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CHAPTER 8

Has Expert Been as Careful as in Regular Professional Work Outside Paid Litigation Consulting?

Methodology

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Methodology

Daubert requires the district court, as gatekeeper, to determine, in part, the reliability of the proffered expert testimony. Critical to reliability is the issue of whether the expert is being as careful in her expert work and testimony as she would be in the course of her regular professional work. Stated another way, has the expert supported her position in the manner reasonably expected of an expert who, outside the court, adheres to the standards of "intellectual rigor" demanded by her profession? The nature of the "same intellectual rigor" standard also allows for its seamless use when faced with experts outside the scientific arena. Expert testimony in a wide range of specialized areas can be challenged where the opinions are developed in a manner that fails to satisfy the methodology demanded by the expert's profession. For a detailed analysis of this test and its potential going forward, *see* J. Brook Lathram, *The "Same Intellectual Rigor" Test Provides an Effective Method for Determining the Reliability of All Expert Testimony, Without Regard to Whether the Testimony Comprises "Scientific Knowledge" or "Technical or Other Specialized Knowledge,"* 28 U. Mem. L. Rev. 1053 (1998).

The Seventh Circuit was the first federal court to articulate this so-called "same intellectual rigor" standard. In *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996), Chief Judge Posner interpreted *Daubert* as requiring the district court to determine whether proposed expert evidence is "genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* Consequently, the district court must "make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work." *Id.* If the scientists adhere to the same intellectual rigor, the proffered evidence—to the extent it is relevant—is admissible "even if the particular methods [the experts] have used in arriving at their opinions are not yet accepted as canonical in their branch of the scientific community." *Id.* If the experts do not adhere to that same intellectual rigor, the proffered evidence is inadmissible "no matter how imposing their credentials." *Id.* at 318–19.

U.S. Supreme Court

Kumho Tire Co. v. Carmichael
526 U.S. 137 (1999)

Factual Summary

Plaintiffs brought a products liability action against a tire manufacturer and tire distributor for injuries sustained when the right rear tire on their vehicle failed. The expert proffered testimony on the causes of the tire failure based upon a two-factor test and the related use of visual/tactile inspection. The district court excluded the testimony as unreliable. The Eleventh Circuit reversed. The Supreme Court reversed the Eleventh Circuit, holding that the district court had not abused its discretion in excluding the testimony.

Key Language

- The objective of *Daubert*'s gatekeeping requirement ensures "the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." 526 U.S. at 152. The Court did not cite to the Seventh Circuit's opinion in *Rosen*.

First Circuit

SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.
188 F.3d 11 (1st Cir. 1999)

Factual Summary

Plaintiff brought an antitrust action against a computer manufacturer, alleging that integrated extended warranties created a monopoly in the aftermarket computer repair business. Plaintiff's expert opined that the manufacturer had a much greater share of the service aftermarket than it should, given low customer satisfaction. The district court granted the manufacturer summary disposition and the First Circuit affirmed.

Key Language

- "Dr. Bleuel's conclusion may or may not be correct, but an expert must vouchsafe the reliability of the data on which he relies and explain how the cumula-

tion of that data was consistent with standards of the expert's profession." 188 F.3d at 25.
- "Not only did Dr. Bleuel fail to discuss in his report the nature of the data and its meaning, but he failed to explain whether the information-gathering technique used in the DEC documents was valid, whether the data was sufficiently representative to permit him to draw any relevant conclusions, and whether the sampling methodology used to compile these documents corresponded to methods that might be considered legitimate in his discipline. Expert testimony that offers only a bare conclusion is insufficient to prove the expert's point." *Id.* at 25.

Second Circuit

Nimely v. City of N.Y., N.Y. City Police Dep't
414 F.3d 381 (2d Cir. 2005)

Factual Summary
Plaintiff brought a civil rights action against a municipality and police department after he was shot during a police chase. There was a dispute in the case as to whether Plaintiff was shot in the front or the back. The municipality called a forensic pathology expert, who testified that he believed the police officers' accounts of the incident were true and proffered an explanation for factual discrepancies between the officers' testimony and medical evidence. The jury found in favor of Defendants. The Second Circuit reversed. The forensic pathologist's testimony was a central issue on appeal.

Key Language
- "[W]hether a witness's area of expertise was technical, scientific, or more generally 'experience-based,' Rule 702 required the district court to fulfill the 'gatekeeping' function of 'mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 414 F.3d at 396.
- "When an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable expert testimony." *Id.* at 396–97.
- "[The expert's] 'methodology' could not even begin to satisfy any of *Daubert*'s criteria for assessing the scientific reliability of an opinion…." *Id.* at 399.

