CHAPTER 1

Expert's Concept

Has It Been Subjected to Peer Review and Publication?

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First Circuit

Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.

161 F.3d 77 (1st Cir. 1998)

Factual Summary

Plaintiff-Driver and his family were killed when driver attempted to pass slow-moving tractor-trailer; Plaintiffs' vehicle struck oncoming tractor-trailer head-on in left lane. Defendants argued that Plaintiff-Driver's reckless passing maneuver "in the face of obvious danger" was the cause of the accident. An autopsy report revealed the presence of cocaine and cocaine metabolites in Plaintiff-Driver's bloodstream. The district court precluded Defendants' expert pharmacologist from testifying to the significance of the autopsy report, namely that Plaintiff-Driver snorted 200 mg of cocaine within an hour of the accident and that his cocaine consumption impaired his ability to drive. Reversing the district court's *Daubert* ruling, the First Circuit held that the district court improperly deemed the pharmacologist's methodology unreliable simply because the scientific writings in support of his methodology were never published or subjected to peer review.

Key Language

- "[The] secondary sources cited by Dr. O'Donnell lack publication and peer review… but this circumstance does not make such sources *per se* unacceptable. Under ordinary circumstances, an unpublished, unreviewed work, standing alone, probably would be insufficient to demonstrate the reliability of a scientific technique. But when such an article makes the same point as published, peer-reviewed pieces, it tends to strengthen the assessment of reliability." 161 F.3d at 84 (citing *Daubert* at 593 (explaining that neither publication nor peer review is "a *sine qua non* of admissibility")).
- Plaintiffs also argued that the reliability of the pharmacologist's dosage opinion was fatally undermined by virtue of existing scientific literature casting doubt on the pharmacologist's opinion. The court rejected Plaintiffs' argument: "We think that the plaintiffs (and the district court) set the bar too high…. [N]o single factor disposes of a reliability inquiry." *Id.* at 85.
- "*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct. As long as an expert's scientific testimony rest upon 'good grounds, based on what is known,' it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *Id.* (citing *Daubert*, 509 U.S. at 590, 596).
- "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." *Id.*

United States ex rel. Loughren v. UnumProvident Corp.

604 F. Supp. 2d 259 (D. Mass. 2009)

Factual Summary

Whistleblower plaintiff brought qui tam action against UnumProvident Corporation and Genex Services, Inc. alleging violations of the False Claims Act. Plaintiff proposed to submit expert testimony in which the expert used statistical techniques to extrapolate the number of false claims within a sample of claims to estimate the total number of false claims filed. Unum moved to exclude the testimony under Fed. R. Evid. 702. After hearing, and two rounds of briefing, the court granted Defendants' *Daubert* motion.

Key Language

- "Despite the fact that it is the plaintiff's burden to establish that [the expert's] testimony is reliable, neither [the expert's] expert report, nor his supplemental expert report, nor his second supplemental expert report cite to any texts or articles that support the reliability of using his method of extrapolation from overlapping cohorts." 604 F. Supp. 2d at 266.
- "At the hearing, [the expert] failed to cite any peer-reviewed literature to support his novel approach to overlapping cohorts. Only after the Court discommoded the plaintiff at the hearing with a request for publications referencing the use of overlapping samples did the plaintiff provide any peer-reviewed literature, necessary for the Court to evaluate such well-established factors as whether the technique has

been subject to peer review and publication and the level of the technique's acceptance within the relevant discipline." *Id.*
- "These articles with pages of incomprehensible formulae were provided without further explanation or citations to relevant sections, leaving the Court to decipher their complex hieroglyphics on its own without a statistical Rosetta stone. Despite having the burden to persuade the Court of the reliability of [the expert's] method, the plaintiff failed to highlight any portions of the articles supporting [the expert's] method of using weighted averages to account for the overlapping nature of the cohorts, and the Court was unable to find any such support on its own." *Id.*

United States v. Monteiro

407 F. Supp. 2d 351 (D. Mass. 2006)

Factual Summary

Defendants sought to exclude expert testimony of a Massachusetts state police sergeant who performed toolmark examinations on cartridge casings found at the scene of a shooting. Defendants argued that the sergeant's testimony was inadmissible under *Daubert* because he did not follow established standards with respect to documentation and peer review of his testimony regarding toolmark identification. The court held that the government had two weeks to review and verify the sergeant's testimony or it would be inadmissible under Rule 702.

Key Language

- The government offered the testimony of Special Agent Curtis who indicated that it was standard procedure in the field to have a second examiner independently review the findings of the first examiner, something that Sergeant Weddleton failed to offer any evidence of having done. "Moreover, the definitive treatise in the field indicates that a second examiner must review the first examiner's work and conclusions." 407 F. Supp. 2d at 369.
- The court held that, until the sergeant's work had been peer reviewed and his conclusions verified his testimony would be inadmissible under Rule 702. But, "[r]eview and verification of Sgt. Weddleton's results by a second qualified examiner, and proper documentation of the results of both that review and Sgt. Weddleton's original review, will render Sgt. Weddleton's testimony admissible under Rule 702." *Id.* at 374.

Pugliano v. United States

315 F. Supp. 2d 197 (D. Conn. 2004)

Factual Summary

Inmates brought lawsuit claiming that they did not obtain a fair trial because the makeup of the jury did not represent a fair cross-section of the community. Petitioners sought to rely upon a social psychologist who opined that a racially and ethnically heterogeneous jury is less likely to convict a criminal defendant, regardless of his or her race. The Court excluded the opinion because it was unreliable under *Daubert*.

Key Language

- "[The expert] obtained the data to formulate his opinion from thirty-three published professional studies. But [he] does not quote from or discuss the studies. He merely provides cursory conclusions reached in some of the research on which he claims to have relied." 315 F. Supp. 2d at 200.
- "Given the paucity of detail the court is unable to make the findings required by Rule 702 and determine if the research is a reliable and valid foundation for his conclusions. This is so even where, as here, the expert believes such details are not necessary because he feels confident in representing the findings to the court." *Id.* (citations omitted).

Carballo Rodriguez v. Clark Equip. Co.

147 F. Supp. 2d 81 (D. P.R. 2001)

Factual Summary

Plaintiffs sued crane manufacturer for injuries suffered when a load was dropped from the crane onto the workers. Plaintiffs claimed, based upon the expert's proffered testimony, that the hoist brake mechanism was defective due to the risk of false positive latching. The expert's testimony was admissible despite the lack of peer review, because such practical knowledge did not lend itself to such review.

Key Language

- "*Daubert*'s list of specific factors 'neither necessarily nor exclusively applies to all experts or in every case.'" 147 F. Supp. 2d at 83 n.1.

Quiles v. Sikorsky Aircraft

84 F. Supp. 2d 154 (D. Mass. 1999)

Factual Summary

Plaintiff brought suit against manufacturer of helicopter, claiming a failure to warn and that it was defectively designed and manufactured. In support, Plaintiff offered the affidavit of an expert who opined that the thickness of the fairing cap did not conform with specifications, which caused the tip cap to crack. Defendant

challenged the sufficiency of Plaintiff's expert's affidavit as unreliable. The district court rejected Plaintiff's expert's affidavit and granted Defendant's summary judgment motion.

Key Language

- "[Plaintiff's expert] primarily appears to have read government reports and plans and drawn conclusions based on his reading. He is acting essentially as an interpreter of engineering documents. As such, he does not appear to be relying on a method subject to testing, peer review, or publication. Further, any rate of error or level of acceptance is the result of [the expert's] individual ability to interpret and his specific execution in this case, rather than the strength of a theory or technique." 84 F. Supp. 2d at 164.

Shahzade v. Gregory

923 F. Supp. 286 (D. Mass. 1996)

Factual Summary

Plaintiff brought action alleging nonconsensual sexual touching 50 years before filing of the complaint. The issue was whether she blocked out her memories for that time and recovered the "repressed memories" during psychotherapy. The court permitted expert evidence regarding repressed memory following Defendant's motion to preclude such testimony.

Key Language

- The concept of repressed memories is accepted within the psychiatric profession, including the American Psychiatric Association. The theory has been the subject of peer review and the concept of "dissociative amnesia" is recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV, 1994). 923 F. Supp. at 289.

Whiting v. Boston Edison Co.

891 F. Supp. 12 (D. Mass. 1995)

Factual Summary

Nuclear power station worker's estate brought action claiming that he developed acute lymphocytic leukemia (ALL) as a result of exposure to radiation. Expert failed in his reliance on reports linking types of leukemia to radiation to note that the reports distinguished lymphocytic leukemia as not being radiation induced. To the extent that the theories of the expert witness were subject to peer review they were overwhelmingly rejected. Defendant moved to exclude testimony of Plaintiff's expert witnesses regarding health physics and radiation epidemiology. The experts were excluded.

Key Language

- "The linear non-threshold model cannot be falsified, nor can it be validated. To the extent that it has been subjected to peer review and publication, it has been rejected by the overwhelming majority of the scientific community." 891 F. Supp. at 25.
- "[The testimony] has no capacity to be of assistance to a jury in resolving the ultimate issues in this case." *Id.*

Second Circuit

Ruggiero v. Warner-Lambert Co.

424 F.3d 249 (2d Cir. 2005)

Factual Summary

Plaintiff appealed a summary judgment dismissing her complaint that claimed that her husband's liver cirrhosis and death were caused by his diabetes medication, Rezulin. Plaintiff argued that (1) there was error on the ruling on general causation and (2) medical evidence of Plaintiff's experts was erroneously ruled inadmissible. The court affirmed the judgment, holding that Plaintiff failed to produce sufficient evidence that Rezulin was capable of causing or exacerbating the cirrhosis.

Key Language

- "Dr. Dietrich was unable to point to any studies or, for that matter, anything else that suggested that cirrhosis could be caused or exacerbated by Rezulin." 424 F.3d at 251.
- "The judge further concluded that insofar as Dr. Dietrich's opinion relied on a differential diagnosis, that technique was insufficiently reliable to support the opinion as to general causation…." *Id.* at 254.

Wills v. Amerada Hess Corp.

379 F.3d 32 (2d Cir. 2004)

Factual Summary

Plaintiff-appellant filed an action under the Jones Act, general maritime law, and New York state law, alleging that her husband's illness and death were caused by exposure to toxic emissions that he encountered while working on vessels owned and operated by Defendant-appellees. The district court granted summary judgment for Defendants, and Plaintiff appealed, arguing that the district court abused its discretion in excluding her expert's causation testimony and erred in holding that the burden of proof as to causation rested with her. Because her suit was brought under the Jones Act, she argued that burden shifting of the Pennsylvania Rule should apply and the standards under *Daubert*

should be relaxed. The Second Circuit affirmed the summary judgment of the district court.

Key Language

- The court, in determining that the district court had been entirely appropriate in excluding the expert's testimony, noted that "[t]he district court determined that there was no evidence that the theory had been tested or subjected to peer review. Indeed, [the expert] admitted that the theory was the product of his own 'background experience and reading,' rather than scientific testing or peer review." 379 F.3d at 49 (citations omitted).

Amorgianos v. Amtrak

303 F.3d 256 (2d Cir. 2002)

Factual Summary

Plaintiff brought action for injuries allegedly sustained as a result of toxic chemical exposure while painting a bridge at a job site overseen by Defendant. Plaintiff claimed that exposure to xylene resulted in central nervous dysfunctions. None of the articles relied upon by Plaintiff's expert showed evidence of the short-term exposure to xylene; all the articles dealt with individuals' exposure to various chemicals to which Plaintiff had not been exposed; and all the articles connected the solvent exposure to peripheral nervous system symptoms to symmetrical polyneuropathy as opposed to asymmetrical symptoms claimed by Plaintiff. As to the industrial hygienist, he did not read one article as part of the literature survey conducted concerning his opinion that Plaintiff was overexposed to xylene. The expert's opinion was precluded, and the Second Circuit agreed with the lower court that a new trial was warranted.

Key Language

- "This is not to suggest that an expert must back his or her opinion with published studies that unequivocally support his or her conclusions." 303 F.3d at 266.
- "Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may 'go to the weight, not the admissibility' of the expert's testimony." *Id.* at 267.
- On the physician's opinions regarding specific causation: "the analytical gap between the studies on which she relied and her conclusions was simply too great and [ ] her opinion was thus unreliable." *Id.* at 270.

McCullock v. H.B. Fuller Co.

61 F.3d 1038 (2d Cir. 1995)

Factual Summary

Plaintiff brought action against manufacturer of glue that was used and she claimed exposure to it at her workplace. She claimed inadequate warnings and that the exposure to glue fumes caused respiratory and throat polyps. Plaintiff's medical expert offered that he based his causation opinions on differential diagnosis and other factors including medical literature. Defendant pointed out that Plaintiff's expert could not identify any medical literature that says glue fumes cause throat polyps. Post-verdict, Defendant moved for judgment as a matter of law. The Second Circuit affirmed the lower court's denial of Defendant's motion.

Key Language

- "[Plaintiff's expert] based his opinion on a range of factors, including his care and treatment of [Plaintiff]; her medical history (as she related it to him and as derived from a review of her medical and surgical reports); pathological studies; review of Fuller's MSDS; his training and experience; use of a scientific analysis known as differential etiology (which requires listing possible causes, then eliminating all causes but one); and reference to various scientific and medical treatises. Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." 61 F.3d at 1044.

United States v. Abu-Jihaad

553 F. Supp. 2d 121 (D. Conn. 2008)

Factual Summary

Defendant-terrorist suspect brought *Daubert* motion against government expert on al-Queda, questioning tactics of gathering information and assessment. The district court deemed the expert testimony admissible.

Key Language

- "[The expert] has published a book entitled *Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network*, which was cited as an authoritative source in the 9/11 Commission's Report. It is also used in courses taught at Harvard University and at Johns Hopkins University, among others." 553 F. Supp. 2d at 125.
- "[The expert] has published peer-reviewed articles on the subjects about which he intends to testify, including articles for *Foreign Affairs*. He also regularly lectures and speaks on these subjects. [He] has testified as an expert in seven trials held in the United States and in several cases before foreign courts." *Id.* at 126.

- "[The expert's] work receives a considerable amount of peer review from academic scholars and others, and by all accounts, [his] work is well regarded." *Id.*
- "The testimony and evidence at the hearing demonstrate that [the expert's] opinions and conclusions are subjected to various forms of peer review and that the opinions he proposes to offer here regarding al Qaeda's origins, leaders and certain tradecraft are generally accepted within the relevant community." *Id.*

Mahoney v. JJ Weiser & Co., Inc.

2007 WL 3143710 (S.D. N.Y. Oct. 25, 2007)

Factual Summary

Plaintiffs alleged a breach of fiduciary duty against an insurer due to an excessive claim loss ration. Defendant challenged Plaintiffs' expert in a *Daubert* hearing. The court concluded that Plaintiffs' expert did not offer scientific testimony and has spent greater than 50 years working in the insurance industry, thus his testimony was admissible.

Key Language

- "The insurers recognize that an expert may be qualified based on his experience…. In substance, [defendant's expert] is primarily seeking to proffer testimony as to industry usage of a term. That form of testimony does not really fit within the analytical framework of *Daubert*." 2007 WL 3143710, at *5–6.
- "[T]he absence of any publication by [defendant's expert] or any peer review of his opinions is essentially irrelevant to their admissibility." *Id.* at *6.
- "The 'methodology of proffered nonscientific testimony need not be subjected to rigorous testing for scientific foundation or peer review,' so long as 'the methodology employed was rooted in the experts' practical experience.'" *Id.* at *6 (citing *Crowley v. Chait*, 322 F. Supp. 2d 530, 539 (D. N.J. 2004)).
- "Given the array of [defendant's expert's] work experience, his long-time membership in industry associations and attendance at their meetings, and the existence of empirical evidence corroborating his conclusion, I conclude that [the expert's] opinions concerning the industry standard claim-loss ratio are sufficiently reliable to be admissible." *Id.* at *7.

Israel v. Spring Indus., Inc.

2006 WL 3196956 (E.D. N.Y. Nov. 3, 2006)

Factual Summary

A child who suffers from certain medical conditions alleged to be caused by Dundee crib sheets on which he slept as an infant. The sheets were labeled 100 percent cotton when they allegedly were not. His severe allergic reaction allegedly exacerbated his atopic dermatitis causing severe pain and mental injuries. Defendants brought suit to exclude three of Plaintiffs' experts. The judge granted one in whole and two in part.

Key Language

- "[E]xpert opinions are inadmissible if based on speculative assumptions." *Id.* at *2.
- "The court may also consider whether the expert's 'theory or technique has been subjected to peer review and publication.' Plaintiffs do not suggest that [the expert's] technique has been subjected to peer review, and it is unlikely that it has been. There are many methods of educational testing that have been peer reviewed and are considered valid in the field, but a six-minute oral spelling and math test in a doctor's office is not one of them." *Id.* at *8 (citations omitted).

Ellis v. Appleton Papers, Inc.

2006 WL 346417, 2006 U.S. Dist. LEXIS 7164 (N.D. N.Y. Feb. 14, 2006)

Factual Summary

Plaintiffs were employed by the Tompkins County Department of Social Services between 1984 and 1993. During that time they used carbonless copy paper (CCP) and were repeatedly exposed to CCP. They claim that their prolonged and repeated exposure to toxic chemicals found in CCP resulted in serious personal injuries. Defendants moved to preclude Plaintiffs' expert witnesses for failing to meet the required standard under *Daubert* and Rule 702. The court granted the motions.

Key Language

- "Defendants demonstrate without contradiction that peer-reviewed medical literature does not support [the expert's] general theory…. [Defendants' expert] adds that in his own research he has found no literature to support this theory." 2006 U.S. Dist. LEXIS, at *12–13, 2006 WL 346417, at *4.
- "This publication reviewed the known literature on CCP and was peer-reviewed by more than 20 specialists. Although it recognized the presence of formaldehyde in CCP, it established that there is no scientific evidence that medical problems such as those described by plaintiffs are caused by exposure to CCP. [Plaintiffs' expert] does not contend that the theory that exposure to CCP can cause chemical encephalopathy exists anywhere in peer-reviewed medical literature. This proposition falls far short of

supporting his theory…." 2006 U.S. Dist. LEXIS, at *13, 2006 WL 346417, at *4.

United States v. Paracha

2006 WL 12768 (S.D. N.Y. Jan. 3, 2006)

Factual Summary

This case arises out of a defendant being convicted of, inter alia, providing material support to al Qaeda in violation of 18 U.S.C.S §2239B. The district court subsequently clarified three of its evidentiary trial determinations. Among the determinations, the court held that the government sufficiently demonstrated the reliability of its proposed terrorism expert's peer review-based "vetting" methodology in forming his opinions on certain areas of the al Qaeda organization.

Key Language

- The government's terrorism expert's "methodology is similar to that employed by his peers in his field; indeed, he explained that he works collaboratively with his peers, gathering additional information and seeking out and receiving comments on his own work." 2006 WL 12768, at *20.
- "The testimony and evidence at the hearing demonstrate that [the government's expert's] opinions and conclusions are subjected to various forms of peer review and that the opinions he proposes to offer here regarding al Qaeda's origins, leaders and certain tradecraft are generally accepted within the relevant community. [The expert's] methodology, as he describes it, is similar to that employed by experts that have been permitted to testify in other federal courts involving terrorist organizations." *Id.* (citations omitted).
- "In developing his opinion on Khalid Sheik Mohammed, for example, [the government's expert] relied on multiple sources of information that he gathered and vetted through his process of cross-referencing and peer review, and explained that he has been gathering information relevant to Mohammed for several years." *Id.* at *22.

In re Rezulin Prods. Liab. Litig.

369 F. Supp. 2d 398 (S.D. N.Y. 2005)

Factual Summary

Plaintiffs brought personal injury actions against the defendant drug manufacturer and others alleging that the drug Rezulin could silently cause liver injury and exacerbate pre-existing liver conditions in patients taking it. Defendant filed a motion to exclude Plaintiffs' expert testimony on the grounds that the patients' theory of silent injury was never tested or peer-reviewed, was not published except by an expert who did so in connection with the litigation, and was not accepted outside the litigation. The court granted Defendant's motion to exclude Plaintiffs' expert testimony.

Key Language

- "The challenged testimony in this case does not satisfy any of the core *Daubert* factors. The theory that Rezulin can cause a silent liver injury has never been tested and necessarily has no error rate. It never has been published or subjected to peer review—aside from an edited version of [a physician's] report, which used more tentative language and which he published in a toxicology journal at the suggestion of a member of its editorial board who also is a paid consultant for the plaintiffs in this litigation." 369 F. Supp. 2d at 424.
- "The Court does not consider a toxicology journal's publication of [the expert's] otherwise unsupported theories as indicating anything other than that the theories are interesting and worth considering." *Id.* at 423 n.158.
- "If a statement in a textbook is unsupported by research, the textbook does not buttress the reliability of the expert testimony in question." *Id.* at 423 n.159.
- "[P]laintiffs have come forward with no evidence that [the expert] ever proposed this idea publicly before, and [another physician] admitted at the evidentiary hearing that he had not presented the theories in his expert report on the possible mechanisms of Rezulin's alleged toxicity in any context other than this litigation." *Id.* at 424.

