technique was not generally accepted in the relevant scientific or technical community. Dukes, at \*23; Williamson v. Reynolds, 904 F.Supp. 1529 (E.D.Okla. 1995) (hair evidence); Summers, 897 F.Supp. at 538 (multichemical sensitivity).

f. The studies upon which the expert relied were too small or inconclusive to draw any statistically significant results.

g. The expert was unable to testify to a reasonable degree of medical or scientific certainty. Holbrook, at \*21-23; Paoli, 35 F.3d at 750-52 (Pennsylvania rule requiring testimony to reasonable degree of medical certainty was substantive and, therefore, under Hanna v. Plumer, was binding on federal court instead of FRE where Pennsylvania law supplied the rule of decision).

h. The expert testified that an alleged cause was merely "possible" rather than "probable." Holbrook, at

\*22-23; Daubert, 43 F.3d at 1322.

i. The expert was unable or failed to provide any experimental, statistical, or other scientific data from which a causal relationship might be inferred or which might be used to test a hypothesis based on the theory espoused by the expert. Zarecki, at \*19-20; Dukes, at \*23-31 (instructive examination of expert witness at deposition set out in text of case); Grimes, 907 F.Supp. at 38.

j. The expert did not independently diagnose the plaintiff. Muzzey, at \*8.

k. The expert conducted no research on the subject matter of his or her testimony outside of the litigation. Muzzey, at \*27; Dukes, at \*31, \*34.

l. The expert relied on anecdotal evidence as the basis for establishing the existence of causation. Muzzey, at \*26; Grimes, 907 F.Supp. at 35 n.2.

m. The expert formed the opinion first and then searched for facts to support it. Muzzey, at \*29.

n. The theory or technique the expert used was not grounded in scientific knowledge. Muzzey, at \*29; Zarecki, at \*20.

o. The expert's conclusions were based on subjective observations (sometimes referred to as "eyeballing the data"). Rosen, at \*9-11; Dukes, at \*31; O'Connor v. Commonwealth

Edison Co., 137 F.3d 1090, 1106-07 (7th Cir. 1994); Pomella, 899 F.Supp. at 343.

p. The expert never the saw the actual results of a test, but only a summary or report based on the test. Muzzey, at \*35.

q. The expert relied on faulty, unreliable, or inaccurate data. Muzzey, at \*13-15, \*28.

r. The expert stated without pointing to any authoritative sources that a fact or theory was generally accepted in the scientific or technical community. Dukes, at \*35; Grimes, 907 F.Supp. at 38.

3. Some matters on which the courts are still divided regarding reliability:

a. Animal studies  
Joiner, \*18; \*38-42 (Smith, J., dissenting); Paoli, 35 F.3d at 781.

b. Epidemiological studies  
Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (4th Cir. 1995); Daubert, 43 F.3d at 1320-22; Sorenson, 31 F.3d at 643 & n.8; Muzzey, at \*25-26; Joiner, at \*43-46 (Smith, J., dissenting); TMI, 911 F.Supp. at 817-19.

C. Is The Medical Testimony Relevant?

Relevance asks whether the proposed expert testimony will assist the trier of fact in deciding a disputed issue. Courts have found that purported "expert" testimony that concerns matters of common sense or common knowledge, or do not involve any scientific or technical knowledge, fail

the Daubert relevance test. Pugh v. LaQuinta Motor Inns, Inc., No. 94-510 Section "N", 1996 U.S. Dist. LEXIS 1402, at \*6 (E.D.La. Feb. 2, 1996); Buckner, at \*8-10.

In most cases, however, the relevance prong of Daubert goes to what is sometimes called "specific causation." See Wade-Greaux v. Whitehall Lab., 874 F.Supp. 1441, 1448 (D.V.I.), aff'd, 467 F.3d 1120 (3d Cir. 1994); Casey v. Ohio Med. Prods., 877 F.Supp. 1380, 1382 (N.D.Cal. 1995). For example, the scientific community may accept the fact that radiation at certain levels over given periods of time causes cancer (general causation). However, to prove that the plaintiff's cancer was caused by radiation requires proof that the plaintiff was exposed to sufficient amounts of radiation for an adequate period of time (specific causation). Muzzey, at \*30-31; Joiner, at \*21-25; Zarecki, at \*23; Grimes, 907 F.Supp. at 37; Gier by and through Gier v. Educational Serv. Unit No. 16, 66 F.3d 940, 944 (8th Cir. 1995). Specific causation may also require proof that other factors did not cause the plaintiff's cancer (e.g., smoking).

A plaintiff in a products liability action must demonstrate that even if the product's design was defective and no warning was given of the defect, the defective design or absence of a warning was a substantial factor in causing the plaintiff's injury or illness. Similarly, proof that certain dosages or concentrations of chemicals cause harm is insufficient to prove that a plaintiff's injury or illness was caused by that chemical in the absence of any evidence that the plaintiff was exposed to the chemical at the required levels.

#### IV. RULE 403: THE FINAL SAFEGUARD

Proffered expert testimony may pass Daubert's requirements of reliability and relevance, only to fail the FRE 403 requirement that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. U.S. v.

Sinclair, 74 F.3d at 757-58; Sanchez v. KPMG Peat Marwick, No. CIV 93-0406, 1996 U.S. Dist. LEXIS 2773, at \*12-13 (D.N.M. Jan. 8, 1996); Pettigrew, at \*25-26; TMI, 911 F.Supp. at 819-20.

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