Zaremba v. Gen. Motors Corp.
360 F.3d 355 (2d Cir. 2004)

Factual Summary
Plaintiff brought a products liability action against an automobile manufacturer for injuries sustained during a collision. Plaintiff's engineering expert was to testify as to a safer alternative design, and Plaintiff's biomechanic was expected to testify that Plaintiffs' injuries would not have been as serious had the automobile manufacturer incorporated the alternative design. The district court excluded the testimony of both experts as unreliable and the Second Circuit affirmed. The engineer's testimony was the central issue on appeal.

Key Language
- "The objective of the 'gatekeeping' requirement of *Daubert* and Rule 702 is 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 360 F.3d at 358.
- "Numerous courts have excluded expert testimony regarding a safer alternative design where the expert failed to create drawings or models or administer tests." *Id.*
- "*Daubert* and Rule 702 require that [the engineer's] testimony be reliable. In the absence of drawings, models, calculations, or tests, it was not manifest error for the District Court to find that [the expert's] testimony was insufficiently reliable." *Id.* at 359.

Amorgianos v. Nat'l R.R. Passenger Corp.
303 F.3d 256 (2d Cir. 2002)

Factual Summary
Plaintiff brought a products liability action to recover damages for injuries allegedly sustained as a result of workplace exposure to organic solvents. Plaintiff sought to introduce expert testimony establishing that solvent exposure caused Plaintiff's neurological condition. The district court excluded the experts' testimony and the Second Circuit affirmed.

Key Language
- "In short, the district court must 'make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 303 F.3d at 255–56.

- "The flexible *Daubert* inquiry gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact. To warrant admissibility, however, it is critical that an expert's analysis be reliable at every step." *Id.* at 267.
- Plaintiff's industrial hygienist testified about variables used in determining exposure to a toxic solvent, but the expert failed to include those variables in his calculations with respect to Plaintiff's exposure. "Because Caravanos's opinion rested on a faulty assumption due to his failure to apply his stated methodology 'reliably to the facts of the case,' Caravanos's expert opinion regarding the xylene concentration to which [Plaintiff] was exposed was not based on 'good grounds.' Accordingly, the district court's exclusion of Caravanos's testimony… was not an abuse of discretion." *Id.* at 269.

Third Circuit

Elcock v. Kmart Corp.

233 F.3d 734 (3d Cir. 2000)

Factual Summary

Plaintiff brought a premises liability action against a retailer to recover for injuries allegedly sustained when she fell in the store. Plaintiff proffered a vocational rehabilitation expert whose opinions substantially informed the large trial award for loss of future earnings and earning capacity. The district court allowed the expert to testify at trial and did not conduct a *Daubert* analysis. Acknowledging that the trial court did not have benefit of the *Kumho Tire* decision at the time of trial, the Third Circuit reversed.

Key Language

- "*Daubert*'s gatekeeping requirement… make[s] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field…. [T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." 233 F.3d at 746.
- "[B]ecause Copemann never explained his method in rigorous detail, it would have been nearly impossible for Kmart's experts to repeat Copemann's apparently subjective methods, or, in the nomenclature of *Paoli II*, to find that his "method consists of a testable hypothesis" for which there are "standards controlling the technique's operation." *Id.* at 747.
- "Each approach, taken in isolation, may very well contain sufficient analytical rigor to be deemed reliable. However, we are inclined to view Copemann's admittedly novel synthesis of the two methodologies as nothing more than a hodgepodge of the Fields and Gamboa approaches, permitting Copemann to offer a subjective judgment about the extent of Elcock's vocational disability in the guise of a reliable expert opinion." *Id.*

Fourth Circuit

Marsh v. W.R. Grace & Co.

80 F. App'x 883 (4th Cir. 2003)

Factual Summary

Plaintiff brought a products liability action against a fertilizer manufacturer, alleging that the fertilizer caused decedent's cancer and subsequent death. Plaintiff sought to rely on expert testimony from a medical doctor with specialized experience in pathology and immunology. The district court found that the expert's methods and logic used to reach his opinion as to causation were unreliable under *Daubert*. Absent this testimony, there was no genuine issue as to causation, and the district court granted Defendants' motion for summary judgment. The Fourth Circuit affirmed.

Key Language

- "[W]e find sufficient support for the district court's determination that Dr. Levin's methods are not generally accepted by the medical community, the final *Daubert* factor. While the plaintiffs argue that Dr. Levin relies on a methodology used by other immunologists and cite a portion of an article in the *Journal of the American Medical Association* in support of that contention, the article only supports Dr. Levin's proposition that population studies are not determinative. While potentially true, the district court, supported by the record, found that Dr. Levin did not demonstrate that his methods used in this case are also used by experts in his field." 80 F. App'x at 888.

Cooper v. Smith & Nephew, Inc.

259 F.3d 194 (4th Cir. 2001)

Factual Summary

Plaintiff brought a products liability action against a screw manufacturer, alleging that a defective screw in his back was responsible for failed back surgeries and resulting complications. Plaintiff sought to introduce expert testimony regarding causation based upon a differential diagnosis. The expert did not physically examine Plaintiff and did not speak with any of Plaintiff's treating physicians. The district court excluded the expert's testimony and the Fourth Circuit affirmed.