Perkins v. Origin Medsystems, Inc.

299 F. Supp. 2d 45 (D. Conn. 2004)

Factual Summary

Plaintiff alleged that she suffered injuries proximately caused by the use of a surgical fastening device during a laparoscopic hernia operation. In support of her claim, Plaintiff intended to call, among others, an expert in the fields of female chronic pelvic pain and laparoscopic hernia repair surgery. The physician was prepared to testify that the device caused unnecessary post-operative pain in women experiencing chronic pelvic pain and did in fact injure Plaintiff who suffered from chronic pelvic pain. The court excluded the physician's study because she admitted that the study was a "work in progress" and admitted that she did not rely on the study in forming her opinions in this case. Nevertheless, the court found that the physician's opinion was admitted to prove

both general and specific causation. The court reasoned that the physician's experience, knowledge, and training, taken together with the clinical process she followed, which disclosed a correlation between placement of tacks from the fastening device and Plaintiff's, satisfied the *Daubert* threshold of reliability.

Key Language

- "In support of its motion to exclude, [Defendant] argues that '[n]o other physician or researcher has published so much as a letter to the editor supporting [Plaintiff's expert's] position on this issue. Despite what Plaintiffs argue about [the expert's] qualifications and experience, this is clearly a case where an expert is offering a novel theory and citing her own incomplete studies in support of it.' These contentions are rejected." 299 F. Supp. 2d at 58 (citations omitted).

United States v. Oskowitz

294 F. Supp. 2d 379 (E.D. N.Y. 2003)

Factual Summary

Defendant, charged with knowingly procuring, counseling, and advising the preparation of false tax returns, filed a motion to exclude various evidence, including moving to exclude or limit testimony proffered by the government's expert handwriting witness on the basis that it was not reliable. The Court permitted the handwriting expert's testimony regarding experience in observing many samples of handwriting over the course of a career, as such an expert could appropriately explain to the jury how two samples of handwriting are similar to each other. The expert could not, however, give the opinion that a handwriting sample was written by a particular person, because the handwriting analysis field does not pass *Daubert*.

Key Language

- "It has not asserted that [the expert's] techniques can be or have been tested, or whether his techniques, let alone the whole field of handwriting identification, have been subjected to peer review and publication." 294 F. Supp. 2d at 383.
- "In fact, many of the courts that have analyzed handwriting expert testimony after *Daubert*/*Kumho* have found it lacking. 'Handwriting analysis has never been subject to meaningful reliability or validity testing, comparing the results of the handwriting examiners' conclusions with actual outcomes.' 'There is no peer review by a 'competitive, unbiased community of practitioners and academics.'" *Id.* at 384 (citations omitted).

Rowe Entm't, Inc. v. The William Morris Agency, Inc.

2003 U.S. Dist. LEXIS 17623, 2003 WL 22272587 (S.D. N.Y. Oct. 2, 2003)

Factual Summary

Plaintiff alleged that a conspiracy existed among Defendants to engage in racial discrimination and to boycott and exclude the black concert promoter agencies from promoting concerts given by all white performers and the most popular black performers. The black concert promoter agencies' expert proposed to testify as to institutional racism in the entertainment industry. The expert concluded that the accounts and incidents in the concert promotion industry recounted by the black concert promoter agencies were similar to accounts and incidents by other African American business people described to him and other researchers. Among other factors, the testimony failed to satisfy the *Daubert* factors.

Key Language

- "Plaintiffs maintain certain of the literature relied on by [their expert] has been subject to peer review. However, [his] methodology in the Report which concludes, based on interviews contained in studies of other industries, that the same conditions exist in an unrelated industry based on reading the complaint and a limited number of depositions has not been shown to have been subject to peer review as an accepted methodology." 2003 U.S. Dist. LEXIS 17623, at *32–33, 2003 WL 22272587, at *11.

Clarke v. LR Sys.

219 F. Supp. 2d 323 (E.D. N.Y. 2002)

Factual Summary

Plaintiff brought suit alleging that a cover to a grinder machine was defective, permitting his hand to be pulled into the machine and resulting in significant damage. Plaintiff presented expert engineer to testify that the lack of an interlock guard caused the grinder to be defective. Defendants challenged Plaintiff's expert's opinions on the basis that they were not supported in practice or by the relevant safety standards in place. The district court denied the motion.

Key Language

- "[T]he *Daubert* factors apply to an expert's methodology or principles, not his or her conclusions. Disputes about the strength of an expert's credentials, faults in an expert's decision to use a particular methodology, or the lack of textual authority for an

expert's opinion 'go to the weight, not the admissibility, of his testimony.'" 219 F. Supp. 2d at 333 (citations omitted).

Colon v. BIC USA, Inc.

199 F. Supp. 2d 53 (S.D. N.Y. 2001)

Factual Summary

Infant-plaintiff brought suit after sustaining severe burns when a lighter he was playing with suddenly ignited his shirt. Defendant brought motion for summary judgment on the failure to warn defective design and defective manufacturing claims of the lighter. Plaintiffs offered an expert to opine that the lighter was defective because it did not have a fail-safe technology and that the size and color of the lighter were particularly attractive to children. Plaintiffs' expert's opinions in this regard were excluded. Defendant's summary judgment motion as to the failure to warn claim and the design defect were granted but denied as to the manufacturing defect.

Key Language

- Plaintiff's expert "has not written or published any articles describing his theories, and there can be no known error rate where [he] has not tested a prototype of his design, tested a product in the marketplace that embodies his design, or reviewed test results performed by others on his proposed designs." 199 F. Supp. 2d at 79.

Katt v. City of New York

151 F. Supp. 2d 313 (S.D. N.Y. 2001)

Factual Summary

Former female civilian employee of New York City Police Department brought action claiming that she was subjected to a hostile work environment. Plaintiff offered expert testimony from former police department employee and sociologist to testify as to the "blue wall of silence" and of problems facing women and minorities in municipal police agencies. After trial, Defendants moved to preclude such testimony as based upon flawed methodology and largely based upon anecdotal material. The district court denied the motion.

Key Language

- "The Expert Report in this case demonstrated that [the expert's] testimony was to consist of opinions that were based not only on his own personal experiences at the NYPD, but also on his interviews with police officers, and the hundreds of commission reports, research articles, scholarly journals, books and newspaper reports that he had read in the course of over twenty years of academic research. Such data is of a type reasonably relied upon by experts in various disciplines of social science." 151 F. Supp. 2d at 357 (citation omitted).

Arnold v. Dow Chemical Co.

32 F. Supp. 2d 584 (E.D. N.Y. 1999)

Factual Summary

Estate of worker who died from multiple myeloma brought wrongful death action against chemical manufacturer, claiming that the myeloma was caused by exposure to trichlorethethylene (TCE). Plaintiff's experts opined that decedent's exposure to TCE was a substantial factor in causing his multiple myeloma. Defendants challenged Plaintiff's experts' causation analysis as having never been tested in any study.

Key Language

- "The theory that TCE is a substantial factor in causing multiple myeloma in exposed individuals has apparently been tested and has been subject to peer review and publication." 32 F. Supp. 2d at 590.
- "Whether the conclusions of this plaintiff's experts are generally accepted in the scientific community and whether there is a significant potential rate of error in the tests they relied upon, are issues of contention between the parties and are triable issues for the jury." *Id*. at 590–91.

Zwillinger v. Garfield Slope Hous. Corp.

1998 U.S. Dist. LEXIS 21107, 1998 WL 623589 (E.D. N.Y. Aug. 17, 1998)

Factual Summary

Plaintiff sued carpet manufacturer claiming that he developed multiple chemical sensitivity as a result of the chemical fume "4-PC" from new carpet. Defendant challenged Plaintiff's offered expert on several grounds, including that his "studies" had not been peer reviewed, and studies cited by Plaintiff demonstrate at most that carpets emit gasses that may cause irritation, while the majority of the literature refutes that contention. The district court granted Defendant's motion.

Key Language

- "In this case, as discussed above, the results of various tests regarding the effects of carpet emissions on mice have been published and subjected to peer review. However, [Plaintiff's expert's] own study, the only study cited by plaintiff which attempts to demonstrate a correlation between exposure to 4-PC

and changes in the immune system, has not been completed, and its results have not been published. Although [he] has discussed the possibility of publication with the Archives of Environmental Health, his research, as noted above, is still in progress. Thus, [his] hypothesis that exposure to 4-PC causes 'immunotoxicity syndrome' or multiple chemical sensitivity has not been subjected to peer review." 1998 U.S. Dist. LEXIS 22107 at *53, 1998 WL 623589, at *17.

Frank v. New York

972 F. Supp. 130 (N.D. N.Y. 1997)

Factual Summary

Former employees alleged that they developed multiple chemical sensitivity (MCS) following exposure to pesticides and other agents. Plaintiffs intended to present expert testimony concluding that their alleged impairments were caused by exposure to various chemicals and substances. These experts opined that as a result these plaintiffs suffered unusually severe reactions to low levels of chemicals and environmental pollutants. Defendant brought a motion to exclude such testimony as unreliable, untested, and otherwise unsupportable. The district court granted the motion.

Key Language

- "Peer review of the MCS theory has revealed a host of flaws in the theory, warranting skepticism as to the validity of MCS." 972 F. Supp. at 135.

Third Circuit

Schneider v. Fried

320 F.3d 396 (3d Cir. 2003)

Factual Summary

In this medical malpractice action, Plaintiff brought suit against the physician on the grounds that he improperly administered the drug Procardia sublingually for a pre-treatment prior to undergoing angioplasty. Shortly thereafter she died of an acute myocardial infarction. Plaintiff's experts were excluded by the magistrate, in part, because the cardiologist's opinions as to the use of Procardia to prevent coronary spasm was not supported by the literature he cited. The Appellate Court reversed, in pertinent part, because the cardiologist possessed eminent credentials and his broad knowledge of heart conditions and his own experience in the field.

Key Language

- "Without delving into the question whether articles discussing the use of Procardia for one purpose are relevant to whether it was a violation of the standard of care to administer it for another purpose, we note that expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702." 320 F.3d at 406.
- "[I]nstead general acceptance and peer review are only two of the factors that a district court should consider when acting as gatekeeper." *Id.*
- "Thus, we conclude that [the expert's] experience renders his testimony reliable, demonstrates that his testimony is based on 'good grounds,' and that the Magistrate Judge abused his discretion by excluding it." *Id.*

Oddi v. Ford Motor Co.

234 F.3d 136 (3d Cir. 2000)

Factual Summary

Plaintiff brought suit following an accident, where the floor of the truck cab was pierced by a bridge abutment, claiming that the truck was not crashworthy. Plaintiff's expert opined that an alternative bumper would have sustained the impact and a thicker or ribbed flooring of the cab would have prevented the incident. The expert's improper methodology consisted of his intuition based upon experience in the field. The Third Circuit held that the expert's opinions were properly excluded.

Key Language

- "Although there may be some circumstances where one's training and experience will provide an adequate foundation to admit an opinion and furnish the necessary reliability to allow a jury to consider it, this is not such a case." 234 F.3d at 158.
- "There is nothing here to submit to peer review, and it is impossible to ascertain any rate of error for [the expert's] assumptions…." *Id.*

In re TMI Litig.

193 F.3d 613 (3d Cir. 1999)

Factual Summary

Residents brought actions for personal injuries against various defendants who allegedly developed radiation-induced neoplasms as a result of a nuclear reactor accident at a power plant. Several expert challenges were made. A meteorologist's testimony was offered to explain how the hypothesized plume, containing the highly radioactive release that is part of "blow out," traveled and dispersed throughout the area surrounding Three Mile Island. The meteorologist's plume theory was mere speculation, as it was based upon a model

numerical synoptic analysis that was not subjected to careful peer review, as opposed to a computer generated synoptic analysis that was a standard meteorological technique that had been subjected to significant peer review. The meteorologist's testimony was excluded.

Key Language

- "Here, it is impossible to know whether the disputed model's methodology can or has been tested or whether the model has been subjected to peer review or publication." 193 F.3d at 669.
- "The National Research Council's Committee on an Assessment of [Center for Disease Control and Prevention] Radiation Studies, has noted that if dose reconstruction studies are credible, they 'must rely on solid science, state-of-the-art methods, and careful peer review.'" *Id.* at 671.

Heller v. Shaw Indus., Inc.

167 F.3d 146 (3d Cir. 1999)

Factual Summary

Plaintiffs alleged that their respiratory illnesses were caused by volatile organic compounds (VOCs) emitted from carpet installed in their home and manufactured by the defendant. Following an in limine hearing to address Defendant's *Daubert* challenges to Plaintiffs' proffered experts, the district court granted Defendant's motion for summary judgment. Plaintiffs' medical expert causally linked Plaintiffs' respiratory ailments with carpet fibers from the rugs installed in their home. The district court apparently gave overriding weight to the admission of Plaintiffs' expert that he relied on no published studies in formulating his causation conclusion. Although the Court of Appeals upheld the district court's award, the court noted that the district court erred in excluding the testimony of Plaintiffs' medical expert "on the basis that it was not grounded in scientific studies."

Key Language

- "We do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness To so hold would doom from the outset all cases in which the state of research on the specific ailment or on the alleged causal agent was in its early stages, and would effectively resurrect a *Frye*-like bright-line standard, not by requiring that a methodology be 'generally accepted,' but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies." 167 F.3d at 155 (citations omitted).
- "In the actual practice of medicine, physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty… [E]xperience with hundreds of patients, discussions with peers, attendance at conferences and seminars, detailed review of a patient's family, personal, and medical histories, and thorough physical examinations are the tools of the trade, and should suffice for the making of a differential diagnosis even in those cases in which peer-reviewed studies do not exist to confirm the diagnosis of the physician." *Id.*

Kannankeril v. Terminix Int'l, Inc.

128 F.3d 802 (3d Cir. 1997)

Factual Summary

Homeowners sued pest exterminator for alleged chronic toxicity arising out of application of pesticides to their home. The district court excluded Plaintiffs' medical expert for failure to produce any evidence that any of Plaintiff's claims of cognitive impairment were caused by exposure to pesticides. On appeal, it was found that the doctor's opinions concerning the toxic effects of organophosphates are well recognized in the scientific community and the doctor's opinions were not a novel theory. The Third Circuit reversed.

Key Language

- Peer review and publication may not "in every case be necessary conditions of reliability." 128 F.3d at 809.
- "Instead, [the expert] merely reported that [Plaintiff] exhibited the 'signs and symptoms of chronic toxicity related to exposure to chlorpyrifos (Dursban).'" *Id.*
- "Thus, although [the expert] did not write on the topic, his opinion is supported by widely accepted scientific knowledge of the harmful nature of organophosphates." *Id.*

Allstate Ins. Co. v. Hamilton Beach/Proctor-Silex Inc.

2008 WL 3891259 (W.D. Pa. Aug. 19, 2008)

Factual Summary

Plaintiff's insurer brought suit alleging a defective toaster was the cause of a residential fire. Defendant brought motion to exclude Plaintiff's origin and cause expert, but the judge denied the motion.

Key Language

- "[A]lthough [the expert's] particular technique had not been subject to peer review, it is based on a

methodology that is sufficiently reliable for the purposes of admissibility." 2008 WL 3891259, at *5
- "A strict application of each and every *Daubert* factor is not necessary. As discussed above, the reliability of an expert's methods are to be judged according to the particular circumstances of each case. No single factor is always pertinent." *Id.*

In re Human Tissue Prods. Liab. Litig.

582 F. Supp. 2d 644 (D. N.J. 2008)

Factual Summary

Recipients of bone allografts (implants of human bone into another) allegedly harvested inappropriately and not adequately tested for diseases brought lawsuit against harvesting company. Defendant brought *Daubert* motion to exclude Plaintiff's expert testimony regarding transmission of certain diseases and general causation, and the judge granted the motion.

Key Language

- "The Court first notes that an absence of definitive published studies on the issue of general causation need not *per se* disqualify an expert's opinions on general causation so long as there are other factors supporting the reliability of the opinion." 582 F. Supp. 2d at 659.
- "Thus, if general causation is to be established in this litigation, it may only be established through methodologies, other than medical and scientific literature review, or reliance upon other, less pertinent medical and scientific studies and literature requiring extrapolation from the experts." *Id.*
- "The extrapolations of Plaintiffs' experts, to the extent they suggest that unprocessed bone stored at room temperature for thirty days or longer is capable of transmitting the diseases at issue based upon the existing literature and professional experience, have not been tested, peer-reviewed, published, or widely-accepted. Instead, the Court must consider other factors of reliability, such as the medical and scientific relationship between the expert's opinion to theories and literature that have been established to be reliable, the qualifications of the expert witness, and the non-judicial uses to which the opinion has been rendered." *Id.* at 659–60.

In re Nellson Nutraceutical, Inc.

356 B.R. 364 (Bankr. D. Del. 2006)

Factual Summary

Following trial to determine enterprise value of Chapter 11 debtors' business, question arose as to admissibility of expert testimony offered by debtors in support of particular valuation.

Key Language

- "[The expert's] methodology has not been subject to peer review, nor have there been any publications using this method that [the expert] considered in forming his opinion. This factor weighs in favor of excluding his testimony. "356 B.R. at 375.
- "As [the expert's] methodology has not been tested, has not been subjected to peer review, is not generally accepted in the field and has never been used or relied upon in a court of law, there is no way to know whether the methodology leads to erroneous results and there are no established standards controlling its application. Indeed, [the expert] testified that he would use EBITDA minus Cap Ex in an 'appropriate case' but he was unable to identify a single factor that he would deem relevant to determine whether to use his invented methodology. This factor weighs in favor of excluding [his] testimony." *Id.*
- In this case, two of the three criteria for the admissibility of expert testimony are met: qualification and relevancy. [The expert's] use of EBITDA minus Cap Ex to determine terminal value under a DCF analysis, however, is not reliable and, thus, must be excluded." *Id.* at 377.

Johnson v. Vane Line Bunkering, Inc.

2003 WL 23162433, 2003 U.S. Dist. LEXIS 23698 (E.D. Pa. Dec. 30, 2003)

Factual Summary

Plaintiff fell while working as a dock worker and suffered a stroke one week later. Plaintiff claimed that the stroke was caused by his fall. Defendant sought to preclude expert testimony by the treating neurologist on the ground that the neurologist's supplemental expert reports and opinion on causation did not satisfy, among other things, the *Daubert* standard for determining the reliability and relevancy of expert opinions. However, the court concluded that the neurologist engaged in reaching a differential diagnosis in a reliable manner, ordering standard laboratory tests, physically examining Plaintiff, taking medical histories, and considering alternative causes of Plaintiff's illness. Furthermore, Defendant failed to point to a single plausible alternative cause of Plaintiff's stroke that the neurologist had failed to explain away. The fact that the neurologist allegedly failed to consider certain specific medical reports concerning Plaintiff, and even assuming that his

conclusions were partially inconsistent with a peer-reviewed publication, these circumstances did not render his expert opinion unreliable or not relevant.

Key Language

- "As noted above, in this circuit, physicians need not 'cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.' '[E]xperience with hundreds of patients, discussions with peers, attendance at conferences and seminars, detailed review of a patient's family, personal, and medical histories, and thorough physical examinations are the tools of the trade, and should suffice for the making of a differential diagnosis even in those cases in which peer reviewed studies do not exist to confirm the diagnosis of the physician.' Thus, the court finds that it is unnecessary to delve into the teachings of the cited publications, particularly in light of the undisputed fact that [the expert] performed 'standard diagnostic techniques.'" 2003 U.S. Dist. LEXIS 23698, at *24–25, 2003 WL 23162433, at *8 (citations omitted).

Magistrini v. One Hour Martinizing Dry Cleaning

180 F. Supp. 2d 584 (D. N.J. 2002)

Factual Summary

Former employee at a dry cleaner brought a products liability action, claiming that exposure to dry cleaning fluid caused his leukemia. Defendant's expert's contention that Plaintiff's leukemia was not caused by exposure to any dry cleaning agent was supported by the expert's own work and medical literature that had been subjected to extensive peer review. Plaintiff's proffered physician could not provide any scientific support in the literature for his theory that all lymphohematopoietic cancers can be treated together for etiological purposes. There was no support in the literature for his contention that chlorinated ethylenes are structurally and functionally similar and that they can be treated together in determining their toxicological effects. The parties cross-moved to exclude each others' respective expert testimony. Plaintiff's physician's testimony was excluded and his industrial hygienist's testimony was permitted. Defendant's expert witness testimony was held admissible.

Key Language

- "The particular combination of evidence considered and weighed here has not been subjected to peer review." 180 F. Supp. 2d at 602.
- "When a weight-of-the-evidence evaluation is conducted, all of the relevant evidence must be gathered, and the assessment or weighing of that evidence must not be arbitrary, but must itself be based on methods of science." *Id.*
- "While flexible application of the *Daubert* factors permits this Court to find that, properly applied, the weight-of-the-evidence methodology is not an unreliable methodology, in order for [the expert's] opinion to go to a jury, the *application* of that methodology also must be reliable." *Id.*
- "[Defendant's expert's] own work and the medical literature on which he relies has been subject to extensive peer review and his evaluation of the literature was broad enough to encompass all of the relevant literature. [His] method is both generally accepted and widely used in a non-judicial setting by scientists and medical doctors." *Id.* at 612.
- Proxy level of exposure "has been subject to peer review and is a generally accepted way of estimating exposure levels in the absence of air sampling." *Id.* at 614.

Milanowicz v. The Raymond Corp.

148 F. Supp. 2d 525 (D. N.J. 2001)

Factual Summary

Plaintiff brought products liability action against manufacturer of fork lift, alleging that a defect caused him to sever his finger. The alleged defect concerned the replacement forks that had been installed on the forklift. Plaintiff's expert opined that the design of the forks constituted an inherent danger because it required manual adjustment of the forks, resulting in an unwarranted risk. As part of its summary judgment motion, Defendant moved to preclude expert testimony as unreliable. The district court granted the motion.

Key Language

- The peer review factor "could be satisfied by general design manuals or industry-specific journals." 148 F. Supp. 2d at 533.
- "Industry practice may be used as a proxy for peer review." *Id.*
- "[B]eyond general design principles, [Plaintiff's expert] identified nothing in the literature which would suggest peer review of his conclusions." *Id.* at 538.

Booth v. Black & Decker, Inc.

166 F. Supp. 2d 215 (E.D. Pa. 2001)

Factual Summary

Plaintiffs brought action alleging that a defective toaster

oven caused fire in their house. Plaintiffs' expert opined that the toaster was defective because it lacked a high-temperature limit switch or thermal cut-off device and also because the toaster contained a lot of plastic material, which has a low melting point. The expert's hypothesis was not tested and he did not describe the basis for his personal observations. Defendant moved for summary judgment on the grounds that the expert's opinion was unreliable and unsupportable. The district court granted the motion.

Key Language

- Plaintiff's expert "asserted that his method of investigating the cause of the fire was a standard method applied by others in the field, but he produced no persuasive, objective evidence that this method was subject to peer review, had a known or potential rate of error, could be measured against existing standards, or was generally accepted, as required by Rule 702." 166 F. Supp. 2d at 220.
- "The Court was presented with no evidence, aside from [the expert's] assurances, that others use the methodology he applied in investigating the cause of this electrical fire." *Id.*

Hall v. Babcock

69 F. Supp. 2d 716 (W.D. Pa. 1999)

Factual Summary

Plaintiffs brought action against Defendants, claiming that radiation released from a nuclear fuel fabrication facility caused them to develop cancer. Plaintiffs' experts were found to provide credible evidence that exposure to radiation was a substantial factor in bringing about Plaintiffs' cancers. The expert's findings based on differential diagnosis were held admissible.

Stecyk v. Bell Helicopter Textron, Inc.

1998 WL 599256, 1998 U.S. Dist. LEXIS 14081 (E.D. Pa. Sept. 8, 1998)

Factual Summary

Plaintiffs brought suit against various manufacturers of airplane and its parts following a crash. Defendant brought motion in limine concerning proffered testimony of Plaintiff's expert engineers, arguing that the basis for the testimony concerning torquemeter shaft and the amount of oil that leaked from the airplane was unreliable. The court denied Defendants' motion.

Key Language

- "[T]he fact that [Plaintiff's expert's] theory of causation has not been subjected to peer review and publication is not dispositive." 1998 U.S. Dist. LEXIS 14081, at *10, 1998 WL 599256, at *4.
- "Given the general engineering principles underpinning his theory of causation, it is questionable whether [his] findings are suitable for peer review and publication." *Id.* at *11.

Allen v. IBM

1997 U.S. Dist. LEXIS 8016 (D. Del. May 19, 1997)

Factual Summary

Plaintiff brought action for wrist injuries allegedly sustained from typing on computer keyboards manufactured by IBM. Defendant brought motion to exclude Plaintiffs' expert's testimony (including testimony of human factors and engineering experts) on the basis that their claims were unsupported assumptions and speculation. Defendant's motion was granted as to these experts.

Key Language

- Plaintiff's expert "testified that the particular reports at issue… have not been subject to peer review. Further, he was uncertain whether the methodology leading to his conclusion has been utilized or recognized by others." 1997 U.S. Dist. LEXIS 8016, at *52.
- "While with particular regard to design defect, several scientific articles relied upon by [Plaintiff's expert] were purportedly subject to peer review, [his] more recent *in limine* testimony never addressed whether his analysis or methodology has been followed by others in his field. As such, this factor militates against the admissibility of the proffered testimony." *Id.*
- "[T]here are several different types of accepted peer review, which in and of itself is a 'fluid' concept. There is 'formal' peer review, where an article submitted to a scientific journal is distributed to 'outside' reviewers (other than the journal's editor and unknown author) for comments. Another form of peer review consists of presentation of a study at a scientific conference or symposium, where it is subjected first to an abstract critique for sound methodology and subject matter relevance by the particular conference's organizers, then later critiqued and commented upon by the conference's audience. Yet another form of peer review consists of review and comments on an article by the editor of the journal to which the work is submitted." *Id.* at *85–86.
- The expert "maintains that NIOSH reports actually undergo both an internal and (often) external peer review process prior to publication in their pres-

ent state, so the NIOSH articles considered were also subject to the appropriate review." *Id.* at *86.

Dennis v. Pertec Computer Corp.

927 F. Supp. 156 (D. N.J. 1996)

Factual Summary

Data entry operators brought suit, alleging upper extremity disorders because of their use of a certain type of keyboard. The proffered testimony of the ergonomist was that keystroking has been identified with upper extremity disease, and he was going to discuss specific design deficiencies. The physician's proposed testimony concerned the causal relationship between Plaintiffs' respective conditions and the purported defect of the keyboard design. The expert testimony was precluded.

Key Language

- "Plaintiffs do attempt to justify the merits of [their expert's] opinion by indicating that 'four published articles [support [his] conclusion] that excessive [key] force… *may* result in injury to the user. Both parties dispute the underlying premise of those studies." 927 F. Supp. at 161–62 (citations omitted).
- "[I]t may explain [the expert's] decision to restrict the use of the report to the judicial forum rather than subject his opinion to peer review." *Id.* at 162.

Rutigliano v. Valley Bus. Forms

929 F. Supp. 779 (D. N.J. 1996)

Factual Summary

Plaintiff alleged that she developed formaldehyde sensitization from exposure to carbonless carbon paper. Plaintiff's physician diagnosed Plaintiff with formaldehyde sensitization during her initial office visit off self-report of her symptomatology, and medical, family, and work history. The physician had Plaintiff's blood tested for formaldehyde antibodies on numerous occasions. Plaintiff also had extensive allergy testing by a variety of specialists and received spirometrys. Plaintiff's physician contended that the results of these tests support her original diagnosis of formaldehyde sensitization. Defendant challenged this expert's testimony as unreliable and unsupportable. The district court granted Defendant's motion.

Key Language

- "Copious literature has been generated and published on the health effects of CCP use. Therefore, the Court cannot find that the topic is too new, too particular or of too limited interest to be published. Indeed, [Plaintiff's expert] has never attempted to obtain peer review of her theory, and has no intention of doing so. In light of the copious peer-reviewed literature determining that CCP does not cause the injuries that [she] wishes to testify that it has caused, [Plaintiff's expert's] failure to seek or obtain peer review of her theory weighs heavily against the reliability of her methods.
- Indeed, it appears that [the expert] has not tested her theory that CCP use can causes formaldehyde sensitization anywhere outside the judicial arena." 929 F. Supp. at 785 (citations omitted).

Diaz v. Johnson Matthey, Inc.

893 F. Supp. 358 (D. N.J. 1995)

Factual Summary

Plaintiff brought an action against his former employer for lung problems allegedly related to platinum allergy from on-the-job exposure to platinum salts. As to general causation, Plaintiff's expert proffered that platinum salt allergy can cause continuing asthmatic symptoms after exposure has ceased. Defendant brought motion to exclude such testimony as unreliable and unsupported by peer review. The district court granted the motion.

Key Language

- "That the status of the scientific literature supporting [the expert's] opinion is somewhat limited might not, in and of itself, be a bar to his testifying about general causation, provided he was qualified as an expert." 893 F. Supp. at 374.

Wade-Greaux v. Whitehall Labs., Inc.

874 F. Supp. 1441 (D. V.I. 1994)

Factual Summary

The opinions of expert witnesses for a child who brought a products liability action against the maker of a drug that was taken by the child's mother during pregnancy were inadmissible under *Daubert*. Plaintiff alleged the drugs caused her limb deformities, and the court ruled that the causation experts' testimony was not based on reliable, scientifically valid methodology, where methodology on which witnesses relied was not accepted by the community of scientists studying birth defects, had not been subjected to peer review, had not been put to non-judicial use, and were unlikely to produce accurate results.

Key Language

- "In evaluating the scientific validity or reliability of a particular methodology, it is also appropriate for a

trial court to consider whether the methodology has been subjected to peer review." 874 F. Supp. at 1478.
- "Unlike the community-accepted methodology, which has gained general acceptance through publication and critical review in peer-reviewed journals and other authoritative publications, there is no evidence that any of the methodologies advanced by plaintiff's experts has been subjected to peer-review among the community of scientists. Indeed, not one of plaintiff's experts has identified any specialized literature endorsing his or her particular methodology. Absent publication in the relevant scientific literature, there is no likelihood that any of these methodologies has been exposed to the type of critical scientific scrutiny that the community's criteria has survived." *Id.* at 1479.
- "In evaluating the scientific validity or reliability of a particular methodology, it is also appropriate for a trial court to consider whether the methodology is used in a non-judicial setting. If a methodology has not been put to any non-judicial use, that weighs against admissibility." *Id.*
- "[T]hese witnesses do not employ any methodology outside of the courtroom or subject their conclusions to critical peer review." *Id.*

Fourth Circuit

Pugh v. Louisville Ladder, Inc.
361 F. App'x 448 (4th Cir. 2010)

Factual Summary
In this product liability case, Plaintiff alleged that a ladder manufactured by Defendant structurally failed during normal use, causing Plaintiff to fall and suffer injuries. At trial, two engineering experts testified on Plaintiff's behalf, and the jury returned a verdict in his favor. Defendant appealed arguing that the district court abused its discretion with respect to allowing the expert testimony. The Fourth Circuit concluded that the lower court did not abuse its discretion and affirmed.

Key Language
- "Although defendant's claims of error before this court focus solely on the *Daubert* hearing, we recognize that the district court had additional evidence before it supporting the admissibility of plaintiff's experts' testimony, such as a joint affidavit submitted by [the doctors] with numerous exhibits including engineering formulas, published articles, and 'expert reports' detailing the testing [the doctors] performed in this case. The fact that the district court had such materials prior to the *Daubert* hearing further explains the manner in which the hearing was conducted, *i.e.* Louisville Ladder was given an opportunity to attack plaintiff's prior assertions in support of the admissibility of his experts." 361 F. App'x at 454.
- "Such holding, however, does not shift the focus of the *Daubert* test to experts' conclusions, but merely clarifies that the district court's broad discretion includes the discretion to find that there is 'simply too great an analytical gap between the data and the opinion proffered.' *Id.* Our recent decision in *Moreland*, decided after *Joiner* and the 2000 amendments to Rule 702, reiterates the fact that the proper focus remains on the expert's 'principles and methodologies.'" *Moreland*, 437 F.3d at 431; *id.* at 454.

Tunnell v. Ford Motor Co.
245 F. App'x 283 (4th Cir. 2007)

Factual Summary
Plaintiff was injured when his Ford Mustang collided with a pole and caught fire, eventually leading to an amputation of both legs. He alleged the car was defective because it lacked a battery cutoff device (BCO), which would disable the electrical wiring in the car in the event of an accident. The district court, under *Daubert*, excluded Plaintiff's expert testimony because the expert did not establish a net improvement in using a BCO device. The court then granted the manufacturer's motion for a directed verdict. Plaintiff appealed and the Fourth Circuit affirmed.

Key Language
- "There was also no evidence that [the expert's] BCO solution had been subjected to peer review or had been generally accepted within the automotive engineering community. Absent more extensive testing by [the expert] or acceptance of the BCO solution by his peers, the district court's decision to strike [his] testimony was not an abuse of discretion." 245 F. App'x at 286.
- "The district court thus did not abuse its discretion in striking [the expert's] testimony because he appeared to conclude that BCOs would be a desirable added safety device rather than a necessary correction for a defective product." *Id.*

Marsh v. W.R. Grace & Co.
80 F. App'x 883 (4th Cir. 2003)

Factual Summary
Plaintiffs claimed that a fertilizer chemical caused them

to contract different types of cancer. Defendant made and sold the fertilizer, which Plaintiffs in turn used on their farms. The district court precluded Plaintiff's causation expert on *Daubert* grounds on the grounds that the methods and logical processes by which the expert reached his conclusions were not reliable. The expert's theory was that if a person was "set up for cancer, then the etiologic agent can cause cancer." The expert did not focus on epidemiological studies. He used one lab test, performed on only two plaintiffs, to reach his causation opinion.

Key Language

- "[E]pidemiological evidence is not necessarily required for a valid expert opinion on causation so long as the expert's methods are otherwise sound."
- "[N]ot all medical experts' theories and methods will need to be published or peer reviewed, that is a valid consideration in considering the facts of a particular case."
- The court agreed that the expert's conclusion that a chemical in the fertilizer was a carcinogen was not reliable because neither the EPA nor the National Toxicology Program has listed it as a carcinogen. The court felt that further support would be needed in order for this opinion to be reliable.

United States v. Fitzgerald

80 F. App'x 857 (4th Cir. 2003)

Factual Summary

During a federal criminal prosecution for abusive sexual contact with minors, the government sought to present expert evidence by a psychologist about the methodology and behavior of child molesters to prove Defendant's intent. The Fourth Circuit affirmed the preclusion of such evidence as unreliable.

Key Language

- The proffered expert claimed that his opinions had been published and subjected to peer review. A list of publications was given with no proof offered as to peer review. The court noted that "We give [the expert] some credit for publication, but we simply do not know whether his work has been subjected to peer review."

United States v. Crisp

324 F.3d 261 (4th Cir. 2003)

Factual Summary

Defendant appealed multiple convictions arising out of an armed robbery on the grounds that forensic fingerprint analysis and forensic handwriting analysis used against him did not satisfy the *Daubert* analysis. The Fourth Circuit reaffirmed the widespread and lasting acceptance of handwriting and fingerprint analysis as accepted in the expert community.

Key Language

- The expert's testimony is "entirely in keeping with the conclusions of the post-*Daubert* courts that uniform standards have been established 'through professional training, peer review presentation of conflicting evidence and double checking.'"

Cooper v. Smith & Nephew, Inc.

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

Factual Summary

Plaintiff brought action against manufacturer of spinal fusion device, alleging that the device caused failed back surgeries and complications. Plaintiff's expert's view that the pedicle screw device was defective was unsupported in the literature. On the other hand, the peer review supported medical literature is replete with evidence that smoking can cause non-unions to occur in these surgeries. The district court granted Defendants' motion to preclude Plaintiff's orthopedic expert and the Fourth Circuit affirmed, holding that the proffered expert must provide medical evidence in support of his conclusion that non-union was caused by the device and his subjective view that a pedicle screw device is inherently dangerous.

Key Language

- "The medical literature in peer-reviewed journals indicates that smoking increases the likelihood of a nonunion. The district court held that [the expert's] diagnosis was unreliable in part because [he] 'summarily rejects evidence that [the plaintiff's] long history of smoking caused nonunion….'" 259 F.3d at 202.

Oglesby v. Gen. Motors Corp.

190 F.3d 244 (4th Cir. 1999)

Factual Summary

Mechanic who was injured when radiator hose detached as he was adjusting transmission cable of pick-up truck brought products liability action against truck manufacturer, alleging that his injuries were the result of a defective plastic hose connector. The expert simply formed his opinion using logical conjectures rather than evidence such as re-creating the hose in question and obtaining reports on the hose from manufacturer. His testimony was found to be unreliable and inadmissible.

Key Language

- "Reliability of specialized knowledge and methods for applying it to various circumstances may be indicated by testing, peer review, evaluation of rates of error, and general acceptability." 190 F.3d at 250.
- "His testimony was not sufficiently reliable, however, and did not properly draw on specialized knowledge. Rather, it depended on an imperfect syllogism constructed from unsupported suppositions." *Id.*

Consolidated Coal Co. v. Latusek

1999 U.S. App. LEXIS 18351 (4th Cir. Aug. 6, 1999)

Factual Summary

Defendant appealed an order from the Benefits Review Board, which affirmed an award under the Black Lung Benefits Act to the plaintiff coal miner who developed interstitial pulmonary fibrosis (IPF). The Fourth Circuit remanded the case to the ALJ, who failed to articulate adequate reasons for discounting Defendant's expert testimony concluding that the condition was unrelated to exposure to coal dust.

Key Language

- The publications in support of plaintiff's experts, "offered tepid support [of the] ALJ's conclusion." 1999 U.S. App. LEXIS 18351 at *13.
- "According to the ALJ's decision, the articles were credited solely because of their publication and related peer review. In the face of significant expert criticism, this alone is insufficient." *Id.*
- "The ALJ's reliance on that fact that the articles [plaintiff's expert's relied on] were published and subjected to some amount of peer review does not indicate that they were necessarily reliable." *Id.* at *12.
- "The substance of the articles does not strongly endorse the link between IPF and dust exposure." *Id.*
- "Instead, one of the articles reports a study that finds the incidence of IPF in coal workers to be the same as that within the general population and concludes only that there was a 'possible' link between coal mining and IPF." *Id.*
- "Finally, several of the physicians who reviewed the articles found them to be severely lacking in appropriate sampling methods, indicating that the articles did not enjoy general acceptance within the relevant scientific community." *Id.* at *12–13.
- "Considering the combined experience and credentials of [defendant's] physicians compared to the thin support provided by the countervailing articles, we find [the ALJ's] appraisal wholly unsatisfactory." *Id.* at *14.

Ruffin v. Shaw Indus.

149 F.3d 294 (4th Cir. 1998)

Factual Summary

Plaintiffs allegedly sustained severe toxic injuries from exposure to chemicals in carpeting installed in their home. Plaintiffs sued the retailer and manufacturer of the carpeting. The district court excluded the testimony of Plaintiffs' expert who analyzed a sample of the subject carpet and ultimately found the sample to be "biologically active." Plaintiffs' expert was the president of Anderson Laboratories, Dr. Rosalind Anderson. The Court of Appeals upheld the district court's award of summary judgment to Defendants. The court closely scrutinized the testing methodology Dr. Anderson employed in analyzing the carpet sample. The Court noted that the EPA's Office of Research and Development (ORD) had conducted tests on carpet samples previously identified by Anderson Labs as toxic and found no "convincing signs of even mild toxicity." Defendants relied heavily on the EPA's ORD carpet study and compared the EPA's testing methodology with that of Dr. Anderson. The court emphasized that Plaintiffs failed to proffer any evidence of peer reviews supportive of Dr. Anderson's methodology.

Key Language

- "The EPA's ORD carpet study contained four evaluations analyzing both the EPA and Anderson Labs toxicological studies [and]… all four reviewers in the ORD carpet study concluded that the EPA's methodology was scientifically valid and superior to that conducted by Anderson Labs… [and] they all expressed more confidence in the EPA's methodology and results than in those of Anderson Labs." 149 F.3d at 299.
- "Defendants submitted affidavits stating that another panel of peer reviewers assembled by the EPA were generally supportive of the scientific methods employed by the EPA and private laboratories but critical of the scientific methods employed by Anderson Labs. Plaintiffs, on the other hand, failed to submit any evidence of peer reviews supportive of Dr. Anderson's methodology or any proof that her studies had been published. Therefore, the uncontradicted evidence before the court demonstrates that peers in the relevant scientific community have been critical of the methodology employed by Anderson Labs but generally supportive of the procedures employed by EPA and private laboratories cited by defendants, which failed to independently replicate Dr. Anderson's findings." *Id.*

United States v. Horn
185 F. Supp. 2d 530 (D. Md. 2002)

Factual Summary
Criminal defendant challenged government witnesses regarding the scientific reliability of standard field sobriety tests (SFSTs), which include the walk and turn test, the one-leg stand test, and horizontal gaze nystagmus test. The government claimed that the tests had been subject to peer review by the National Highway Transportation Safety Administration (NHTSA) reports. However, Defendant's expert opined that the methodology referred to but not explained in the field studies cited to in the NHTSA reports had not been subject to peer review. The evidence itself was found to be inadmissible expert testimony under Rule 702 but was admissible lay opinion testimony under 701. The evidence could only be used as circumstantial evidence of intoxication but not as direct evidence as to blood-alcohol level.