Key Language

- Noting that the expert had not conducted a physical examination, the court opined that "[i]n certain circumstances, a physician may reach a reliable differential diagnosis without personally performing a physical examination." 259 F.3d at 203.
- "[T]he purpose of Rule 702's gatekeeping function is to 'make certain that an expert… employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id*.
- Dr. Mitchell's admission that his evaluation was "not consistent with the diagnostic methodology he employs in his own medical practice" because "[w]ith his own patients, Dr. Mitchell insists upon a physical examination…. Dr. Mitchell had access to [Plaintiff], and yet, for purposes of this litigation, chose to deviate from his traditional method of evaluation. By itself, Dr. Mitchell's failure to conduct a physical examination may not be grounds to exclude his methodology as unreliable. However, the fact that Dr. Mitchell did not employ in the courtroom the same methods that he employs in his own practice provides further support for the district court's ultimate conclusion that his testimony was unreliable." *Id.*

Fifth Circuit

Wells v. SmithKline Beecham Corp.

601 F.3d 375 (5th Cir. 2010)

Factual Summary

Plaintiff brought a products liability action a drug manufacturer alleging that the manufacturer failed to warn that drug use could lead to compulsive gambling, resulting in a $10 million dollar gambling loss. Plaintiffs introduced opinions from three causation experts who linked the drug to pathological gambling. The district court granted summary disposition for the manufacturer, ruling the experts did not support Plaintiff's claim with scientifically reliable evidence of causation. The Fifth Circuit affirmed.

Key Language

- "*Daubert* requires admissible expert testimony to be both reliable and relevant. 'This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.' Although there are 'no certainties in science,' the expert must present conclusions "ground[ed] in the methods and procedures of science.' In short, the expert must 'employ[ ] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 601 F.3d at 378.
- "We explained that the expert's testimony did "not bear the necessary indicia of intellectual rigor.' While 'association' was well established, 'experts have recognized that the evidence that trauma actually causes fibromyalgia is insufficient to establish causal relationships.'" *Id.* at 379.

Burleson v. Tex. Dep't of Criminal Justice

393 F.3d 577 (5th Cir. 2004)

Factual Summary

Plaintiff, a prison inmate, brought a civil rights action against prison officials, alleging they exposed him to hazardous conditions while he was working as a welder in the prison's stainless steel plant. The district court granted Defendants' motion for summary judgment. On appeal, Plaintiff challenged the district court's decision to exclude the testimony of his proffered expert, a toxicologist. The Fifth Circuit affirmed.

Key Language

- "The district court's responsibility 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 393 F.3d at 584.
- "A court may rightfully exclude expert testimony where a court finds that an expert has extrapolated data, and there is 'too great an analytical gap between the data and the opinion proffered.'" *Id.* at 587.
- "Here, the magistrate judge found that Dr. Carson's opinion was based on speculation, guesswork, and conjecture to support his theory…. Based on the evidence in the record and the arguments before the court,… the magistrate judge did not commit revers-

ible error in finding Dr. Carson's testimony unreliable." *Id.*

Black v. Food Lion, Inc.
171 F.3d 308 (5th Cir. 1999)

Factual Summary
Plaintiff brought a premises liability action against a grocery store after she slipped on some mayonnaise and sustained a back injury. Plaintiff was subsequently diagnosed with fibromyalgia and Plaintiff's expert hypothesized that the fall caused physical changes, resulting in hormonal changes that caused the fibromyalgia. The district court admitted the expert's testimony on causation and the Fifth Circuit reversed.

Key Language
- "The overarching goal of *Daubert*'s gate-keeping requirement 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 171 F.3d at 311.
- Noting that the expert's testimony did not "bear the necessary indicia of intellectual rigor" as measured by the *Daubert* standards, the court held that the district court had abused its discretion by admitting the testimony because the testimony was "unsupported by a specific methodology that could be relied upon in this case" and was "contradicted by the general level of current medical knowledge." *Id.* at 312, 314.

Watkins v. Telsmith, Inc.
121 F.3d 984 (5th Cir. 1997)

Factual Summary
Plaintiff's decedent was killed after a conveyor at a gravel wash plant collapsed when its wire rope snapped. Plaintiff brought a products liability action against a conveyor manufacturer, alleging a defective design caused the conveyor to collapse, killing the decedent. Plaintiff's engineering expert was expected to testify that the conveyor was unsafe and that there were alternative feasible designs. The expert did not make any design drawings and did not conduct any tests of his proposed alternatives. The expert did not analyze the cost of the proposed alternative designs or determine what impact those designs might have had on the conveyor's utility. The district court excluded the expert's testimony, finding it substantially inadequate and the Fifth Circuit affirmed.