Key Language
- Peer review "as contemplated by *Daubert* and *Kumho Tire* must involve critical analysis that can expose any weaknesses in the methodology or principles underlying the conclusions being reviewed." 185 F. Supp. 2d at 556.
- The "process of selection of articles for publication in a peer review journal involves an evaluation by one or more experts in the field, to insure that the article meets the rigors of that field. Under this standard, most of the publications regarding the SFST tests, including publications in bar journals, likely do not meet this criteria." *Id.* at 556–57.

Black v. Rhone-Poulenc, Inc.
19 F. Supp. 2d 592 (S.D. W. Va. 1998)

Factual Summary
Class action involved fire that broke out at Defendant's plant. Plaintiffs claimed intentional and negligent infliction of emotional distress; their claims of psychological and behavioral impairments overwhelmingly related to exposure to a "toxic cloud" and being forced to "shelter-in-place." Plaintiffs offered experts in the field of psychology and toxicology who were expected to testify as to the results of their field investigation into the psychological effects resulting from the fire. Defendants challenged the methodology behind the experts' opinions. The court dismissed Plaintiffs' case.

Key Language
- "The importance of adequate, true peer review cannot be overstated. Equally true is that mere publication of an article is not the end of the peer review process; it is but the beginning." 19 F. Supp. 2d at 600.
- Plaintiff's expert "made reference to other similar studies found in peer-reviewed literature, and suggested his methods and results comport with the peer review requirement. Rarely, however, did he provide sufficient details to permit the Court to perform the necessary comparative analysis between his work here and that of his colleagues elsewhere." *Id.*

Ballinger v. Atkins
947 F. Supp. 925 (E.D. Va. 1996)

Factual Summary
Plaintiff brought an action against various defendants, claiming that he developed chronic hypoglycemic-type symptoms as a result of ingesting NutraSweet in connection with the "Atkins" diet. Plaintiff's proffered biochemist proposed that the combination of the ketogenic diet coupled with consumption of large amounts of aspartame contributed to neurological damage because of an inability of Plaintiff to remove large amounts of aspartic acid. This expert conceded that his opinion was a "working hypothesis," and his reasoning had not been subject to any public peer review. A motion to exclude Plaintiff's experts was granted.

Key Language
- The expert "concluded that his reasoning and methodology in this case could not be submitted for publication in a scientific or medical journal 'because there is not sufficient scientific basis.'" 947 F. Supp. at 927.
- "He admits that '[t]here is no data in the literature.'" *Id.*

Fifth Circuit

United States v. Valencia
600 F.3d 389 (5th Cir. 2010)

Factual Summary
Defendants were natural gas traders and were convicted of wire-fraud and attempting to manipulate natural gas markets. Experts sought to compare their practice methods to those within publications, though few publications existed. The Fifth Circuit held that allowing the prosecution's expert testimony was not an abuse of discretion.

Key Language
- Regarding the *Daubert* factors, the district court recognized that the unprecedented nature of [the

expert's] work made it impractical, if not impossible, to subject the methods to peer review and publication, and that there would be no general acceptance of the theory in the scientific or expert community. 600 F.3d. at 426.
- "In light of the district court's insightful consideration of, and fidelity to, the *Daubert* factors at this necessarily 'flexible' stage of the trial, we cannot say that the court abused its discretion in admitting [the expert's] testimony as sufficiently rigorous economic and statistical analysis." *Id.* at 426.

Wells v. SmithKline Beecham Corp.

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

Factual Summary

Patient who lost $10 million gambling while taking a dopamine agonist to alleviate symptoms of his Parkinson's disease brought products liability action against drug manufacturer. Plaintiff retained three expert witnesses to opine that the drug caused pathological gambling. In reaching their conclusions, the experts relied upon: (1) published articles documenting case-specific correlations between Requip and gambling; (2) a single unpublished study showing a nexus between Parkinson's medicines generally and gambling; (3) GSK's internal data revealing case-specific associations between Requip and gambling; and (4) the fact that GSK has since changed the Requip label to warn about possible gambling side-effects. Each of the three experts conceded that there exists no scientifically reliable evidence of a cause-and-effect relationship between Requip and gambling, and the Fifth Circuit affirmed the lower court's decision to disallow the experts' testimony.

Key Language

- "The experts based their general causation conclusion primarily on the scientific literature, which they claim shows an association between Requip and problem gambling." 601 F.3d at 380.
- "The literature, though, does not provide the necessary 'scientific knowledge' upon which to base an opinion under *Daubert*. [The doctors] characterized all but one of the studies as 'anecdotal evidence,' and each expert conceded that the studies were not statistically significant epidemiology. They were, in fact, case studies. Although, '[c]ase-control studies are not per se inadmissible evidence on general causation,' this court has frowned on causative conclusions bereft of statistically significant epidemiological support." *Id.* at 380.
- Only one study reached statistical significance, but the study had other scientific problems making it insufficient as a basis for expert opinion. "Submission to the scrutiny of the scientific community is a component of 'good science,' " but the study was never peer-reviewed or published." *Id.* at 380.
- "While '[w]e… understand that in epidemiology hardly any study is ever conclusive, and we do not suggest that an expert must back his or her opinion with published studies that unequivocally support his or her conclusions,' here 'there is simply too great an analytical gap between the data and the opinion proffered.'" *Id.* at 380.

Paz v. Brush Engineered Materials

555 F.3d 383 (5th Cir. 2009)

Factual Summary

In a product liability case, Plaintiff alleged Defendant's beryllium-containing products, which Defendant sold to The Boeing Company to use at the Stennis Space Center, caused the employees' personal injuries, including beryllium sensitization ("BeS") and chronic beryllium disease ("CBD"). The district court excluded Plaintiff's doctor's testimony diagnosing CBD. The court found that the doctor's testimony should be excluded because it was unreliable under *Daubert*. The district court found the employees' proffer of articles was unavailing because none of the articles supported a diagnosis of CBD on the basis of multi-nucleated giant cells alone. The district court found the doctor's assertion that the presence of multi-nucleated giant cells alone could lead to a diagnosis of CBD failed to satisfy the *Daubert* standard because the basis of such a diagnosis had not been tested or subjected to peer review or publication, and otherwise was not generally accepted in the medical community, and her "mere assurances" that her methodology for diagnosis was "generally accepted" in the scientific community was insufficient to render her testimony and report reliable under *Daubert*.

Key Language

- "The district court reviewed the articles [the doctor] submitted to the district court to support her 'independent' finding of CBD in Pittman based on multinucleated giant cells and found they did not support [her] contention." 555 F.3d at 389.
- "The district court committed no reversible error because the record demonstrated [the doctor's] own [published] research asserts a diagnosis of CBD requires both an indication of BeS and either granulomas or mononuclear infiltrates." 555 F.3d at 389.

Her published research ran contrary to her in-court testimony.

Burleson v. Tex. Dep't of Criminal Justice

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

Factual Summary

Plaintiff brought a §1983 action against prison officials, alleging that they violated the Eighth Amendment's prohibition against cruel and unusual punishment by exposing him to hazardous conditions while he was working as a welder in the Boyd Unit Stainless Steel Plant. The district court granted Defendants' motion to exclude expert testimony and Defendants' motion for summary judgment. Plaintiff appealed. The Fifth Circuit affirmed the district court rulings.

Key Language

- The magistrate judge found that the theory of the plaintiff's expert, Dr. Carson, had never been tested and had never been submitted for peer review. Plaintiff argued that the magistrate erred in finding that Dr. Carson's conclusion was not submitted to peer review or scientific testing and argued that Dr. Carson offered epidemiological studies that linked thorium dioxide with multiple cancers. The court held: "Dr. Carson offers no studies which demonstrate a statistically significant link between thorium dioxide exposure in dust or fumes and Burleson's type of lung or throat cancer…. Additionally, one of the few, if not the only, epidemiology study which examined the cancer risk to welders from thoriated welding electrodes was a Danish study that showed no statistically significant link between the exposure to thoriated welding electrodes and cancer." 393 F.3d at 584–85.
- "In support of his 'radiation hot spot' theory, Dr. Carson relies primarily on two published studies that he maintains address the radiation hot spot theory as a cancer risk… The defendants note that the epidemiological studies have demonstrated no adverse health effects from exposure to small doses of radiation… Dr. Carson is even quoted affirming in his own scholarly papers that 'an important step in studies relating to worker health and industrial exposure is the estimation of mean exposure level.' Dr. Carson admits that the radiation dose a patient receives is critical to an evaluation of causation… He asserts that the lower the dose or exposure level, the lower the probability of causation." *Id.* at 585.

Bocanegra v. Vicmar Servs., Inc.

320 F.3d 581 (5th Cir. 2003)

Factual Summary

Trial court excluded Plaintiff's expert who was expected to testify that smoking marijuana affected Defendant-driver's reaction time in operating a vehicle on the grounds that the quality and quantity of the marijuana Defendant used was unknown. The Fifth Circuit overturned the decision explaining that the unknown dosage went to the weight of the expert's testimony and that the expert's testimony would still be helpful to the jury.

Key Language

- "[R]esidual impairment from marijuana use lasts for at least twelve hours after ingestion, have been peer-reviewed and are widely accepted in the field of toxicology." 320 F.3d at 585.
- "The 'Yesavage study' published in the American Journal of Psychiatry has been repeatedly relied upon by courts confronted with issues related to the residual effects of drug use"… "Indeed, [even defendant's expert] testified that he considered the Yesavage study to be a valid, peer-reviewed study." *Id.*

Pipitone v. Biomatrix, Inc.

288 F.3d 239 (5th Cir. 2002)

Factual Summary

Patient who contracted salmonella infection after receiving injection of synthetic fluid in his knee joint brought products liability action against fluid manufacturer. The district court granted summary judgment, in part, on the grounds that Plaintiff's proffered infectious disease expert's opinion concluding that the fluid caused the salmonella infection was not supported in the literature. The literature search conducted did not yield any reports of salmonella infections arising from the use of any contaminated injectable knee product. The Fifth Circuit reversed.

Key Language

- "The lack of literature on injection-related salmonella infections of the joint does not undermine [the expert's] hypothesis." 288 F.3d at 246.
- "Where, as here, there is no evidence that anyone has ever contracted a salmonella infection from an injection of any kind into the knee, it is difficult to see why a scientist would study this phenomenon." *Id.*
- "[T]he lack of reports in the literature that any knee injectable other than Synvisc has caused a salmonella infection, *supports*, rather than contradicts, [the expert's] conclusion that the infection did not arise due to unsterile technique or other source not related to Synvisc." *Id.*

Practice Tip

Challenging an expert's opinion on the grounds that there is a lack of support or no support in the literature may backfire, as it did here. Be careful not to simply rely on this point alone—the peculiar nature of the case needs to be taken into consideration and possibly dealt with up front. As this opinion demonstrates, the court actually relied upon the fact that there was no evidence in the literature to support the expert's contention. Even if the court found the proffered opinion otherwise reliable, one would think that the court would simply not have found the peer review factor of *Daubert* applicable under the circumstances. Instead, the court relied upon the lack of peer review in support of the reliability of the opinions.

St. Martin v. Mobil Exploration

224 F.3d 402 (5th Cir. 2000)

Factual Summary

Defendant oil companies appealed award based upon a finding that they failed to adequately maintain spoil banks on canals they operated, resulting in damage to a freshwater flotant marsh. Plaintiffs' ecology and hydrology expert opined that Defendants' activities caused the erosion of vegetative mats. On appeal, this expert's opinion was challenged because his hypothesis as to the specific marsh was not subject to peer review. Motion denied.

Key Language

- "[A] court could not rationally expect that a marshland expert would have published a peer-reviewed paper on each possible permutation of factors or each damaged area of marsh." 224 F.3d at 406–07.
- The expert's "testimony was based on his personal observation of the marsh in question and his general and undisputed expertise on marsh ecology and deterioration." *Id*. at 407.

Practice Tip

This case demonstrates the importance of first-hand or personal knowledge of the expert in these types of situations. Not one expert offered by the defense observed the situation of the canals and surrounding marsh area. The court made a note of this point and seemed to favor Plaintiff's expert because he did make such personal observations.

Allen v. Pa. Eng'g Corp.

102 F.3d 194 (5th Cir. 1996)

Factual Summary

Decedent died of brain cancer and family brought suit against manufacturer of EtO sterilizers asserting that while he worked in a hospital for over twenty years he had to occasionally replace cylinders containing ethylene oxide. Three experts proffered opinions on behalf of Plaintiffs that EtO exposure caused the decedent's cancer. The court held that such opinions were not reliable on the basis that, although EtO had been classified as a carcinogen, it was not probative as to the issue of specific causation.

Key Language

- "Not only is the experts' conclusion at best weakly supported, if not contradicted, by the evidence on which they rely, but they all declined to say that they would subject their findings to the test of peer review for publication." 102 F.3d at 198.
- The expert stated in his deposition that his opinion was "not a scientific study. This is a legal opinion." *Id*. The court noted that this was the exact situation to be averted.

Strogner v. Cain

2008 WL 269078 (E.D. La. 2008)

Factual Summary

Defendant was convicted for murder and rape and sentenced to two concurrent life sentences. He challenged an expert's testimony regarding the use of DNA evidence.

Key Language

- "[The prosecution expert] testified at the *Daubert* hearing that there are numerous validation studies of the type of DNA testing used in the instant case. These studies, which [the prosecution expert] specifically discussed, support the current protocol in use at the F.B.I. lab for STR typing. An intensive study validating the Amp FLSTR Profiler Plus and the AmpFLSTR Cofiler testing kits by comparison with the Powerplex 16 kit produced by Promega Corporation again validates the testing kits used in the instant matter. Another study validating the Profiler Plus and Cofiler kits, which was discussed at the *Daubert* hearing, was 'Practical Applications of Genotype Surveys and Forensic STR Testing,' which [the prosecution expert] co-authored. He also described other studies that focused on the thirteen loci routinely used for DNA testing in F.B.I. casework. [The prosecution expert] pointed out that the sources he discussed in court were only a small subset of the publications available on forensic STR DNA analysis." 2008 WL 269078 at *12.

- "Thus, meaningful peer review can be conducted without the publication of primer sequences by the Perkin-Elmer Corporation. [The doctor] explained that TWGDAM guidelines on developmental validation studies are not mandatory but are simply guidelines." *Id.* at *13.

Burton v. Wyeth-Ayerst Labs. Div. of Am. Home Prods. Corp.

513 F. Supp. 2d 719 (N.D. Tex. 2007)

Factual Summary

Plaintiff ingested certain dietary drugs manufactured by Defendant and alleges that because of them she now suffers from various cardiovascular diseases. Defendant moved to exclude the other party's expert. The judge denied the motion in part and granted the motion in part.

Key Language

- "The fact that these studies may have been funded for the purpose of litigation does not render them inadmissible (especially since the studies were published and subject to peer review)." 535 F. Supp. 2d at 727.
- "At best, these studies demonstrate that Miller's opinion may be one of those 'shaky but admissible' opinions referred to in *Daubert*, for which cross-examination and proper jury instructions are the appropriate remedy, and these studies cited by Wyeth provide the defendant with fertile ground for such examination. However, these studies are insufficient to undermine the reliability of Miller's opinion to the point of rendering it inadmissible." *Id.*

In re Katrina Canal Breaches Consolidated Litig.

2007 WL 3245438 (E.D. La. 2007)

Factual Summary

A group harmed during hurricane Katrina sought class certification. Challenge rose as to whether *Daubert* hearing must be had regarding experts who testify in order to meet Fed. R. Civ. P. 23 certification requirements or if a "*Daubert* light" hearing is appropriate. The court held that a *Daubert* hearing was appropriate and not premature to the extent that class certification issues were addressed.

Key Language

- "[T]he Court finds that its Rule 702 review of the expert report of [the expert] will be vigorous but limited to the opinion's reliability and relevance to the requirements of class certification under Rule 23." 2007 WL 3245438 at *12.
- "A full *Daubert* examination will not be taken at this stage, and a determination at this time whether [the expert's] opinion will be accepted at the time of trial on the issues will not be made. The purpose of this examination is: [to] ensure that [these expert opinions] contain no flaws that would render [either] inadmissible as a matter of law: the methodology must show some hallmarks of reliability whether through peer review or use of generally-accepted standards or methods; the expert must be qualified; and the opinion must have probative value for the issues of class certification." *Id.* at *12.

United States v. Holy Land Found. for Relief & Dev.

2007 WL 2059722 (N.D. Tex. 2007)

Factual Summary

Defendants were charged with making contributions to organizations alleged to be affiliated with by Hamas, a specially designed terrorist organization. Defendants sought to exclude the United States experts from testifying. The court granted the motion in part and denied the motion in part.

Key Language

- "The defendants mount an excruciatingly detailed analysis of the *Daubert* 'peer review and publication' factor as it relates to prior publications by [the expert]. That the prior writings of [the expert] may not have been subject to pre-publication peer review is not an issue as it relates to his qualifications as an expert. [The expert's] professional experience and education alone may be sufficient to evince his field of expertise." 2007 WL 2059722 at *8.
- "That he published articles, lectures, books, and monographs which were not subject to peer review prior to their publication, does not discount his expertise and specialized knowledge in his field." *Id.*

Scordill v. Louisville Ladder Group

2004 U.S. Dist. LEXIS 2359 (Feb. 17, 2004)

Factual Summary

Plaintiff brought suit against a ladder manufacturer after the ladder buckled while he was standing on a step with his back away from the ladder leaning forward and performing welding. Defendant claimed that Plaintiff misused the ladder and that his position caused the accident and retained an expert to engineer to support its position. Plaintiff moved to exclude the expert on the grounds that the expert's testimony was not based on facts in the record and was speculation.

The Court affirmed the lower court's ruling allowing for the testimony as Plaintiff's arguments for exclusion went to the weight of the evidence not its admissibility.

Key Language

- "[Defendant's expert's] opinion is based on the very specific facts of this case and does not lend itself to peer review." [He] has not generated a study that is subject to repetition but instead has applied generally accepted engineering principles and concepts utilized in stress analysis to the facts of this accident. "As a result, the Court concludes that the second *Daubert* factor is inapplicable."

Sittig v. Louisville Ladder Group LLC

136 F. Supp. 2d 610 (W.D. La. 2001)

Factual Summary

Plaintiff who was injured in a fall brought action against ladder manufacturer, claiming that the ladder was unreasonably dangerous. The experts opined that the ladder was defective because the fly component of the ladder could separate with little horizontal force and thus rendered the ladder unsafe. Expert testimony was inadmissible, as their opinions were not based upon rigorous scientific testing. The court noted that the alternative design theory offered by one of the experts was tested only by him and had not been subject to peer review or publication. The expert opinions were precluded.

Key Language

- "[The expert's] alternative design has only been tested by [him], and it has not been subject to peer review and publication." 136 F. Supp. 2d at 620.

Brumley v. Pfizer, Inc.

200 F.R.D. 596 (S.D. Tex. 2001)

Factual Summary

Decedent's family brought suit against manufacturer of Viagra, alleging that it caused his heart attack. Plaintiffs' expert proffered testimony that Viagra increases the levels of catecholamines in the blood, resulting in increased sympathetic nerve activity and increased cardiac risk in patients with ischemic heart disease. Pfizer brought a motion to exclude the expert's testimony as unreliable, as there have been no reports supporting his conclusion. The district court granted the motion.

Key Language

- "The only studies that have been reported have concluded that there was no indication that Viagra created any increased cardiac risk." 200 F.R.D. at 602.
- The expert "concluded that Viagra is unsafe because no study has tested whether it is safe for patients with ischemic heart disease who engage in sexual activity." *Id.*
- The expert "may have pointed out an important void in the scientific literature, but the lack of proof of a drug's safety does not prove it is dangerous. It may be advisable to assume that Viagra is dangerous for patients with ischemic heart disease, given the lack of evidence to the contrary, but in a lawsuit where the plaintiff bears the burden of proving that a drug is dangerous, the Court cannot assume that element of the plaintiff's claim." *Id.*

Torries v. Hebert

111 F. Supp. 2d 806 (W.D. La. 2000)

Factual Summary

Plaintiffs applied for a preliminary injunction barring the playing of "gangster rap" music at Defendant's skate boarding facility. Plaintiff's application stemmed from an incident of violence among teenage patrons at Defendant's facility. Plaintiff contended that the "gangster rap" music played on the night in question contributed to the episode of teenage violence. The district court precluded Plaintiff's expert from testifying that "gangster rap" contributes to teenage violence and aggression.

Key Language

- "Dr. Bouillon admitted that he has not published any articles related to music and adolescent violence. Although Dr. Bouillon stated that his general opinions on the correlation between music and violence are unanimously accepted in the psychological community, the Court was not presented with any evidence that the psychological community is unanimous its opinions of 'gangster rap' and its effect on children under conditions similar to the ones at issue in this case." 111 F. Supp. 2d at 807.

In the Matter of Ingram Barge Co.

187 F.R.D. 262 (M.D. La. 1999)

Factual Summary

In toxic tort case, motion was filed to exclude physician as expert witness as to increased risk of developing cancer after alleged exposure to benzene, toluene, styrene and xylene. Although peer reviewed scientific literature provides evidence of benzene's neurotoxicity, liver toxicity, pulmonary toxicity, and carcinogenic properties, the expert's theory that exposed persons are more likely to develop cancer than non-exposed

persons has not been peer reviewed. Thus, the evidence is inadmissible. Physician was excluded.

Key Language

- "Although [the expert's] report referred to 'peer-reviewed scientific literature,' listed 12 published articles, and he referred to some sources in his deposition, he did not link the findings in any of them to his recommendation for twice a year testing nor his opinion that exposed claimants have a significantly increased risk of developing cancer." 187 F.R.D. at 266.
- "One can only infer from [the expert's] failure to articulate his methodology that there is none." *Id.*

Smith v. Borden, Inc.

188 F.R.D. 257 (M.D. La. 1999)

Factual Summary

Plaintiff sued manufacturer of aerosol battery protector for injuries incurred when it came in contact with positive terminal of car's battery and caused electrical arc. Plaintiff alleged that the aerosol product was defective because it was too large and too likely to come in contact with insulating cap. Plaintiff offered various engineers in support of this theory and defendant moved to exclude expert witness testimony. District court granted in part and denied in part Defendant's motion.

Key Language

- "It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy." 188 F.R.D. at 260.
- "[T]he defendant did not identify any journals or treatises in the area of 'aerosol can design.' Universities do not award degrees in 'aerosol can design.' However, there are certain scientific and engineering principles that go into the design of an aerosol delivery system. It is the explanation of these principles, and their application to the product at issue in this case, that ultimately will be of 'assistance to the trier of fact' as Rule 702 contemplates." *Id.* at 262.

Wooley v. Smith & Nephew Richards, Inc.

67 F. Supp. 2d 703 (S.D. Tex. 1999)

Factual Summary

Recipient of pedicle bone screw device brought product liability action against manufacturer. Defendant's motion to exclude expert's testimony was granted on the basis that expert's opinion that patient was harmed by pedicle screw implant was not reliable. At least ten other courts had excluded same expert's testimony as methodologically unsound and therefore unreliable.

Key Language

- Expert's "arm chair-quarterback style evades meaningful testing, eludes peer review, and makes error rates incalculable…. Opinions based upon his ill regard for the use of pedicle screw fixation are at best conclusory, and at worst just bad science and junk medicine." 67 F. Supp. 2d at 708 (citing *Goodwin v. Danek Med., Inc.*, 1999 U.S. Dist. LEXIS 19121, at *8 (D. Nev. July 8, 1999)).

Anderson v. Bristol Myers Squibb Co.

1998 WL 35178199 (S.D. Tex. Apr. 20, 1998)

Factual Summary

Plaintiff claimed that infection in polyurethane covering her implants caused a type of cancer called cutaneous T-cell lymphoma. Plaintiff's experts opined that a staph infection caused the cancer and that they had published hundreds of articles on cancer. Defendant challenged Plaintiffs' experts' theories as unsupported and unreliable. District court granted Defendant's motion.

Key Language

- Plaintiff's expert's "causation theory has never been subjected to peer review and publication." "While it is true that [she] has published two articles concluding that there is some sort of *association* between staph infections and CTCL, she has never suggested, in her published work, that this relationship is *causal*." 1998 WL 35178199 at *10.

Cuevas v. E.I. Dupont De Nemours & Co.

956 F. Supp. 1306 (S.D. Miss. 1997)

Factual Summary

Plaintiff claimed a host of medical problems stemming from exposure to spray called Oust, which was utilized for weed control to the side of a highway. Plaintiff presented his treating physicians as experts, alleging a temporal relationship between the alleged exposure and exacerbation of Plaintiff's medical problems. District court granted Defendant's motion for summary judgment as the physicians' methodology was not sufficient to amount to reliable scientific knowledge.

Key Language

- Plaintiff's expert "admits that his opinion has not undergone any type of peer review, and he does not know of any other toxicologist who agrees with his opinion." 956 F. Supp. at 1312.

Pick v. Am. Med. Sys.

958 F. Supp. 1151 (E.D. La. 1997)

Factual Summary

Plaintiff brought action against manufacturer of silicone elastomer penile implant alleging that it caused an autoimmune disorder and systemic coccal disease. Plaintiff's expert's testimony concerning general causation regarding silicone gel and autoimmune diseases and case studies in support of this conclusion was held admissible. Testimony concerning systemic coccal disease and testimony regarding specific causation held inadmissible under *Daubert*.

Key Language

- "True peer review means that a scientific hypothesis is subjected to independent evaluation by other scientists in that particular field, typically by independent testing and replication of the results. Prepublication 'editorial peer review,' on the other hand, usually consists of sending the proposal article to several outside reviewers who comment on its content and make a recommendation on publication. It is simply not feasible for the editorial staff or the outside reviewers to attempt to replicate the author's findings prior to publishing them. Consequently, just because an article is published in a prestigious journal, or any journal at all, does not mean *per se* that it is scientifically valid." 958 F. Supp. at 1158.
- "The fact that [case] studies frequently appear in medical journals also satisfies *Daubert* and establishes that case studies are well-accepted in the scientific community as valid methodology." *Id.* at 1161.

Bennett v. PRC Pub. Sector, Inc.

931 F. Supp. 484 (S.D. Tex. 1996)

Factual Summary

Police dispatchers brought action against manufacturer of computer-aided dispatch system, alleging that defective design caused repetitive motion disorders. Plaintiffs offered expert to opine that the work stations were defectively designed and caused repetitive motion disorders. Defendant contended that Plaintiffs' expert's opinions were not supported by adequate methodology. Defendant's motion in limine granted.

Key Language

- There "is no reliable evidence or other indication that any of the material submitted by plaintiffs was peer reviewed." 931 F. Supp. at 494.
- "When asked whether his theory regarding a causal connection between non-adjustability and upper extremity disorders had been peer reviewed, [the expert] answered, 'I discussed it with my peers and I have gotten concurrence with my thoughts, if that is what you call peer reviewed.'" *Id.* He did not discuss peer reviewed literature defined as "a journal or refereed journal." *Id.*
- "The NIOS Report states that it uses the term 'cumulative trauma disorder,' or 'CTD,' to refer to those musculoskeletal impairments that *appear* to be work-related." *Id.* at 495.

Sixth Circuit

Mike's Train House, Inc. v. Lionel, L.L.C.

472 F.3d 398 (6th Cir. 2006)

Factual Summary

Two distributors of model trains contracted with a third manufacturer and designer. Plaintiff, one of the distributors, claimed misappropriation of trade secrets and unjust enrichment toward Defendant, the other manufacturer, for use of its train models. Defendant challenged admissibility of Plaintiff's expert, which the judge allowed in, and the jury awarded more than $40 million to Plaintiff. On appeal, the Sixth Circuit vacated the lower court decision because it did not consider *Daubert* factors in its analysis of the expert's testimony and harm was caused because of it.

Key Language

- "We conclude that the district court abandoned its gate-keeping function by failing to make any findings regarding the reliability of [the expert's] testimony." 472 F.3d at 407.
- "[The expert] created the criteria with which he compared the design drawings; however, there is no evidence that his methodology had ever been tested, subjected to peer review, possessed a known or potential rate of error, or enjoyed general acceptance." *Id.*
- "Although it is true that 'in some instances well-grounded but innovative theories will not have been published,' and that '[s]ome propositions… are too particular, too new, or of too limited interest to be published,' *Daubert*, 509 U.S. at 593, 113 S. Ct. 2786, the novelty of a theory does not shield an expert's testimony from judicial scrutiny." *Id.*

- "In *Nelson*, although we acknowledged that peer review may not always be available in the case of novel theories or methodology, we emphasized that scrutiny by the scientific community is one of several indicators of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* at 407–08 (citing *Nelson*, 243 F.3d at 251 (quoting *Daubert*)).

Mohney v. USA Hockey, Inc.

138 F. App'x 804 (6th Cir. 2005)

Factual Summary

Plaintiff crashed into the boards during a hockey game and suffered a spinal injury that left him a quadriplegic. Defendant Bauer, the manufacturer of the helmet worn by Plaintiff at the time of the accident, filed several motions, including a motion to exclude Plaintiff's experts and a motion for summary judgment. The motions were granted and upon appeal, the dismissal affirmed.

Key Language

- "Dr. Collins did not cite any published work to buttress his opinion, nor could he because Dr. Collins' theory has not been subject to peer review or publication." 138 F. App'x at 808.
- "Johanson cited no research or publications quantifying the impact forces (vibrations) necessary to cause the screw-nut combinations to become loose." *Id.* at 810.

Patterson v. Cent. Mills, Inc.

64 F. App'x 457 (6th Cir. 2003)

Factual Summary

The minor plaintiff's mother bought him an adult t-shirt. While watching the Super Bowl, the 10-year-old decided he wanted hot dogs for supper. He turned on the burner for the stove, and then tried to get something out of the cabinets. In so doing, the shirt came into contact with the open flame and burned him extensively. Defendant moved in limine to preclude Plaintiff's "flammability expert" from testifying regarding flammability warnings on clothing. The district court granted the motion after a *Daubert* hearing, and the case proceeded to a defense verdict at trial. Among other issues, the *Daubert* based preclusion was raised on appeal.

Key Language

- The standard of review of the lower court's decision to admit or preclude evidence is an abuse of discretion standard. "An abuse of discretion occurs when the reviewing court is left with the 'definite and firm conviction' that the district court 'committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'"
- As to the 'peer review' factor, the court states, "Here, the testimony at the *Daubert* hearing revealed that [plaintiff's expert] had never written flammability warnings for clothing, had no specific training with regard to warnings on clothing, and had never had an article regarding clothing subjected to peer review. Indeed, [the expert's] only experience with flammability warnings came with regard to those placed on mattresses and furniture. Given this, the district court did not abuse its discretion in preventing the expert from testifying on the issue of warnings on clothing."

First Tenn. Bank Nat'l Ass'n v. Barreto

268 F.3d 319 (6th Cir. 2001)

Factual Summary

Lender sued to compel Small Business Association (SBA) to fulfill its alleged contractual obligation under guaranty to repurchase defaulted loan. SBA submitted that the lender was substantially negligent in servicing the loan and offered an expert in banking who opined that the lender did not act consistent with prudent banking standards. The district court permitted the expert to testify as to his testimony. On appeal, the lender argued that the banking expert's opinions had not been subjected to peer review, among other *Daubert* challenges. The Sixth Circuit permitted the testimony.

Key Language

- "The fact that the [non-scientific expert's] opinions may not have been subjected to peer review, or that their validity has not been confirmed through empirical analysis, does not render them unreliable and inadmissible." 268 F.3d at 335.
- "[W]e find the *Daubert* reliability factors unhelpful in the present case, which involves expert testimony derived largely from [the expert's] own practical experiences throughout forty years in the banking industry. Opinions formed in such a manner do not easily lend themselves to scholarly review or to traditional scientific evaluation." *Id.*

Hardyman v. Norfolk & W. Ry. Co.

243 F.3d 255 (6th Cir. 2001)

Factual Summary

The Sixth Circuit overturned the lower court's exclusion

of railway worker's expert's testimony regarding carpel tunnel syndrome. Part of the court's analysis focused on whether the methodology of differential diagnosis is a generally accepted technique.

Key Language

- "Differential diagnosis generally is a technique that has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results[;] it is a method that involves assessing causation with respect to a particular individual." 243 F.3d at 261, citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 758 (3d Cir. 1994).
- "One appropriate method for making a determination of causation for an individual instance of disease is known as 'differential diagnosis….'" *Id.* at 260.

Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp.

2001 U.S. App. LEXIS 3212 (6th Cir. 2001)

Factual Summary

Unsecured creditors' committee filed suit to prevent transfers of property and payment of debts. Bankruptcy court held that the transfers were not fraudulent and the circuit court upheld the decision. At issue on appeal was whether the bankruptcy court erred in permitting the expert testimony of an expert on solvency issues, on the theory that solvency expertise was not a widely accepted field. The expert's opinion was admissible.

Key Language

- Court mentioned *Daubert* factors, including peer review, but did not rely upon these factors in the analysis. The expert's "qualifications as an expert were well established, and his valuations were based on discounted cash-flow valuation, a well-recognized methodology for determining a business's going-concern values." 2001 U.S. App. LEXIS 3212 at *7–8.

Nelson v. Tenn. Gas Pipeline Co.

243 F.3d 244 (6th Cir. 2001)

Factual Summary

Individuals claimed to have been exposed to PCBs resulting from exposure to natural gas pipeline compressor station. The PCBs were contained in lubricant used at the compressor. District court excluded expert testimony that concluded that Plaintiffs' alleged injuries were more likely than not caused by exposure to PCBs. Plaintiffs argue that the lack of peer review was only because the expert's opinions were at the "forefront of toxicology." Circuit court affirmed, as expert's opinion was not based on reliable scientific knowledge.

Key Language

- "[T]he lack of peer review and publication was plainly relevant to the determination of whether [the expert's] causation theory was based upon good science." 243 F.3d at 251.
- Peer review factor not met "because [the expert] has authored two other studies which were peer reviewed. Although plaintiffs broadly assert that those studies reached similar conclusions related to other PCB exposures, it is clear that they do not demonstrate the reliability of the theory that the plaintiffs' environmental exposure to PCBs can and did cause the impairments and ailments that they claim." *Id.* at 251–52.

Clay v. Ford Motor Co.

215 F.3d 663 (6th Cir. 2000)

Factual Summary

Action brought against manufacturer of SUV, arising out of a rollover accident, based upon design defect in that the SUV has a propensity to roll over. The circuit court permitted Plaintiffs' expert to testify that the vehicle overcompensated during a double lane change and that the rollover occurred because of the instability of the SUV. The majority opinion did not address the *Daubert* peer review element. The dissent was critical of the fact that the expert did not subject his theories or techniques to peer review.

United States v. Bonds

12 F.3d 540 (6th Cir. 1993)

Factual Summary

Defendant was convicted of murdering driver of van. Defendant stole victim's van after he shot him. Prosecution sought to establish that blood found on van's front seats was Defendant's, as it was established earlier that Defendant sustained severe ricochet wound in shooting. Court rejected Defendant's argument that district court erred in admitting expert testimony concerning the DNA match between the blood sample taken from the van and Defendant's sample.

Key Language

- "In some instances well-grounded but innovative theories will not have been published…. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in

methodology will be detected. The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is based." 12 F.3d at 559.

- "It is important… to note that 'flaws in methodology' uncovered by peer review do not necessarily equate to a lack of scientific validity, since the methods may be used on scientific principles and the alleged flaws go merely to the weight, not the admissibility, of the evidence and the testimony. Instead, peer review and publication should be viewed as evidence that the theory and methodology are scientific knowledge capable of being scrutinized and have in fact been scrutinized by the scientific community." 12 F.3d at 559.

Baker v. Chevron USA, Inc.

680 F. Supp. 2d 865 (S.D. Ohio 2010)

Factual Summary

The residents near an oil refinery brought suit against Chevron alleging the exposure to benzene caused various ailments. Defendants moved to exclude the residents' causation expert as unreliable, and the court granted the motion.

Key Language

- "While the authors write that their study suggests that a peak exposure to benzene for a short period is more harmful than a lower exposure for a longer period of time, it is clear that the purpose of the study is to consider whether OSHA STEL [short term exposure limit] is sufficiently protective. Therefore this study does not support an opinion the Plaintiffs' short-term peak exposures to benzene probably caused their illnesses." 680 F. Supp. 2d at 881.
- "A study 'is considered statistically significant only when the odds ratio is expressed with a 95 percent confidence interval (consistently) and when that interval does not include an odds ratio of 1.0 or below.'" *Id.* at 882 (internal citations omitted).
- "The Court recognizes that an expert's opinion does not have to be unequivocally supported by epidemiological studies in order to be admissible under *Daubert*." *Id.* at 887.
- "In this case, the opinions expressed by [the expert's] revised report are based on a scattershot of studies and articles which superficially touch on each of the illnesses at issue. However, no depth of opinion is developed in any of the selected references as to any of Plaintiffs' illnesses." *Id.* at 887.

Anderson v. Ridge Tool Co.

2008 WL 3849923 (E.D. Ky. Aug. 14, 2008)

Factual Summary

Plaintiff was injured and alleged that the Ridgid 300 design was defective and was the cause of injury. Defendant brought a *Daubert* motion to exclude Plaintiff's expert's testimony, and the court denied the motion.

Key Language

- "A review of [the expert's] credentials shows that he has published a great number of papers, though none appear to be directly related to the topic at issue in this case. As noted by [the expert] during his testimony 'the matters which we are talking [about] here is [sic] very fundamental to design and normally we only publish recent advancements and what we are talking about here today is over 30 years old technology.' The general nature of [his] testimony in the present action does not lend itself to publication, and the fact that [his] specific conclusions in this case have not been subject to peer review does not weigh against its admissibility." 2008 WL 3849923 at *6.

Hayes v. MTD Prods., Inc.

518 F. Supp. 2d 898 (W.D. Ky. 2007)

Factual Summary

A man was killed when his riding lawnmower rolled over on top of him, crushing him. Plaintiff sought to have former CPSC investigator testify that failure to equip the lawnmower with roll-over equipment constituted gross negligence. Defendant brought a *Daubert* motion to exclude the testimony. The court granted Defendant's motion.

Key Language

- "While [the expert] certainly cites to a wide variety of publications discussing lawn mower safety in his proposed report, he does not appear to have cited any publications that concluded that the failure of some riding mower manufacturers to provide ROPS on their mowers amounts to, in [the expert's] words, 'gross negligence.'" 518 F. Supp. 2d at 900.
- "Furthermore, it does not appear that [the expert] himself has published any materials on ROPS and riding mowers, and certainly there is no evidence that any of [his] conclusions have been peer reviewed. Therefore, the second *Daubert* factor also suggests excluding [his] proposed testimony." *Id.*

Hough v. State Farm Ins. Co.

2007 WL 1500181 (E.D. Mich. May 22, 2007)

Factual Summary

Plaintiff was a passenger in a car driven by her mother when another vehicle crossed into their lane and hit their vehicle head-on. Plaintiff suffered injuries to her spine as a result of the accident. Plaintiff filed claims as a resident relative to collect no-fault benefits from Defendant. Plaintiff collected benefits for medical expenses and wage loss due to the accident. Plaintiff's lawsuit sought benefits for attendant care, replacement services, mileage, and medical expenses. Defendant moved to exclude the *de bene esse* deposition testimony of Plaintiff's expert regarding the results of Plaintiff's discogram and the reliability of a discogram, and the judge denied the motion and allowed Plaintiff's expert to testify.

Key Language

- "With respect to whether discography has been subjected to peer review and publication, [plaintiff's expert] cited the most recent metanalysis, which was published in the January 2007 edition of *Pain Physician*. The *Pain Physician*'s website describes the publication as 'a peer-reviewed, multi-disciplinary journal written by and directed to an audience of interventional pain physicians, clinicians and basic scientists with an interest in interventional pain management and pain medicine,' which 'presents the latest studies, research, and information vital to those in the emerging specialty of interventional pain management.'" 2007 WL 1500181 at *2
- "Although [the defense expert's] report states that there are no 'carefully designed research studies… that have been performed for the discogram,' unlike [plaintiff's expert], [the defense expert] does not provide any specific authority substantiating his statements. Consequently, this Court believes that Plaintiff has provided sufficient evidence that the discogram procedure has been subject to peer review and publication." *Id.* at *3 (internal citations omitted).
- "In conclusion, based on the testimony of [plaintiff's expert] specifically describing the testing of the technique employed by examiners performing discograms, the articles published on discograms, the results of studies finding low false-positive rates, and the general acceptance of discogram by two national organizations, this Court concludes that Plaintiff is able to proffer [the expert's] testimony regarding the performance of the discogram." *Id.* at *4.

Ashburn v. Gen. Nutrition Ctrs., Inc.

2007 WL 4225493 (N.D. Ohio Nov. 27, 2007)

Factual Summary

Man died from dehydration while exercising and while on creatine supplement. Both parties brought *Daubert* motions to exclude the other party's experts.

Key Language

- "[Plaintiff's expert] had not previously considered the issue on which he is asked to opine, and only did so after he was contacted by counsel for Plaintiff in this case. Thus, his opinions were developed solely for this case, have not been tested in the market place of ideas by having been peer reviewed…"2007 WL 4225493 at *3
- Where there is an absence of peer review *and* testing, the *Daubert* standards which have been developed by the Courts cannot in the instant case be satisfied. *Id.*
- Defendant's expert "has conducted multiple studies on creatine as reflected in many articles on the supplement. Those articles have been published, subjected to peer review, and apparently accepted within the scientific community." *Id.* at *5.
- "It appears to this Court that [Defendant's expert's] testimony is founded on testing, peer reviewed research and writing and his more than 20 years of experience." *Id.* at *5.

Honaker v. Innova, Inc.

2006 WL 3702270 (W.D. Ky. 2006)

Factual Summary

Defendant was injured when her pressure cooker exploded. Defendant brought *Daubert* motion to exclude Plaintiff's expert, and the court granted the motion.