Key Language
- Agreeing that the expert had made his assessment of unreasonable dangerousness and proposed his alternative designs "'without… any scientific approach to the proposition at all,'" the Fifth Circuit held that the district court "should ensure that the [expert's] opinion comports with applicable professional standards outside the courtroom and that it 'will have a reliable basis in the knowledge and experience of [the] discipline.'" 121 F.3d at 992–93, 991.

Sixth Circuit

Best v. Lowe's Home Ctrs., Inc.
563 F.3d 171 (6th Cir. 2009)

Factual Summary
Plaintiff brought a premises liability action against a retailer for loss of his sense of smell when pool chemicals spilled onto Plaintiff's clothes and face while shopping. Plaintiff sought to introduce expert testimony from an otolaryngologist and former chemical engineer to establish a causal link between the chemical spill and his injuries. The district court excluded the expert's testimony and granted summary disposition holding that the method employed by the expert on causation represented unscientific speculation. The Sixth Circuit reversed.

Key Language
- "Admissibility under Rule 702 does not require perfect methodology. Rather, the expert must 'employ[ ] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' Dr. Moreno's diagnosis might not stand up to exacting scrutiny if he were testifying as a research scientist or a chemist, but he is neither of those. He performed as a competent, intellectually rigorous treating physician in identifying the most likely cause of Best's injury. Any weaknesses in his methodology will affect the weight that his opinion is given at trial, but not its threshold admissibility." 563 F.3d at 181–82.

Jahn v. Equine Servs., PSC
233 F.3d 382 (6th Cir. 2000)

Factual Summary
Plaintiff brought a veterinary malpractice action against his veterinarians when his pony died following corrective surgery. Cause of death was unknown and a central issue in the case was Plaintiff's experts seek-

ing to introduce opinions concerning possible cause of death. The district court determined that the proposed expert testimony was inadmissible under *Daubert* and granted summary judgment for the veterinarians and the Sixth Circuit reversed.

Key Language

- "[T]o be considered appropriately scientific, [an] expert need not testify to what is 'known to a certainty' but must only state 'an inference or assertion… derived by the scientific method.'… Testimony meets this threshold when 'an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice in the relevant field.'" 233 F.3d at 388.
- "By off-handedly labeling [the expert's conclusions] as a 'guess,' the district court failed to explore whether the proposed testimony was based on 'the same level of intellectual rigor that characterizes the practice' of veterinary medicine." *Id.* at 391.
- "Because the opinions of Dr. Mundy and Dr. Robbins were based on undisputed objective medical facts and because the experts apparently applied a scientifically-based methodology to the limited facts with which they were presented, we believe that the district court abused its discretion in finding them inadmissible… under Rule 702." *Id.* at 392–93.

Seventh Circuit

Am. Honda Motor Co., Inc. v. Allen

600 F.3d 813 (7th Cir. 2010)

Factual Summary

Plaintiff brought a warranty claim against a motorcycle manufacturer concerning alleged problems with the steering assembly. Plaintiff sought class certification and relied upon an expert causation report from a motorcycle engineer that utilized the expert's own standard to establish the permissible amount of steering wobble. The district court did not conclusively rule on the admissibility of this expert testimony prior to certification. The Seventh Circuit reversed, ruling that the district court should have ruled on admissibility of expert opinion evidence prior to certification and further finding the expert's opinions unreliable under *Daubert*.

Key Language

- "The small sample size also highlights the constraints litigation placed upon Ezra's methods and professional judgment; Ezra was not being as thorough as he might otherwise be due to Plaintiffs' reluctance to pay for more testing." 600 F.3d at 818.

Jenkins v. Bartlett

487 F.3d 482 (7th Cir. 2007)

Factual Summary

Plaintiff brought a §1983 action against the police officer who shot her son as he attempted to flee custody. The claim focused on the officer having allegedly violated the decedent's civil rights through the use of excessive force. The police officer relied upon expert testimony from a medical examiner to support his version of the incident facts through reconstruction. Despite repeated efforts by Plaintiff to exclude the expert's opinions, the expert was permitted to testify at trial and the jury returned a verdict for the police officer. The Seventh Circuit affirmed.

Key Language

- "The goal of *Daubert* is to assure that experts employ the same 'intellectual rigor' in their courtroom testimony as would be employed by an expert in the relevant field." 487 F.3d at 489.
- "No attempt was made to show that the absence of these analyses caused Dr. Mainland's investigation to fall below the level of intellectual rigor employed by an expert in the field. For example, although Ms. Jenkins seemed to find it significant that Dr. Mainland could not say whether Officer Bartlett had fired from the ground or from the hood of the car, Ms. Jenkins did not explain how such knowledge, or the lack thereof, would affect the reliability of Dr. Mainland's opinion testimony." *Id.* at 489–90.

Naeem v. McKesson Drug Co.