Key Language

- "[The expert] himself admits that his theory about Honaker's accident has not been tested and that it would be difficult to do so. [The expert's] theory has not been subjected to peer review or publication—at any level." 2006 WL 3702270 at *2.
- "None of the mini-theories which are contained in [the expert's] explanation have been tested or subjected to peer review. Because there have been no tests, there is no information on his theory's rate of error and there is no information indicating that his theory is or would be generally accepted within the scientific community." *Id.*
- "Not one of the *Daubert* factors indicates that [the expert's] testimony satisfies the standards required of an expert witness planning to offer scientific opinions." *Id.*

Birge v. Dollar Gen. Store Inc.
2006 WL 5175758 (W.D. Tenn. 2006)

Factual Summary
Son of the plaintiff was shot when assaulted in a Dollar General Store parking lot. Plaintiff sought to introduce evidence as the foreseeability of the attack and other issues by her premises security expert. Defendant brought a *Daubert* motion to exclude the evidence and the court granted the motion.

Key Language
- "Because the proffered testimony is not scientific in nature, the methodology need not be subjected to rigorous testing for scientific foundation or peer review. Nevertheless, the expert must still provide a methodology that can be proven to be reliable…. The expert must explain the means by which he reached his conclusions, and such means must satisfy at least one of the *Daubert* factors of reliability."2006 WL 5175758 at *5.
- "[The expert] cites to no publications, studies, research, or other data that support his methodology in determining what constitutes a "pattern of crime," his opinion that there was a pattern of crime at the Dollar General store, or his opinion that the attack was foreseeable. As such, his methods and opinions cannot be tested or subjected to peer review, there are no known rates of error for the method or controlling standards, and there is no evidence that his methods are generally accepted in the industry." *Id.* at *11.
- "In addition to being based on an unreliable and untested methodology, his opinion regarding a "pattern of crime" and foreseeability will not assist the jury." *Id*. at *11.
- "[The expert] does not provide support for his methodology so as to make it reliable. Although he cites to a 1994 Wal-Mart study on roving patrol vehicles and to a book by Larry Siegel on criminology, [the expert] does not explain with any specificity how those sources support his methodology." *Id.* at *13.
- There are no peers to test his theories and no way in which to duplicate his results. *Id.* at *13.

Morehouse v. Louisville Ladder Group, LLC
2004 U.S. Dist. LEXIS 21766 (D. S.C. 2004)

Factual Summary
Plaintiff was injured when one of the side rails of the ladder made by Defendant allegedly failed while he was standing on it, causing him to fall and sustain an injured back and a fractured shoulder. Defendant filed motions to exclude the testimony of Plaintiff's expert witness and for summary judgment. The court granted both motions, holding that Plaintiff's expert lacked sufficient indicia of reliability under *Daubert* and that Plaintiff had not met his burden of proof in demonstrating that his injuries were proximately caused by Defendant's product.

Key Language
- "Defendant contents that Dr. Durig's 'spontaneous buckling theory… could gain both credibility and the requisite indicia of reliability through review by the relevant engineering or scientific communities.' According to Defendant, Dr. Durig chose neither to conduct his only method of hypothesis testing… nor to videotape or otherwise measure the results of his climbing activity so that they could be reviewed and evaluated…. Such scrutiny by the scientific community is important, not only because it establishes reliability, but because it is a component of 'good science.'" 2004 U.S. Dist. LEXIS at *18–19.
- "Plaintiff attempted to argue that peer review would not be helpful based on the facts of this particular case and cited *Scordill v. Louisville Ladder Group, LLC*, No. 02-2565, 2003 U.S. Dist. LEXIS 19052, at *1 (E.D. La. Oct. 24, 2003)." *Id.* at *19.
- "The court agrees with Plaintiff that to the extent that Dr. Durig's opinion is based on the very specific facts of this case, it does not lend itself to peer review. The court refuses to accept, however, any contention by Plaintiff that Durig's hypothesis testing—*i.e.*, climbing the exemplar ladder—need not have been videotaped or otherwise recorded so that the results might be scrutinized by Defendant as well as others in the scientific community." *Id.* at *20.
- "Because Durig failed to record his hypothesis testing or include relevant details in his report, it is extremely difficult for the court to evaluate the reliability of his work. Accordingly, the court finds that Dr. Durig's report also fails to possess the indicia of reliability necessary under the second *Daubert* factor." *Id.* at *21.

Harvey v. Allstate Ins. Co.
2004 WL 3142227 (W.D. Tenn. Oct. 4, 2004)

Factual Summary
Plaintiff filed, inter alia, fraud and breach of contract claims against his insurance company for its refusal to pay his insurance claim and the cancellation of his insurance policy after his car was allegedly stolen. Plaintiff further claimed that Defendant's deci-

sion to deny his claim was made solely on the basis of a report by Defendant's expert. Plaintiff filed a motion to exclude Defendant's expert on the grounds that the methodology that he used did not meet *Daubert* requirements, which was denied by the district court.

Key Language

- Plaintiff argued that Defendant's expert, Pacheco, should be excluded because there had been no peer review of his "key pathway analysis," the technique whereby one examines the locks and their respective keys to determine if picking or tampering has occurred with the lock. "Pacheco admitted that there was no board, journal or publication or scientific body that accepted the analysis as a valid scientific study. Pacheco also stated that besides commercial entities there [sic] were marketing the analysis for profit, there has been no independent review." 2004 WL 3142227 at *3.
- An analysis of the reliability of the testimony "focuses on the 'methodology and principles' that form the basis if the testimony." *Id*. at *2.
- "Allstate's response to Harvey's motion are three letters showing that there has indeed been peer review of the 'key pathway analysis.' In particular, one report states in regard to Pacheco's methodology that 'we find your processing of evidence to the examination stage follows all of the proper procedures that are used to handle evidence obtained in any criminal investigation. We also find that your methods of examination of the lock and key components follow all of the proper techniques that are used in a scientific examination…' Based on these exhibits, it is clear to the court that 'key pathway analysis' has been subjected to peer review." *Id*. at *3.

W. Tenn. Chapter of Associated Builders & Contractors, Inc. v. City of Memphis

300 F. Supp. 2d 600 (W.D. Tenn. 2004)

Factual Summary

Plaintiffs sued the city for a Minority/Women Business Enterprise (MWBE) program that required the city to award a certain percentage of construction contracts to businesses owned by African-Americans and women. According to Plaintiffs, the city's disparity study did not meet the evidentiary standards required to show a compelling interest for the program. Plaintiffs proffered an expert for the purposes of critiquing the city's disparity study. The city argued, in part, that his methods for testing availability of MWBE contractors were too controversial to meet the Fed. R. Evid. 702 standard of evidentiary reliability. The court disagreed, finding the expert's method was testable, the method had been published in many respected journals, and was clearly one method accepted in the academic community.

Key Language

- "Social science and law do not subject studies to the same rigorous peer review of physics, chemistry, and the hard sciences. Still, [the expert's] method has been published in many respected journals and is clearly one method accepted in the academic community. [His] work has been embraced by the conservative community, as evidenced by his publication in the conservative *Harvard Journal on Law and Public Policy* and similar journals, but the Court is not requested to look to the sector of the community that includes [this expert]. The Court looks only to his inclusion within the earnest academic discussion of disparity studies." 300 F. Supp. 2d at 604.

Robertson v. Richard

2003 U.S. Dist. LEXIS 22083 (E.D. La. Dec. 8, 2003)

Factual Summary

Following a car accident, Plaintiff sought medical treatment for low back pain. A neurosurgeon ordered a lumbar discogram, a CT scan, and lumbar arthrogram. Following the tests, the neurosurgeon performed a medial branch neurotomy, in which heat was applied to the nerves that enervated the implicated lumbar joints. Defendants sought to bar the individual from making any reference at trial to the lumbar arthrogram or the medial branch neurotomy and from offering any evidence related to those procedures. The court permitted the testimony as to the procedure as it had been evaluated in double-blind studies, the results of which were published in the medical literature.

Key Language

- Although relatively new and not yet widely used, the procedure [neurosurgeon] performed has been evaluated in double-blind studies, the results of which have been published in the medical literature. 2003 U.S. Dist. LEXIS 22083 at *5.

Zuzula v. Abb Power T&D Co.

267 F. Supp. 2d 703 (E.D. Mich. 2003)

Factual Summary

The decedent was electrocuted while installing an industrial fuse in high-voltage electrical switching gear designed and manufactured by Defendant. Defendant argued that Plaintiff's expert's methodology was flawed

because he had done no studies or tests to indicate that the alternative system that he advocated was safer than the system in which the decedent was electrocuted. The court denied Defendant's motion and addressed Plaintiff's cross-motion to exclude but not on pertinent grounds for this discussion.

Key Language

- "A design already in existence obviously has been tested, suggesting that 'peer review' has been conducted. The defendant has not come forward with any substantial criticism on [plaintiff's expert's] use of the General Electric design, rendering a nullity its complaints about any separate designs that [he] himself may or may not have published for review by his peers." 267 F. Supp. 2d at 714.

H.C. Smith Invs., L.L.C. v. Outboard Marine Corp.

181 F. Supp. 2d 746 (W.D. Mich. 2002)

Factual Summary

Buyer of airplane brought action after purchasing an airplane that was later inspected by Defendants and found to be corroding. Plaintiffs brought motion to exclude Defendants' experts' opinions. In part Defendants' experts were prepared to offer testimony that the inspection revealed no corrosion and the fact that the airplane was later painted may have contributed to the corrosion. Defendants' experts did not publish any reports or otherwise engage in scholarly work in the subjects of corrosion, metallurgy, physics, chemistry or advanced aviation studies. There was no basis for their opinions.

Key Language

- "The witnesses have not published papers nor done any other scholarly work in the area of corrosion, metallurgy, physics, chemistry or advanced aviation studies." 181 F. Supp. 2d at 753.

Bouchard v. Am. Home Prods. Corp.

2002 U.S. Dist. LEXIS 14513 (W.D. Ohio July 30, 2002)

Factual Summary

Plaintiff's expert's testimony that related to an article he co-authored on valulopathy could not form the basis of his opinion, although he was permitted to use the article to "buttress" his opinions. Plaintiff argued that through the publication of the article her expert's opinions had undergone peer review. Defendant's motion to preclude this expert was denied.

Key Language

- "The Court is convinced that his article may not form the basis of his opinion in this case. Although not inconsistent with his prior testimony, [the expert's] article is overly tainted with selection bias due to his failure to blind his examination." *Id.* at 19–20.
- "That having been said, there is no reason that [the expert] may not refer to the information in his article to the extent that it buttresses the opinions to which he has previously testified. The Court is aware of no prohibition against an expert developing and fortifying a conclusion that he has previously expressed." *Id.* at 20.

Cicero v. Borg-Warner Auto., Inc.

163 F. Supp. 2d 743 (E.D. Mich. 2001)

Factual Summary

Plaintiff filed age discrimination lawsuit against former employer. After district court granted Defendant's summary judgment motion, district court issued order to Plaintiff and his attorneys to show cause why they should not be sanctioned for filing a meritless lawsuit. In response to the district court's show cause order, Plaintiff and his attorneys submitted the affidavits of two purported experts in the field of employment law; these two experts opined that Plaintiff's case was the kind of case that an employment discrimination lawyer would consider meritorious and likely pursue on behalf of the former employee. At the close of a *Daubert* hearing, the district court rejected both affidavits.

Key Language

- One of Plaintiffs' attorneys' proffered experts was a law school professor; this purported expert touted himself as qualified to render an opinion on legal ethics in the realm of employment discrimination law. "[T]he court notes that while Mr. Dubin is apparently well published, there is no indication that any articles were peer-reviewed. Unlike professions with a more technical bent, the court takes notice that an article in a law review is typically the product of only the author, and that it undergoes no more serious critique than the grammatical and citation checking done by the law students who run the journals and select the articles…. Simply possessing a law degree does not make one an expert in all areas of the law, even if one's criticisms are insightful. In other words, without an indication that Mr. Dubin's articles on ethics and professional responsibility were subject to meaningful peer review by other experts in that area of the law, his writings and commentaries are really no more than one lawyer's opinion." 163 F. Supp. 2d at 747–48.

Berry v. Crown Equip. Corp.

108 F. Supp. 2d 743 (E.D. Mich. 2000)

Factual Summary

Plaintiff was injured while operating a forklift at her workplace. She sued manufacturer, claiming that the forklift was defectively designed because it did not have a door on it to block the opening to the operator's compartment. Defendant moved for summary judgment, which was granted by the district court.

Key Language

- Courts "interpreting *Daubert* have considered testability of the expert's theory to be the most important of the four factors, and this is especially true in cases involving allegations of defect in product design, as opposed to cases involving medical and pure scientific theories, which will be subjected to rigorous peer review." 108 F. Supp. 2d at 754.
- "Thus, where, as here, the proffered expert has performed no reliable testing of his theory, courts, including the Sixth Circuit, have routinely precluded the witness from offering an expert opinion." *Id.*
- "[H]e has admittedly not subjected his theories to peer review." *Id.* at 755.
- "[H]e has never published anything dealing either generally with the design of stand-up forklifts of any manufacturer… nor has he written anything concerning his particular theory of design defect, that an enclosing door to the operator's compartment is required to keep the operator, and her limbs, inside during operation." *Id.*

Mercurio v. Nissan Motor Corp. in U.S.

81 F. Supp. 2d 859 (N.D. Ohio 2000)

Factual Summary

Plaintiff drove into a tree, after which it was discovered that his blood alcohol level was .18 percent at the time of the accident. Evidence of driver's blood alcohol content was not admissible to show that his injuries were more severe than they would have been if he had not had alcohol in his system, unless manufacturer could show that its proposed witness was qualified to testify as an expert on subject matter and that his conclusion that alcohol use enhanced central nervous system injuries was supported by scientifically valid reasoning. Plaintiff brought suit against Defendant under crashworthiness doctrine. Plaintiff sought to exclude evidence of her intoxication. Motion granted.

Key Language

- "The fact that [the expert] works for an agency that conducts research on behalf of the National Highway Traffic Safety Administration and peer reviews for American Association of Medicine and the Journal of Accident Analysis & Prevention is relevant only if he can point to some specific aspect of those experiences that has given him personal 'knowledge, skill, experience, training, or education' on the effects of alcohol on the human body that a lay witness would not have." 81 F. Supp. 2d at 863.

Wynacht v. Beckman Instruments, Inc.

113 F. Supp. 2d 1205 (E.D. Tenn. 2000)

Factual Summary

Plaintiff's strict products liability action was predicated on her alleged exposure to hazardous chemicals in wastewater released from a lab analyzer. The district court granted Defendant's *Daubert* motion to exclude the testimony of Plaintiff's medical causation expert witness. The causation opinion of Plaintiff's expert was based almost exclusively on the temporal proximity between Plaintiff's initial exposure and the onset of her symptoms.

Key Language

- Plaintiff's expert conceded that her causation opinion was never subjected to peer review. "Without testing data or support in scientific or medical literature, the Court cannot say with any confidence whether her reasoning would have any acceptance in the medical or scientific communities." 113 F. Supp. 2d at 1210.

Bush v. Michelin Tire Corp.

963 F. Supp. 1436 (W.D. Ky. 1996)

Factual Summary

Plaintiff brought action following explosion of tire, after he mounted the old tire on a larger old rim despite the manufacturer's warnings. Plaintiffs' offered tire expert was permitted to testify as to technological developments in the tire industry, custom, and practice as well as safer alternative designs. However, he was unable to testify as to protocol, procedures or raw data from proffered tests that he did not conduct and he otherwise had no personal knowledge of same. Plaintiffs offered no evidence to show that the protocols, procedures, or raw data from tests were subject to peer review or were otherwise reliable. Such material was found to be unreliable and was excluded.

Key Language

- Neither the expert nor the "Defendants have any personal knowledge of the protocol, procedures, or

raw data from the tests. Plaintiffs, in this case, have offered no evidence of peer review or otherwise to show the reliability of the test results. This type of research is inadequate to support an expert opinion." 963 F. Supp. at 1445–46.

Seventh Circuit

Am. Honda Motor Co., Inc. v. Allen
600 F.3d 813 (7th Cir. 2010)

Factual Summary
Motorcycle buyers sought class certification for an alleged steering problem in Honda Gold Wing motorcycles. The buyers alleged that the motorcycles were defective due to an inadequate damping of a "wobble," side-to-side oscillation of the front steering assembly. To demonstrate the predominance of common issues, Plaintiffs relied heavily on a report prepared by a motorcycle engineering expert. Honda moved to strike the experts testimony pursuant to *Daubert*. The district court concluded that it was proper to decide whether the report was admissible prior to class certification because "most of Plaintiffs' predominance arguments rest upon the theories advanced by the expert." The Seventh Circuit agreed and affirmed.

Key Language
- The expert "originally developed the standard for use in a mid-1980s lawsuit in which he testified as an expert against Honda and subsequently published it in a journal article aimed at forensic engineers who testify as experts on motorcycle instability… Despite its publication, there is no indication that [the expert's] wobble decay standard has been generally accepted by anyone other than [the expert]." *Id.* at 817.
- The expert's article merely "suggested" a standard for wobble decay; it acknowledged that he was "unaware of any governmental, industry or [Society of Automotive Engineers] standards determining acceptable response characteristics for [motorcycles]… in… wobble mode," and noted that "it is up to the investigating forensic engineer to define a reasonable standard that he may defend in the legal forum before opposing council [sic] or a jury," *Id.* at 818.
- "Even if we were to assume that [the expert's] standard is generally accepted by mere virtue of its publication in a peer-reviewed journal, its reliability remains in question." *Id.* at 818.

Allen v. LTV Steel Co.
68 F. App'x 718 (7th Cir. 2003)

Factual Summary
Plaintiff was operating a crane alongside a road when a tire exploded allegedly causing him to fall forward into the windshield of the crane, allegedly causing him serious injury. Plaintiff brought suit, inter alia, against the tire manufacturer. The subject tire was no longer in existence at the time of the lawsuit, and Plaintiff's expert attempted to posit that a defect was the cause of the explosion based on the reports of other tire explosions. The district court granted summary judgment to the manufacturer after rejecting the proposed testimony of Plaintiff's expert on *Daubert* grounds.

Key Language
- The standard of review of the lower court's decision to admit or preclude evidence is an abuse of discretion standard. "As long as the court below has applied the appropriate test, this Court reviews the decision of the trial court to admit expert testimony for an abuse of discretion."
- The Seventh Circuit agreed with the district court's finding that the proposed expert testimony did not meet the reliability prong of *Daubert*. The court noted with approval the lower court's analysis. "In reaching his conclusion that [plaintiff's expert's] testimony had failed the 'reliability prong, the judge noted that the methods of the putative expert had neither been 'verified by testing, subjected to peer review, nor evaluated for its potential rate of error".
- The tire was no longer in existence at the time of the lawsuit. Plaintiff's expert attempted to extrapolate from other tire incidents that the cause of those other incidents was the cause of this incident. In this regard, the court noted that the expert "had provided no support for the proposition that a defect in a specific tire can be established based solely on an examination of reports describing the failure rates of other tires. Furthermore, the judge also faulted [the expert] for failing to establish a connection between the incident tire and those failed tires that were the subject of those reports. Even if such a connection had been established, the judge continued, [the expert] made 'absolutely no attempt' to account for other alternative explanations of the tire explosion.

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

Factual Summary
Plaintiff filed a wrongful death action on behalf of her husband's estate after he was electrocuted following a short circuit of a stove. Defendant argued that Plain-

tiff's expert's opinion that a fatal amount of electrical current could leak through insulation to an uninsulated surface without tripping the circuit breaker, among other opinions, was not based upon known or accepted principles supported by peer review. The Seventh Circuit reversed district court's finding that Plaintiff's expert's opinions admissible. Jury verdict was overturned and case remanded.

Key Language

- "[The expert's] theory is novel and unsupported by any article, text, study, scientific literature or scientific data produced by other in his field." 2002 U.S. App. LEXIS 15131 at *12–13.
- The "expert has not published any writings or studies concerning his 'resistive short' theory." *Id.* at *13.
- "Unsubstantiated testimony, such as this, does not ensure that 'the expert's opinion has a reliable basis in knowledge and experience of his discipline.'" *Id.* (citing *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1995)).

United States v. Havvard

260 F.3d 597 (7th Cir. 2001)

Factual Summary

Criminal defendant argued that the government did not offer expert testimony that fingerprints matched. The Seventh Circuit affirmed the district court's decision concluding that fingerprinting technique has been subjected to peer review for verification.

Key Language

- The court was satisfied that "individual results are routinely subjected to peer review for verification…" 260 F.3d at 601.

Smith v. Ford Motor Co.

215 F.3d 713 (7th Cir. 2000)

Factual Summary

Plaintiff brought action against Defendant, claiming that a defect in the power steering gearbox of the van he was driving caused him to lose control of the steering. The trial court excluded Plaintiffs' two engineering witnesses partly because their opinions were deemed unreliable. In making its decision, the trial court noted that neither expert's methodologies had been the subject of peer review. The circuit court reiterated that no single *Daubert* factor ought to be conclusive in the court's reliability determination. The district court did not make any other determination or provide any explanation concerning the lack of peer review and reliability. The case was remanded for a complete determination as to whether the experts based their conclusions on reliable methodologies.

Key Language

- "No single factor among the traditional *Daubert* list is conclusive in determining whether the methodology relied on by a proposed expert is reliable." 215 F.3d at 720.
- "While the district court noted that neither expert had had his work published in a peer reviewed journal, the district court did not indicate whether publication is typical for the type of methodology these experts purported to employ." *Id.*
- "Lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony." *Id.*
- The expert could be "merely applying well-established engineering techniques to the particular materials at issue in this case, then his failure to submit those techniques to peer review establishes nothing about their reliability." *Id.*

Practice Tip

The circuit court was very concerned that the district court discredited the expert's methodology based on lack of peer review without an examination as to whether the methodologies employed were well-established or novel methods. In that regard, peer review may be irrelevant in cases where the methodology employed is well-established and generally accepted in the particular field.

Ancho v. Pentek Corp.

157 F.3d 512 (7th Cir. 1998)

Factual Summary

Plaintiff brought suit against manufacturer of automatic car materials handling system used within corrugated cardboard plant where Plaintiff was employed. Plaintiff submitted an expert report that stated that the design of the automatic car failed to eliminate the unreasonably dangerous pinch points where the transfer car passes by fixed components of the system and failed to provide safety devices. He also offered alternative vague designs purporting to eliminate the defects, but offered no basis for his opinions. The Seventh Circuit affirmed summary judgment.

Key Language

- "There is nothing to work with here in terms of [whether his opinions have] been subjected to peer review. The problem is, there is nothing to review

because he hasn't told us with any degree of particularity what it is he's recommending." 157 F.3d at 517.

Bradley v. Brown
42 F.3d 434 (7th Cir. 1994)

Factual Summary
Workers in office claimed that they developed Multiple Chemical Sensitivity (MCS) following exposure to pesticides applied in the office. The Seventh Circuit held that the district court properly excluded the physicians' opinions, as they would not be helpful. The district court examined the peer review associated with the clinical ecology of MCS and found that the literature raised even further doubts concerning the etiology of MCS.

Key Language
- Subsequent to examining peer review of clinical ecology: "After examining these sources and deciding that the literature raised further doubts as to the explanations of the causes of MCS, the district court determined that the evidence pointed to the conclusion that the 'science' of MCS's etiology has not progressed from the plausible, that is, the hypothetical, to knowledge capable of assisting a fact-finder, jury or judge." 42 F.3d at 438.

Cella v. United States
998 F.2d 418 (7th Cir. 1993)

Factual Summary
Plaintiff seaman brought maritime claim against the United States, alleging that he acquired polymyositis by reason of physical altercations and threats of violence he endured during a 30-day period as a cook on a naval vessel. The Seventh Circuit affirmed the district court's determination that Plaintiff's polymyositis was linked to the physical and verbal abuse he endured while onboard the vessel. Court rejected Defendant's argument that the causation opinion of Plaintiff's neurology expert was inadmissible in light of the "abundance of medical literature stating that the etiology of polymyositis is unknown."

Key Language
- The court rejected Defendant's reliance on the Bendectin line of cases (infant-plaintiffs alleged their birth defects were caused by their mother's ingestion of anti-nausea prescription drug, Bendectin, during pregnancy) as further support for its *Daubert* argument, noting that "the reanalyses which constituted the primary basis for the expert opinion in the Bendectin cases had never been published or subjected to the rigors of peer review, and were generated solely for use in litigation." 998 F.2d at 424.

Schmude v. Tricam Indus., Inc.
550 F. Supp. 2d 846 (E.D. Wis. 2008)

Factual Summary
A manufacturing defect allegedly caused a man to fall off of a ladder, sustaining injuries. A jury returned a verdict for Plaintiff, and Defendant moved for a new trial, claiming that Plaintiff's expert was unreliable. The judge denied the motion for a new trial and found the expert's testimony reliable.

Key Language
- "To be sure, Johnson's opinion as to how the ladder failed was not subjected to scientific testing or submitted for peer review or publication. But the Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael* noted that whether *Daubert*'s specific factors are reasonable measures of reliability in a particular case is a matter the trial judge has 'considerable leeway' to determine." 550 F. Supp. 2d at 852.
- "The goal is to ensure that an expert employs procedures and analysis in a way that is similar to how an expert in the given field would operate outside of court." *Id.*

Amakua Dev. LLC v. H.Ty Warner et al.
2007 WL 2028186 (N.D. Ill. 2007)

Factual Summary
Amakua Development allegedly arranged for a commercial real estate deal between two larger companies and entered into a non-circumvention agreement. The parties then allegedly completed the deal without compensating Amakua. Amakua brought suit. In cross-*Daubert* motions, the court allowed Defendant's experts to testify despite a lack of peer reviewed content due to the use of standard industry techniques.

Key Language
- "Because his testimony, like that of the other three experts offered in this case, is not scientific but is based instead on his personal experience in the real estate industry, there is no reason (and perhaps no way) to verify his technique through 'scientific testing.' In addition, although [the expert] may not have subjected his 'theory' or 'technique' to peer review and publication (it is not clear from his credentials whether he publishes in his field), this would not appear to be relevant, particularly if he is simply

applying standard techniques from his field that do not warrant publication." 2007 WL 2028186 at *8.

Gaskin v. Sharp Elecs. Corp.

2007 WL 2572397 (N.D. Ind. Aug. 31, 2007)

Factual Summary

A Gary, Indiana house caught fire, killing one person. Plaintiff alleged the fire was caused by a defective television. Defendant Sharp moved the court to exclude Plaintiff's two experts. The court denied the motion in part and granted the motion in part, allowing one expert to testify while excluding the other.

Key Language

- "[The expert] is unaware whether the Internet article has been published anywhere or peer reviewed." 2007 WL 2572397 at *9.
- "This Court does not believe this two-paragraph article, of which Plaintiffs have only shown exists on the Internet, sufficiently constitutes peer review or general acceptance from the scientific community. First and foremost, [the author of the article] himself notes that this concept needs more research. Second, although one category detailed in the article is arguably analogous to this case, nowhere does the article directly touch upon the conditions present at a pin connection at a CRT board in a television. Third, there is no evidence that anyone else in the scientific community has reviewed, much less accepted, [the author's] theory." *Id.* at *9.
- "Plaintiffs' argument that the opinions and research conducted by Sharp's retained experts in this case somehow qualifies as a peer review of [the expert's] opinions is untenable." *Id.* at *10.

Loeffel Steel Prods., Inc. v. Delta Brands, Inc.

372 F. Supp. 2d 1104 (N.D. Ill. 2005)

Factual Summary

Plaintiff sued Defendant, alleging breach of contract, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and fraud based on Plaintiff's claimed noncompliance of a piece of industrial machinery manufactured by Defendant and sold to Plaintiff. Defendant challenged the reliability of Plaintiff's expert. The court denied the motion to bar Plaintiff's testimony.

Key Language

- Defendants argued that Plaintiff's expert was not subjected to peer review and therefore did not satisfy the second *Daubert* requirement. However, the court noted: "It is precisely because this is such a case that it makes little sense to ask whether there has been peer review. Moreover, 'lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony.'" 372 F. Supp. 2d at 36.
- The defendant does not "explain how industry studies or publications would bear on the performance of the Line Loeffel purchased from Defendant. Industry studies show that the model of the Line purchased by Plaintiff worked splendidly throughout the country—if they existed—would not invalidate in the slightest Mr. Toczyl's conclusions that the particular machine he observed performed in a very different way. Even if such studies were somehow admissible in support of a counter-expert's testimony, they would only constitute the kind of contradictory evidence that *Daubert* said should be the curative for admissible but shaky testimony.... [T]he absence of corroborating studies or textual authority was not deemed necessarily to require exclusion of the proposed testimony." *Id.* at 41.

Pizel v. Monaco Coach Corp.

374 F. Supp. 2d 653 (N.D. Ind. 2005)

Factual Summary

Plaintiff purchased a motor home and soon after noticed many defects. Although Defendant attempted to repair the motor home, Plaintiff alleged that the repairs did not adequately correct the defects. Plaintiff alleged breach of written and implied warranties. Plaintiff noted he would have an expert witness testify as to the value of the motor home, and Defendant disclosed that it would offer an expert to testify as to the defects and to value as well. Plaintiff filed a motion to suppress portions of Defendant's expert witness's proposed testimony, challenging the foundation of the proposed testimony. Defendant then filed a motion to exclude Plaintiff's expert's testimony. The court denied both motions.

Key Language

- "Under the *Daubert* framework, Trimmell's valuation methodology is reliable because he consulted sources such as the NADA and RV Trader, which are both published and highly accepted valuation techniques in the motor home industry.... Trimmell's opinion was not purely based upon his expertise because he did not randomly assign a value to the motor home without first consulting respected publications." 374 F. Supp. 2d at 657.

Phillips v. Raymond Corp.

364 F. Supp. 2d 730 (N.D. Ill. 2005)

Factual Summary

Plaintiff was employed at a warehouse and operated a stand-up forklift in connection with his normal work duties. He contends that while driving in reverse, he unknowingly struck a "wood chip" with a wheel of the forklift and the wood chip became pinned between the wheel and the floor, jamming the wheel and causing the forklift to stop suddenly. Plaintiff was ejected from the forklift onto the floor and his right leg was amputated below the knee as a result of the trauma. Plaintiff brought a products liability action alleging, among other things, that the forklift was unreasonably dangerous because there was a satisfactory alternate design that would have safeguarded him from the foreseeable event. He offered Sevart and Liu as experts, and Defendant filed a motion to exclude the experts. Defendant alleged that both experts could offer nothing more than their subjective beliefs about the accident. Defendant retained two experts against whom Plaintiff filed motions to exclude, claiming their methodologies were insufficient, misguided, and thus unreliable. The court denied Plaintiff's motions to exclude and granted Defendant's motion to exclude the testimony of Sevart, but denied the motion as to Liu's testimony to the extent that Liu's testimony was not related to the Sevart testimony.

Key Language

- "Being subjected to publication or peer review is an important indicator, but by no means is it dispositive in determining a methodology's reliability." 364 F. Supp. at 735.
- "Sevart did not favorably subject his methodology to any peer review and publication, nor could Sevart establish that his design had been accepted for general application by any manufacturer, regulatory body, or standards organization." *Id.* at 737.
- Plaintiff "cites to several publications and entities that purportedly support Sevart's assertion that latching-rear door are generally accepted as necessary. He cites to the Swedish Board of Occupational Safety and Health, an unnamed patent applicant, a 1989 edition of a forklift operator's manual, trade magazines, ten (unnamed) forklift manufacturers who 'provide a rear post or rear door at [sic] standard equipment,' an uncited report from 1977, and the fact that Crown, another forklift manufacturer, makes a forklift with a rear door." *Id.* at 737. "None of these arguments are helpful to Plaintiff." *Id.*
- "None of the trade magazines offered by [Plaintiff] discuss latching-rear doors, nor do they indicate that the rear doors are standard or non-optional features. As for the 'ten forklift manufacturers,' that claim is imprecise and unhelpful, because it includes forklifts with a 'rear post,' which is not at issue here…. As for the 'Swedish OSHA' study, the Court cannot locate the Swedish study cited…. Finally, the operator's manual, to the extend it speaks meaningfully to the doors at all, discusses rear doors in the context of 'reach trucks.'" *Id.* at 737–38.
- "This manual, which is an operator's manual and not an design analysis, has no apparent relevance, and it certainly has no explained relevance as it relates to forklift design." *Id.* at 738.
- "There is no apparent peer review or publication of Sevart's methods. Sevart's 'analysis' amounts to little more than a series of foregone and conclusory assertions that are not supported by serious documentation, peer review, or acceptable testing." *Id.*
- Defendant "argues that Liu's testimony is unreliable because it has been the subject of no peer review or publication. This absence, however, is not determinative on the facts of the case. The briefs demonstrate that the particular tests performed by Liu were specialized to the facts of this case as alleged by Phillips and thus were not worthy of industry-wide analysis or peer review…. Without a further explanation of the connection between lack of publication and reliability *in this case*, [the Court] cannot determine the extent to which this factor bears on the reliability of the methodologies used by [Liu]." *Id.* at 740 (citing *Smith*, 215 F.3d at 720) (emphasis added).
- "The other *Daubert* factors are not disabling with respect to Corrigan's proffered testimony. The lack of peer review for Corrigan's research and analysis in this case is inconsequential, as the testing she conducted applied directly to this case and its specifics." *Id.* at 743.
- "Caulfield is a recognized leader in his industry who has published dozens of articles, and made actual tests, observations, and inspections designed around this litigation…. Sevart, on the other hand, has published nothing about his latching-rear door,… notwithstanding that his views have been overwhelming rejected by 'the processionals on the American National Standards Institute committee.'" *Id.* at 746.

Despoir, Inc. v. Nikes USA, Inc.

2005 U.S. Dist. LEXIS 10845 (N.D. Ill. Feb. 9, 2005)

Factual Summary

Plaintiff filed a patent infringement action against Defendant Nike, alleging that Defendant infringed on two of its patents by making, using, selling and offering to sell a golf club, the Nike CPR Wood, in violation of 35 U.S.C. §283. Defendant filed a motion for summary judgment as well as a motion to strike Plaintiff's expert from testifying. Defendant argued that some of the tests conducted by Plaintiff's expert, Dr. Aldrich, were unreliable and failed to meet the standards under *Daubert*. The court denied Defendant's motion for summary judgment and also denied the motion to strike portions of Dr. Aldrich's declaration.

Key Language

- "The fact that a particular proposed method is not subject to peer review is a consideration that normally raises substantial concerns about the proposed expert testimony. Such concerns also may well provide fodder for effective cross-examination. In this case, however, because this was apparently [*sic*] first test of its kind, the fact that the methodology has not been reviewed by peers is not dispositive, at least as the record appears to exist." 2005 U.S. Dist. LEXIS at 14–15.
- "Defendant also offers no suggestion that the lack of a study or general acceptance is indicative of an industry-wide or consensus type of rejection of Dr. Aldrich's practices." *Id.* at 15.
- "Therefore, the Court holds that the fact that Dr. Aldrich's tests do not meet all of the *Daubert* factors is not, in the atypical circumstances of this case, fatal to Aldrich's ability to offer testimony." *Id.* at 15–16.

Woods v. Wills

2005 U.S. Dist. LEXIS 25383 (E.D. Mo. Oct. 27, 2005)

Factual Summary

Plaintiffs contend, inter alia, that Defendants covertly gave them prescription drugs including chlorpromazine, carbamazepine, and/or thioridazine. Plaintiffs retained an expert who offered statements about the validity of certain toxicological testing and opined about laboratory analysis of hair samples taken from Plaintiffs. Defendants moved to exclude Plaintiffs' expert on the basis that he was not qualified to establish whether the testing he performed and his opinions were relevant and reliable. The court granted Defendants' motion to exclude the testimony of Plaintiffs' expert because the court concluded that Plaintiffs' expert did not meet the qualification standard set forth in Rule 702 and *Daubert*.

Key Language

- "Mr. Corpus also may not testify as to the rate of human hair growth. Plaintiffs have presented no evidence that Mr. Corpus can provide peer-reviewed and accepted authority on hair growth rates. The article recently supplied by Mr. Corpus from the American Journal of Forensic Toxicology concerns the extraction of cocaine metabolites from hair, and does not analyze or evaluate hair growth rates." 2005 U.S. Dist. LEXIS at 28.

Mejdrech v. The Lockformer Co.

2003 U.S. Dist. LEXIS 15587 (N.D. Ill. Sept. 4, 2003)

Factual Summary

Plaintiffs moved to bar the use of an expert witness in this civil action brought under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The challenged expert had opined that the differences in the isotopic ratios of carbon and chlorine in particular soil and groundwater samples indicated that the TCE in the groundwater in the class areas did not originate from defendants' property. Plaintiffs argued that his methods, report, and opinions were entirely unreliable. The court agreed and excluded the expert.

Key Language

- "[The expert's] isotope analysis method was an unprecedented variation on a peer-reviewed procedure. It was not tested or subjected to peer review or publication, it appears to sustain a high potential rate of error, and it does not enjoy general acceptance within the relevant scientific community. The unreliability of his method is compounded by his seeming disregard of any unfavorable findings in this case." 2003 U.S. Dist. LEXIS 15587, at *10.

Schrott v. Bristol-Myers Squibb Co.

2003 U.S. Dist. LEXIS 18890 (N.D. Ill. Oct. 22, 2003)

Factual Summary

Plaintiffs sought recovery for alleged neurological injury caused by defective breast implants. Two of the defendants moved to bar testimony from a doctor as his opinion concerning causation was unreliable. The court granted Defendants' motion to exclude the testimony.

Key Language

- "Nothing in the record indicates that [Plaintiff's expert's] opinions have been verified by testing, subjected to peer review or evaluated for potential rate of error. Rather, [Plaintiff] claims [her expert's]

opinion is admissible because he produced 695 pages of documents with titles that sound scientific at his deposition." 2003 U.S. Dist. LEXIS 18890, at *4.
- "Even assuming, [Plaintiff's expert] relied on these documents, the court cannot determine whether his opinion is based on these documents because [Plaintiff] has not provided them to the court for review." *Id.* at *4–5.

Practice Tip

Even though it is not the challenging party's burden to establish that an expert's opinion does not meet *Daubert* criteria, the court here was persuaded in that Defendants offered literature establishing that Plaintiff's theory had not gained general acceptance in the scientific community. This submission appeared especially effective given that Plaintiff offered no literature in support of her expert's position.

Newsome v. McCabe

2002 U.S. Dist. LEXIS 6345 (N.D. Ill. Apr. 2, 2002)

Factual Summary

Following a trial, police officers held liable for violation of Plaintiff's constitutional rights moved for judgment or a new trial. They claimed, in part, that Plaintiff's expert witness on eyewitness identification and misidentification did not subject his study to peer review. The expert's test was to show people a photo of Plaintiff-alleged-perpetrator, take the photo away, and ask them to choose the perpetrator from a photo array. The district court denied the motion.

Key Language

- "*Daubert*, however, does not require [Plaintiff's expert] to demonstrate that this exact study has been scrutinized, and is accepted, by the psychological community." 2002 U.S. Dist. LEXIS 6345, at *21.
- In citing *Daubert*, "Rather, it requires him to show that 'the reasoning or methodology underlying [it] is scientifically valid.'" *Id.* at *21. "That he did." *Id.* at *22.

Erickson v. Baxter Healthcare, Inc.

151 F. Supp. 2d 952 (N.D. Ill. 2001)

Factual Summary

Widow of hemophiliac brought wrongful death action against manufacturers of commercial blood factor concentrates after he died of liver disease because of hepatitis B (HBV) and C (HCV) allegedly accelerated by HIV infection. Defendants argued that Plaintiff's experts' opinions should be excluded because HIV and Hepatitis C infection in blood was unforeseeable in 1982 as there was no "medical consensus" that HIV was transmissible by blood or blood products. Defendants' omnibus motion in this regard to exclude Plaintiff's experts was denied.

Key Language

- "Reference to scholarly, peer-reviewed articles is but one of the factors of reliability, and no one factor is determinative." 151 F. Supp. 2d at 965.
- "Differences of reliable expert opinions are for the jury to resolve." *Id.*

Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co.

138 F. Supp. 2d 1088 (N.D. Ill. 2001)

Factual Summary

In declaratory judgment action, insured brought action against insurance company regarding coverage for damage sustained to roof during storm. Insured offered expert to testify regarding the manner and extent of the damage to the roof. Expert had extensive experience and firsthand knowledge of the situation based upon his inspection. Defendant brought motion to exclude the expert's testimony, among other relief sought. Motion denied on this issue.

Key Language

- "Although [the expert's] opinion may not be derived from 'hard science,' his opinions are based on his specialized knowledge of roofing and roofing materials, and his extensive practical experience endows him with the kind of expertise recognized by the Seventh Circuit." 138 F. Supp. 2d at 1097.

Eve v. Sandoz Pharms. Corp.

2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001)

Factual Summary

Plaintiff alleged that a drug, Parlodel, caused a stroke. Plaintiff's experts offered general and specific causation opinions relying upon differential diagnosis methodology. Defendant moved for summary judgment, arguing that Plaintiff's experts' testimony was unreliable. The district court denied this part of Defendant's motion. [Please note that this court took another view with respect to Parlodel. *See Glastetter v. Novartis Pharms. Corp.*, 107 F. Supp. 2d 1015 (E.D. Mo. 2000).]

Key Language

- "In this case, the expert witnesses Dr. Kulig and Dr. Petro rely on a methodology known as differential

diagnosis. This technique is widely used by medical clinicians to identify medical conditions so they may be treated." 2001 U.S. Dist. LEXIS 4531, at *42.