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

Factual Summary

Plaintiff brought a tort action against her former employer for intentional infliction of emotional distress. Plaintiff's expert testified that the employer failed to follow its human resources policies in dealing with Plaintiff, and the jury entered judgment for Plaintiff. On appeal, the employer argued that Plaintiff did not present sufficient evidence to establish a claim for intentional infliction of emotional distress. The Seventh Circuit affirmed, holding that admission of Plaintiff's expert's testimony was harmless error and affirmed.

Key Language

- "*Daubert*, as extended to all expert testimony including non-scientific expert testimony, requires the dis-

trict court to perform the role of gatekeeper and to 'ensure the reliability and relevancy of expert testimony.'" 444 F.3d at 607.
- "[Professor Anthony's] opinions in court were not tied to specific portions of the [defendant employer's] policy manual, and appeared to be general observations regarding what is normal or usual business practice. As such, his testimony did not meet the requisite level of reliability." *Id.* at 608.

Chapman v. Maytag Corp.
297 F.3d 682 (7th Cir. 2002)

Factual Summary
Plaintiff brought a wrongful death suit against an appliance manufacturer, alleging that her husband was electrocuted by a defective kitchen range. It was undisputed that a wire from the range caused a short circuit, allowing electricity to flow to a metal heating duct touched by the decedent. Defendant's expert testified that, had the range been plugged into a grounded outlet, the circuit breaker would have tripped, stopping the flow of electric current. Defendant's expert concluded that the accident could have been prevented had the outlet been properly grounded. Plaintiff's expert offered an alternative theory as to the cause of the short circuit. The district court admitted Plaintiff's expert's testimony and the Seventh Circuit reversed.

Key Language
- Plaintiff's expert did not conduct any scientific tests or experiments to arrive at his conclusion, did not present any proof that his theory of the short circuit was generally accepted, and had not published any writings or studies about his short circuit theory. "The *Daubert* standard and Rule 702 are designed to ensure that, when expert witnesses testify in court, they adhere to the same standards of intellectual rigor that are demanded in their professional work. [The expert's] testimony simply does not satisfy this standard of reliability." 297 F.3d at 688.

United States v. Conn
297 F.3d 548 (7th Cir. 2002)

Factual Summary
Defendant was convicted of willfully dealing in firearms without a license. Defendant argued that he was a collector of firearms and therefore was not in the business of dealing in firearms without the required license. The government presented expert testimony from the Bureau of Alcohol, Tobacco and Firearms (ATF) that Defendant's stockpile of firearms did not constitute a personal collection. The district court admitted the agent's testimony and the Seventh Circuit affirmed.

Key Language
- In applying *Daubert*, the court stated that "the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary." 297 F.3d at 556.
- "Indeed, we have noted specifically that 'genuine expertise may be based on experience or training,'" and "'[i]n certain fields, experience is the predominant, if not the sole, basis for a great deal of reliable expert testimony.'" *Id.*
- The court noted that, in narcotics cases, "experienced narcotics investigators applied the knowledge gained through years of experience and, essentially, described for the jury what they knew about narcotics dealers. Agent McCart's testimony is based on a similar methodology. He was asked to appraise, on the basis of his past experience and training, the value of the firearms found in Mr. Conn's residence. On this record, we cannot say that the district court abused its discretion in determining that the evidence ought to be allowed." *Id.*

Sheehan v. Daily Racing Form, Inc.
104 F.3d 940 (7th Cir. 1997)

Factual Summary
Plaintiff brought an age discrimination suit following his termination from a horse racing publication. Plaintiff submitted a list of the 17 employees the publication wanted to retain after its Chicago office closed. The list contained, in part, the employees' dates of birth, and Plaintiff presented the testimony of a statistician who opined that the probability that the retention of the employees on the list was uncorrelated with age was less than five percent. The district court found the list and the statistician's testimony insufficient to establish a *prima facie* case of discrimination. The Seventh Circuit affirmed.

Key Language
- The list of 17 names was inadmissible under the *Daubert* standard, "which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting." 104 F.3d at 942.
- The court noted that two employees were left off the list. "Although the expert used standard statistical methods for determining whether there was a sig-

nificant correlation between age and retention for the 17 persons on the list,… the omission of [the two employees] from the sample tested was arbitrary. The expert should at least have indicated the sensitivity of his analysis to these omissions." *Id.*
- "The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age—his equating a simple statistical correlation to a causal relation…—indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation." *Id.*

Eighth Circuit

Bland v. Verizon Wireless, (VAW) L.L.C.
538 F.3d 893 (8th Cir. 2008)

Factual Summary
Plaintiff brought a personal injury accident against a retailer after one of its employees jokingly sprayed compressed air containing freon into Plaintiff's water bottle, allegedly causing asthma. Plaintiff sought to introduce differential diagnosis causation evidence through the testimony of his treating physician. The district court excluded this testimony because the expert's testimony did not satisfy the standards for admission of expert scientific testimony under *Daubert*. The Eighth Circuit affirmed.

Key Language
- "Lacking data regarding (1) what exposure levels would involve an appreciable risk of asthma, and (2) Bland's actual exposure level, the district court then looked for other evidence which would support Dr. Sprince's causation opinion. The court suggested one way in which Dr. Sprince may have been able to buttress her opinion would be offering as evidence any personal experience with treating other patients following a similar exposure to difluoroethane, freon, or freon with difluoroethane. When asked about her personal experience treating other patients with similar exposure, Dr. Sprince admitted she had no such experience." 538 F.3d at 898 (citations omitted).

Group Health Plan, Inc. v. Philip Morris USA, Inc.
344 F.3d 753 (8th Cir. 2003)

Factual Summary
Plaintiff brought a misrepresentation and anti-trust suit action against various tobacco companies seeking to recover increased costs of health care allegedly incurred by their members as a result of tobacco-related illnesses. Plaintiff's expert witness sought to provide testimony regarding the causal link between Defendants' alleged misconduct and Plaintiff's injury. The expert postulated a "counterfactual" world where fewer people would have smoked because Defendants would not have conspired to conceal the truth about smoking or would not have conspired to refrain from developing safer products. The expert utilized "the well-accepted doctrine of attributational-risk theory" to calculate what Plaintiff's health care expenditures would have been in that counterfactual world. The district court excluded the expert's testimony on the grounds that it was speculative, inconsistent, and therefore unreliable. The Eighth Circuit affirmed.

Key Language
- "There is no doubt, in our estimation, that Dr. Harris's expert testimony entails a great deal of speculation, for although his estimations are oriented in real-world examples and data points, his use of them often involves inferences that approach leaps of faith." 344 F.3d at 760.
- "[W]hile the cases are legion that assert that expert testimony is inadmissible when it is based on speculative assumptions, that does not mean that testimony must be excluded if an expert occasionally speculates (which is inevitable). What is required is that when experts 'testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work.'" *Id.* (citations omitted).
- "Dr. Harris's work is thorough, sophisticated, and often well-grounded in the relevant scientific literature. But we are nonetheless unable to conclude that the district court committed clear error of judgment in excluding the testimony, for [certain predictions made by Dr. Harris]… strike us as inspired guesses at best." *Id.*

Ninth Circuit

Boyd v. City & County of San Francisco
576 F.3d 938 (9th Cir. 2009)

Factual Summary
Plaintiffs brought a §1983 action against various municipal defendants after a police officer shot their family member, alleging the officer violated the decedent's civil rights through the use of excessive force. The municipalities relied upon expert testimony from a forensic psychiatrist to suggest that the decedent had been attempting to commit "suicide by cop" and had purpose-

fully drawn police fire to accomplish the suicide. The district court found that the expert's opinions passed muster under *Daubert* and the Ninth Circuit affirmed.

Key Language

- "*Daubert* makes clear that the role of the courts in reviewing proposed expert testimony is to analyze expert testimony in the context of its field to determine if it is acceptable science. 'It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' In this case, the district court was satisfied that Dr. Keram's testimony regarding suicide by cop 'pass[ed] muster.' Based on our review, we agree, and conclude that the district court did not abuse its discretion in admitting Dr. Keram's testimony." 576 F.3d at 946.

Elsayed Mukhtar v. Cal. State Univ., Hayward

299 F.3d 1053 (9th Cir. 2002)

Factual Summary

Plaintiff brought a discrimination action against his university employer, alleging that he was denied tenure on the basis of race. The jury entered a verdict for Plaintiff. The Ninth Circuit vacated and remanded on the grounds that the district court committed a reversible error by admitting the testimony of Plaintiff's racial discrimination expert.

Key Language

- "The trial court's 'special obligation' to determine the relevance and reliability of an expert's testimony… is vital to ensure accurate and unbiased decision-making by the trier of fact…. *Kumho Tire* described the 'importance of *Daubert*'s gatekeeping requirement… to make certain that an expert… employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 299 F.3d at 1063.
- "[T]he district court abdicated its gatekeeping role by failing to make *any* determination that Dr. Wellman's testimony was reliable and, thus, did not fulfill its obligation as set out by *Daubert* and its progeny." *Id.* at 1066.

Tenth Circuit

Mariposa Farms, LLC v. Westfalia-Surge, Inc.

211 F. App'x 760 (10th Cir. 2007)

Factual Summary

Plaintiff brought a product liability action against a manufacturer of cow-milking equipment, claiming the equipment malfunctioned and caused mastitis to spread throughout Plaintiff's herd. Plaintiff's expert opined that the bacteria could not have spread as quickly as it did had the milking equipment not malfunctioned. This testimony went to the jury and the jury found the manufacturer 30 percent at fault. The Tenth Circuit affirmed, holding that the expert's process was sufficiently reliable to support admission of his expert testimony.

Key Language

- "We review the manner in which the district court exercised its *Daubert* 'gatekeeping' role for an abuse of discretion. Under *Daubert*'s reliability prong, 'an inference or assertion must be derived by the scientific method… [and] must be supported by appropriate validation—*i.e.*, "good grounds," based on what is known.' The basis question is whether the expert used 'the methods and procedures of science,' and 'the level of intellectual rigor of the expert in the field.'" 211 F. App'x at 762.
- "In this case, Dr. Corbett's use of a process known as reasoning to the best inference to arrive at his conclusions was sufficiently reliable under *Daubert* and *Kumho*, and the district court did not abuse its discretion in admitting his testimony. Dr. Corbett reviewed the lab reports indicating an unusually rapid spread of mastitis, analyzed Mariposa's management and maintenance of the dairy farm, and used his expertise to deduce that the milking system defect caused the mastitis outbreak. Specifically, he opined that while mastitis could spread in properly-functioning milking machines, the mastitis could not spread so rapidly as it did here unless there was a malfunction." *Id.*

Goebel v. Denver & Rio Grande W. R.R. Co.

346 F.3d 987 (10th Cir. 2003)

Factual Summary

Plaintiff brought a toxic tort case against his railroad employer claiming brain damage from exposure to high elevations and diesel fumes. Plaintiff's expert proffered both general and specific causation opinions, testifying that circumstances in a specific rail tunnel could have and did in fact cause Plaintiff's injury. The expert based his conclusion as to general causation on the scientific literature and his conclusion as to specific causation after examining Plaintiff and performing a

differential diagnosis. The district court admitted the testimony and the Tenth Circuit affirmed.

Key Language

- "Regardless of the specific factors at issue, the purpose of the *Daubert* inquiry is always 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 346 F.3d at 992.
- The appeals court noted that the district court had thoroughly reviewed the articles upon which the expert had relied in forming his opinion. "The [district] court emphasized that '[a]nalyzing each individual article and requiring that each article fully support Dr. Teitelbaum's theory, instead of focusing on the cumulative weight of the evidence, would be overemphasizing [his] conclusions, as opposed to his methodology.'" *Id.* at 993.
- "After a careful review of [Defendant's] arguments, Dr. Teitelbaum's affidavits, the underlying medical literature and the record as a whole, we perceive no basis to conclude that the district court abused its discretion by ruling that Dr. Teitelbaum's opinion [on general causation] was adequately supported by the scientific literature." *Id.* at 994.
- "We now conclude that the district court correctly ruled that Dr. Teitelbaum's differential diagnosis was also reliable because he followed a standard and accepted methodology in arriving at the diagnosis." *Id.* at 999.

Lantec, Inc. v. Novell, Inc.

306 F.3d 1003 (10th Cir. 2002)

Factual Summary

Plaintiffs brought an antitrust and breach of contract action against a software manufacturer, alleging that the manufacturer was illegally forcing them from the market. A key issue was whether Plaintiffs had met their requisite burden of establishing the "relevant market" for purposes of their antitrust claims. Plaintiff's expert provided testimony and opinions concerning the scope of the market at issue. The district court found the expert's testimony unreliable and therefore inadmissible and the Tenth Circuit affirmed.

Key Language

- "'Dr. Beyer did not employ in the courtroom the same level of intellectual rigor that characterizes an expert in the field of economics and industrial organization.'" 306 F.3d at 1025.
- "Specifically, the [district] court stated Dr. Beyer (1) used unreliable data; (2) did not understand computers or the computer market; (3) testified that the relevant market was determined by consumer purchasing patterns but did not conduct or cite surveys revealing consumer preferences; (4) did not calculate the cross-elasticity of demand to determine which products were substitutes; (5) changed his opinion from the opinion he gave in an earlier expert report; and (6) did not address changes in the computer market. Further the district court found portions of Dr. Beyer's testimony were non-technical in nature and would not assist the jury." *Id.*
- Before he was hired by Plaintiffs, Dr. Beyer was seeking a new network operating system. In an effort to make an informed purchase, Dr. Beyer spoke with the technology experts at several other consulting firms in the Washington D.C. area. "In reality, Dr. Beyer attempted to spin anecdotes from a handful of personal conversations with firms in a limited geographic area into evidence of a worldwide product market. These conversations are not sufficient facts or data to support Dr. Beyer's conclusions." *Id.* at 1025–26.

Hollander v. Sandoz Pharms. Corp.

289 F.3d 1193 (10th Cir. 2002)

Factual Summary

Plaintiff brought a products liability action against a drug manufacturer, alleging that a drug caused Plaintiff to suffer a brain hemorrhage shortly after giving birth to her child. The district court excluded Plaintiff's expert causation testimony, finding that (1) the experts could not explain the physiological mechanism by which the drug caused strokes; (2) the case reports relied upon by the experts had been repeatedly rejected as a scientific basis for establishing causation; (3) the fact that the drug belonged to a class of compounds that caused hypertension was not reliable causation evidence because that class has shown a diversity of biological activity; and (4) the animal studies upon which the experts relied were too dissimilar to the instant case. The Tenth Circuit affirmed.

Key Language

- "Regardless of the specific factors at issue, the purpose of the *Daubert* inquiry is always the same: '[t]o make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 289 F.3d at 1205–06.

- "As to each expert, we must assess the grounds that they provide for their opinion that Parlodel cause stroke, asking whether those grounds involve 'the methods and procedures of science,' and the 'level of intellectual rigor of the expert in the field.'" *Id.* at 1206.
- "[[T]he experts] have done the best they could with the available data and the scientific literature…. The data on which they rely might well raise serious concerns in conscientious clinicians seeking to decide whether the benefits of the drug outweigh its risks. However, in deriving their opinions that Parlodel caused Ms. Hollander's stroke from the various sources we have outlined, Drs. Kulig, Iffy, and Jose all make several speculative leaps. As a result, the district court did not abuse its discretion in excluding their testimony under *Daubert*." *Id.* at 1213.

Eleventh Circuit

Kilpatrick v. Breg, Inc.
613 F.3d 1329 (11th Cir. 2010)

Factual Summary
Plaintiff brought a products liability action against a pain pump manufacturer, alleging that administering an anesthetic through the pain pump caused personal injury. Plaintiff proffered a single expert witness on the issue of both general and specific causation, with the expert opining that the use of a pain pump to administer anesthetic directly to the shoulder joint can cause glenohumeral chondrolysis. The district court granted the manufacturer's motion to exclude the expert's testimony and for summary disposition, finding that: (1) the medical literature relied upon did not support general causation; (2) the expert did not consider the background risks; (3) concessions by the expert about the speculative nature of the disease's cause seriously undermined the reliability of his methodology; (4) the differential diagnosis was flawed because it presumed the existence of general causation; and (5) specific causation opinions were improperly based on a temporal relationship. The Eleventh Circuit affirmed.

Key Language
- "'*Daubert* requires that trial courts act as "gatekeepers" to ensure that speculative, unreliable expert testimony does not reach the jury. The trial court must 'make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" 613 F.3d at 1335.
- "Kilpatrick is correct that differential diagnosis itself has been recognized as a valid and reliable methodology. But that is not the issue about which the district court found fault. Rather, the district court found that Dr. Poehling's application of this methodology was flawed. In order to correctly apply this methodology, Dr. Poehling must have compiled a comprehensive list of potential causes of Kilpatrick's injury and must have explained why potential alternative causes were ruled out. However, Dr. Poehling only ruled out two causes—thermal energy and gentian violet contrast dye. He clearly testified that he could not explain why potentially unknown, or idiopathic alternative causes were not ruled out. Dr. Poehling also admitted that neither he nor anyone else in the medical community 'understands the physiological process by which [chondrolysis] develops and what factors cause the process to occur.' Thus, the key foundation for applying differential diagnosis was missing, and based on these deficiencies, the district court found that Dr. Poehling failed to apply the differential diagnosis methodology reliably. *Id.* at 1343.

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.
326 F.3d 1333 (11th Cir. 2003)

Factual Summary
Plaintiff brought a breach of contract action against an engine component supplier alleging that the supplier's engine noise reduction was defective and caused impermissible performance losses. Defendant's expert offered testimony that the performance losses were mainly due to problems with Plaintiff's own equipment and based his testimony on a scientific discipline that uses computer models to measure fluid dynamics. The district court admitted the expert's testimony over Plaintiff's objection that the expert had incorrectly applied the scientific discipline in this case. The Eleventh Circuit affirmed.

Key Language
- "'[T]he application and the use of this kind of software is fairly widespread in the aviation industry. And it's been used and applied in applications which are very analogous to the case we have before us.'" 326 F.3d at 1343.
- "[Plaintiff] does not argue that it is improper to conduct a CFD study using the sorts of aerodynamic data that Frank employed, but rather that the specific numbers that Frank used were wrong. Thus,

the alleged flaws in Frank's analysis are of a character that impugns the accuracy of his results, not the general scientific validity of his methods. The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." *Id.* at 1345.

- "Because Frank's methods and results were discernible and rooted in real science—*i.e.*, were 'intellectual[ly] rigor[ous],'—they were empirically testable. As such, they were subject to effective cross-examination and, indeed, were questioned vigorously by Quiet. Accordingly, this is not a case where the jury was likely to be swayed by facially authoritative but substantively unsound, unassailable expert evidence. Under these circumstances, we cannot say that the district court abused its discretion, *i.e.*, committed manifest error, in allowing the presentation of this evidence to the jury." *Id.* at 1346.