- "Case reports and valid studies [that] have been published and subjected to peer review that suggest a plausibility of a causal link between a medical problem and a drug may be sufficient on their own, under certain factual circumstances, to meet *Daubert*." *Id.* at *64.
- "In this case, plaintiffs rely on at least three human case reports with rechallenge published in peer-reviewed literature with evidence of coronary artery spasm as depicted on angiography after use of bromocriptine." *Id.* at *65.
- "Federal courts have found that a doctor's expert testimony meets *Daubert* even if it is simply based on a review of the plaintiffs' medical record and information derived from and supported by peer-reviewed articles. In their brief, plaintiffs specifically refer to twelve different pharmacology texts as support for the well-documentation of bromocriptine and other ergots relationship to vessel spasms, indicating that the medical community was aware of Parlodel's vasoconstrictive properties." *Id.* at *67.

Sanner v. The Board of Trade of the City of Chicago

2001 U.S. Dist. LEXIS 15458 (N.D. Ill. Sept. 27, 2001)

Factual Summary

Plaintiffs' suit involved allegations of conspiracy to restrain trade and fix soybean case and future markets. Plaintiffs intended on calling an expert to testify as to market manipulation based in part upon the use of numerous regression analyses. Defendants challenged the expert's methodology as unsound. The court denied Defendants' motion to preclude in part and granted it in part.

Key Language

- The expert's "theories and methodologies have been the subject of at least three books published by the Cambridge University Press. [His] peers in the field of economics have extensively reviewed all three of these books. Additionally, [his] third book, Manipulation on Trial, discussed the significant role he played as an expert witness, including the methodologies he used to support his conclusions, in the Hunt silver commodities manipulation trial…." 2001 U.S. Dist. LEXIS 15458, at *15–16.
- "Therefore, we find that [the expert's] methodologies have been subjected to peer review." *Id.* at *16.

Odum v. Fuller

2001 U.S. Dist. LEXIS 16876 (N.D. Ill. Sept. 24, 2001)

Factual Summary

Plaintiff's claims arise out of injuries he sustained by a police officer's shooting. Plaintiff intended to use Defendants' wound ballistics expert to cast doubt on Defendant's kinesiology expert. Defendants moved to prevent Plaintiff from eliciting this testimony. The court granted Defendants' motion.

Key Language

- The proffered testimony Plaintiff intended to solicit was subject to the expert's "method for coming to his conclusion—his personal observations complemented with consultation with a 'few' textbooks—is certainly not consistent with the generally accepted method for gathering and evaluating data in the area of loss-of-balance responses." 2001 U.S. Dist. LEXIS 16876, at *17.
- The expert himself said, "[t]he process of scientific research is that one person does a study and… he publishes it in the literature. And then someone else sees it and says… 'I am going to duplicate the study and see if I can show it or not.' [He] admits that he did none of these things." *Id.*

Traharne v. Wayne Scott Fetzer Co.

156 F. Supp. 2d 697 (N.D. Ill. 2001)

Factual Summary

Plaintiff was fatally electrocuted while using a submersible pump (sump pump) to remove accumulated rain water from an above ground swimming pool. Testimony revealed that water seeped inside the metal "body" of the pump where it contacted an unexposed portion of the power cord and became electrified. Plaintiff allegedly pulled the pump's power cord from the pump in such a manner as to cause a breach in the watertight seal through which the power cord ran (from the external outlet to the pump's electrical motor). Plaintiffs' engineering expert opined that a supplemental restraint clamp would have prevented water from ever entering the inner chamber of the pump. Because the expert's theory concerning the supplemental restraint clamp was never subjected to peer review, Defendant argued that his theory was unreliable. The district court rejected this argument.

Key Language

- "This is not a situation where the expert's opinion is in conflict with others in the field who have published papers and articles on the subject. It is a situa-

tion where apparently no one has ever written on the subject…. Given the time restraints of litigation and the limited monetary funds of ordinary people who find themselves plaintiffs in product liability or similar defective design cases, the fact that Dr. Morse himself did not submit for peer review his theory of the need for a supplemental restraint device on sump pumps similar to the defendant's cannot be viewed as a definitive evidence preclusion factor. The need for supplemental restraint devices may not have been deemed a subject of any great significance by experts in the field. In addition, the need may not have been readily apparent to the experts in the field if the known electrocutions similar to that sustained by the decedent were not reported or were few in number…. It must always be remembered that the 'law does not preclude recovery until a statistically significant number of people have been injured…." 156 F. Supp. 2d at 713–14.

- "It does not strike us as reasonable to expect a plaintiff's product design expert to contact others in the industry to see if they have ever proposed, discussed, or attempted creation of a supplemental restraint device or system for sump pumps similar to the defendant's. How many peers, manufacturers, academicians or engineering professors would Dr. Morse have to submit his ideas to in order to be deemed to have submitted his ideas to sufficient scrutiny. And who, amongst his peer group, would he have to submit his ideas to in order to be deemed to have submitted his ideas to men and women of sufficient stature in the industry that their ideas would count…. We think Dr. Morse's non-pursuit of peer review should be left to the trier of fact to weigh and consider." *Id.* at 714.

Dartey v. Ford Motor Co.

104 F. Supp. 2d 1017 (N.D. Ind. 2000)

Factual Summary

Plaintiff claimed that metal cables supporting truck's tailgate fractured because the tailgate was defectively designed. Defendant moved to exclude testimony of metallurgist expert and plastics expert. Defendant's motion was denied in part and granted in part.

Key Language

- The expert "suggested throughout his testimony that the scientific principles involved in his opinion are 'obvious' and thus, he had no need to test his own theory further or submit his opinions to peer review. Given these factors, [the expert's] failure to have his conclusions tested or submit his methodology for peer review do not cast doubt on the reliability of his opinion as to how the metal cables failed." 104 F. Supp. 2d at 1024.
- "'[I]f [the expert] was merely applying well-established engineering techniques to the particular materials at issue in this case, then his failure to submit those techniques to peer review establishes nothing about their reliability.'" *Id.* (citing *Smith v. Ford Motor Co.*, 215 F.3d 713, 719).

Stasior v. Amtrak

19 F. Supp. 2d 835 (N.D. Ill. 1998)

Factual Summary

Employee brought action under FELA seeking damages for carpal tunnel syndrome (CTS), tendonitis, and tenosynovitis. Plaintiff's expert conceded that he did not test his hypothesis that awkward posture, repetition and psychosocial pressures contributed to CTS and tendonitis. The expert did not intend on publishing his conclusions or otherwise subject such conclusions to peer review. District court granted Defendants' summary judgment motion because the ergonomist's proffered testimony was not reliable.

Key Language

- The expert "articulated no methodology or technique by which his conclusions could be scientifically tested or subject to peer review." 19 F. Supp. 2d at 848.
- Expert "explicitly said… that he did not test, nor does he intend to publish for peer-review." *Id.* at 849.
- Expert "did not base his proffered testimony on research he conducted independent of this litigation, but rather formulated his opinion expressly for the purpose of testifying." *Id.*

Dukes v. Ill. Cent. R.R.

934 F. Supp. 939 (N.D. Ill. 1996)

Factual Summary

Railroad worker brought suit under the Federal Employers' Liability Act (FELA) alleging that he developed carpal tunnel syndrome (CTS) because of the railroad's negligence in permitting an unsafe condition. Plaintiff's expert opined that the pressure and repetition in operating signal lights caused his CTS. Defendant moved to exclude the expert's testimony on the basis that it was not supported by sound scientific methodology. District court granted the motion.

Key Language

- Plaintiff's expert "has not conducted an independent investigation or research into the causes of CTS in general, or, more specifically, whether carrying signal lights causes CTS. He has articulated no technique or methodology by which his conclusions can be scientifically and objectively tested or subjected to peer review. He prepared his testimony specifically for this litigation, and his conclusions are mainly based on the Plaintiff's own description of his work. As a result, [plaintiff's expert's] testimony does not meet the requirements of the *Daubert* test." 934 F. Supp. at 951.

Schmaltz v. Norfolk & W. Ry.

878 F. Supp. 1119 (N.D. Ill. 1995)

Factual Summary

Plaintiff's lawsuit against defendant railroad was predicated on his alleged exposure to herbicides (containing atrazine and tebuthiuron) sprayed in Defendant's railroad yard. Plaintiff contended that he acquired Reactive Airway Dysfunction Syndrome (RADS), an asthma-type respiratory syndrome, by reason of his exposure. The district court precluded the causation testimony of Plaintiff's two medical experts, noting that neither physician had performed or identified studies on the effects of atrazine and tebuthiuron on the human respiratory system.

Key Language

- "Peer review of a scientific theory is a significant consideration under *Daubert* because 'scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected.'" 878 F. Supp. at 1123.

Eighth Circuit

Polski v. Quigley Corp.

538 F.3d 836 (8th Cir. 2008)

Factual Summary

Plaintiffs brought suit against corporation alleging that they suffered severe and permanent impairment of their senses of taste and smell due to their use of Cold-Eeze, a nasal spray made and distributed by Quigley for the treatment of cold symptoms. The district court excluded Plaintiffs' causation expert's testimony on grounds that it was unreliable under *Daubert*. The Eighth Circuit affirmed.

Key Language

- "In short, we find no abuse of discretion in the district court's exclusion of [the doctor's] testimony. [The doctor's] causation theory relied on an unproven and indeed untested premise. 538 F.3d at 840.
- "The district court applied Rule 702 following *Daubert*'s guidance, noting that 'because [the doctor's] theory has not been tested *at all*, it has never been subjected to peer review and publication, nor has it been generally accepted in the scientific community, nor does it have a known or potential rate of error.' These are all valid considerations under *Daubert*." *Id.* (citations omitted).

Sappington v. Skyjack, Inc.

512 F.3d 440 (8th Cir. 2008)

Factual Summary

Survivors of a construction worker brought suit against a lift manufacturer. The district court excluded the results of the expert's testing finding them irrelevant and unreliable as too dissimilar to the alleged accident. The Eighth Circuit reversed.

Key Language

- "In this case, however, unlike *Milanowicz*, the expert's proposed alternative design is supported by industry standards, literature, and testing." *Id.* at 453.
- "The 84 pound difference in work platform load between the accident and the testing, however, is not sufficient in our view to render Johnson's testing inadmissible. 'As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.'" 512 F.3d at 450.
- "We conclude it was an abuse of discretion to exclude the results of the experts testing because the purported dissimilarities offered by the district court are not relevant or sufficient to render Johnson's opinions inadmissible." 512 F.3d at 450.

Wagner v. Hesston Corp.

450 F.3d 756 (8th Cir. 2006)

Factual Summary

A farmer injured his hand while inspecting why his machine ceased accepting hay, and brought suit against the baler manufacturer in negligence and strict liability. The district court granted the manufacturer's *Daubert* motion to exclude Plaintiff's expert testimony followed by its summary judgment motion on the grounds that Plaintiff could not support his claims without expert testimony. The Eighth Circuit affirmed.

Key Language

- "The court found that [the expert's] minimal testing of this theory (via limited and largely undocumented tests performed more than twenty years ago in connection with other litigation), the slim evidence of peer review, the lack of evidence showing general acceptance in the industry of safety guards for large round balers similar to the Hesston 5600, and his admission that all but one of his alternative guard designs were built in connection with litigation, all weighed against the admissibility of his testimony." 450 F.3d at 758–59.
- "[The expert's] opinion was speculative and inadmissible because he tested his safety-guard theory by baling a single bale of hay, the test was performed on plaintiff's baler for the sole purpose of this litigation, and there was no evidence of peer review or general acceptance of the theory." *Id.* at 759.
- "Even assuming [the expert] was qualified to render the opinion, the court rejected his theory as unreliable on the grounds that it had not been sufficiently tested, that evidence of peer review was minimal." *Id.*
- "We reject [the expert's] argument, raised for the first time in his reply brief, that peer review does not apply to non-medical devices." *Id.*
- "We will not recapitulate the District Court's impressively thorough analysis supporting its conclusions that the proposed testimony of [the experts] was unreliable. Suffice it to say that we have studied the record, read the briefs, and heard argument and do not discern any error in the District Court's decision. The analysis conducted by the District Court is precisely the type of analysis the decision in *Daubert* would appear to contemplate." *Id.* at 761.

Wagner v. Hesston Corp.

2006 U.S. App. LEXIS 14033 (8th Cir. 2006)

Factual Summary

In an appeal from a ruling by the district court (*see supra*), the Eight Circuit affirmed the exclusion of Plaintiff's expert testimony and the granting of Defendant's motion for summary judgment.

Key Language

- The appellate court, in upholding the district court's exclusion of the plaintiff's experts, found that there was "slim evidence of peer review" for Severt's testimony and "no evidence of peer review" on Chaplin's opinions. 2006 U.S. App. LEXIS, at *6.

Shaffer v. Amada Am., Inc.

2003 U.S. App. LEXIS 19335 (8th Cir. Sept. 18, 2003)

Factual Summary

Plaintiff injured his hand while operating a press machine and then brought a defective design claim against the machine's manufacturer. The district court granted Defendant's *Daubert* motion to exclude Plaintiff's expert testimony. Plaintiff's expert was a researcher and professor in mechanical engineering design and biomechanics. He based his opinions on Plaintiff's statement, the product brochure, and OSHA press release, Safety Line information on brake presses, a video and photos of the press and its brake, the foot switch and publications about injuries caused by press brakes.

Key Language

- As the expert had no experience with press brake designs, or switches for press brakes, had never tested press brakes, had never published about press brakes, was unable to identify any codes or rules related to press brake design standards (another of Plaintiff's experts identified a design standard, but admitted that the press brake met the standard), the court held that "[g]iven [the expert's] lack of design experience or expertise involving press brakes, the district court properly precluded [the expert]…."

Air Crash at Little Rock Ark. v. Am. Airlines

291 F.3d 503 (8th Cir. 2002)

Factual Summary

Plaintiff was a passenger on a plane that crashed on the runway, and she brought suit under the Warsaw Convention. Plaintiff claims that she sustained post-traumatic stress disorder (PTSD). Plaintiff presented a psychiatrist to testify on her behalf that the PTSD caused brain injuries. Although the psychiatrist was permitted to testify as to PTSD, he was unable to testify as to a resulting brain injury from PTSD, as it is unsupported in the literature and there were no diagnostic tests available to establish the hypothesis. Lower court did not conduct *Daubert* hearing, which Eighth Circuit noted should be done if the case was retried on the remand.

Lauzon v. Senco Prods., Inc.

270 F.3d 681 (8th Cir. 2001)

Factual Summary

Carpenter brought personal injury action against manufacturer of pneumatic nailer based on strict liability and negligence theories. Manufacturer brought

summary judgment motion that was granted by district court in part because the peer-reviewed literature involved in the case "did not rise to the level contemplated by *Daubert*" and weighed it as a factor in excluding the proffered testimony. The expert himself published a number of articles for engineers primarily devoted or related to matters in legal cases concluding that the bottom-fire pneumatic nailers are unreasonably dangerous. The Eighth Circuit reversed summary judgment, in part, because some propositions are too new to be published.

Key Language

- In evaluating the expert's written work, the court noted that the organization's journal in which the articles were published consisted of "approximately 450 members, whose work is primarily devote to the investigation of engineering matters pertaining to legal cases." 270 F.3d at 690.
- "The article was published prior to the present litigation and comes to the identical conclusion as proffered in this case: bottom-fire pneumatic nailers are unreasonably dangerous." *Id.*
- "The recent increase in nail gun use and injuries stemming therefrom accounts for, in part, the lack of wealth of peer reviewed information the district court sought." *Id.* at 691.
- "The article published by [the expert] supporting the very essence of his testimony as well as recognition of the dangers associated with a bottom-fire pneumatic nailer and the safer alternative of a sequential-fire nailer in two additional publications is sufficient to meet the peer review factor."

Practice Tip

The court did not seem to mind that the expert's published material was for engineers whose work is primarily devoted to the investigation of engineering matters pertaining to legal cases. However, the court noted that his article was published prior to the litigation at issue and comes to the identical conclusion offered in the case.

Bonner v. ISP Techs., Inc.

259 F.3d 924 (8th Cir. 2001)

Factual Summary

Plaintiff's toxic tort case was predicated on her alleged exposure to an organic solvent manufactured by Defendant. Plaintiff contended that she sustained permanent injuries by reason of her exposure, including psychological and cognitive impairments. Defendants contended on appeal that the district court erred in allowing Plaintiff's causation experts to testify at trial because their opinions were never peer reviewed. Rejecting Defendants' argument, the Eighth Circuit held that the district court properly executed its *Daubert* gatekeeping function.

Key Language

- "There is no requirement 'that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness. Even if the judge believes there are better grounds for alternative conclusion, and that there are some flaws in the scientist's methods, if there are good grounds for the expert's conclusion, it should be admitted…. There is no requirement that published epidemiological studies supporting an expert's opinion exist in order for the opinion to be admissible.'" 259 F.3d at 929.

Turner v. Iowa Fire Equip. Co.

229 F.3d 1202 (8th Cir. 2000)

Factual Summary

Plaintiff brought action against fire equipment company who had performed routine tests of fire suppression equipment located above the grill where Plaintiff worked. The system accidentally activated and covered worker with primarily baking soda. Plaintiff's treating physician attributed Plaintiff's "chronic" problems to the exposure but did not subject this opinion to a differential diagnosis. The district court excluded the testimony and the Eighth Circuit affirmed.

Key Language

- "Most circuits have held that a reliable differential diagnosis satisfies *Daubert* and provides a valid foundation for admitting an expert opinion." 229 F.3d at 1208.
- "The circuits reason that a differential diagnosis is a tested methodology, has been subjected to peer review/publication…." *Id.*
- "[The physician] acknowledged that the differential diagnosis he performed was for the purpose of identifying [the plaintiff's] *condition*, not its *cause*." *Id.*
- "Unlike his diagnosis of condition, [the physician's] causation opinion was not based upon a methodology that had been tested, subjected to peer review, and generally accepted in the medical community. Significantly, [he] did not systematically rule out all other possible causes." *Id.*

Peitzmeier v. Hennessy Indus., Inc.
97 F.3d 293 (8th Cir. 1996)

Factual Summary
Plaintiff auto mechanic sustained severe injuries after the tire he was changing suddenly exploded. Plaintiff instituted strict products liability action against manufacturer of tire changing machine. The district court precluded Plaintiff's engineering expert from offering an alternative design theory for the tire changing machine and subsequently granted Defendant manufacturer's motion for summary judgment. The Eighth Circuit affirmed the district court's *Daubert* analysis of the expert's proffered testimony.

Key Language
- "While not required for admissibility, submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected. In this regard, not one of Milner's proposed changes to the tire-changing machine has been subjected to peer review." 97 F.3d at 298.
- Plaintiff argued that his expert's theories had in fact been subjected to peer review. Plaintiff attempted to equate the cross-examinations his expert had endured in previous, unrelated trials, to peer review. The Court "reject[ed] the suggestion that cross-examination at trial and the number of Milner's court appearances in design defect cases can take the place of scientific peer review. Because Milner's concepts are unfinished and untested, and have not been subjected to peer review, any testimony from Milner about how his proposed design changes would have reduced Peitzmeier's injuries is wholly speculative." 97 F.3d at 298.

Pestel v. Vermeer Mfg. Co.
64 F.3d 382 (8th Cir. 1995)

Factual Summary
Plaintiff brought action against a manufacturer of a stump remover after his foot slipped and went to the cutter wheel of the remover. Plaintiff's expert offered a model for an alternative design for the remover that included a guard that allegedly would have prevented the incident. In this non-scientific case, in assessing the peer review *Daubert* factor, the court noted that the expert had not submitted his alternate design to any manufacturers, academicians, or engineering professors for scrutiny. The Eighth Circuit affirmed the lower court's exclusion of the expert testimony.

Key Language
- "With respect to peer review and publication, the Court noted that the expert had not contacted others in the industry to see if they had attempted to create similar type of guard." 64 F.3d at 384.

White v. Cooper Indus., Inc.
2009 WL 234347 (D. S.D. 2009)

Factual Summary
Plaintiff was injured while working as a forklift mechanic. Plaintiff set out to repair a forklift by suspending its fork carriage assembly with a chain manufactured by Defendants. While he was working underneath the suspended carriage assembly, two links of the chain broke. The carriage assembly fell on him, causing injury to his abdomen, pelvis, and legs. Plaintiff sued. Defendant brought motion to exclude Plaintiff's expert, and judge denied the motion despite a lack of peer reviewed material.

Key Language
- "[The expert] clearly connected his theory of how the chain failed to the facts of the present case, weighing toward admissibility of his opinion… On the other hand, several factors weigh slightly toward excluding [the expert's] opinion." 2009 WL 234347, at *7.
- "Plaintiffs have not shown that [the expert's] methodology has been subjected to peer review or publication, identified an error rate for this methodology, or shown that his technique is generally accepted." *Id.*
- "Overall, however, the *Daubert* factors weigh in favor of admission of [the expert's] opinion." *Id.*

Cummings v. Deere & Co.
589 F. Supp. 2d 1108 (S.D. Iowa 2008)

Factual Summary
Insurer of farm equipment sued Deere and Company, alleging that the design of the fuel tank on a combine was defective. Deere brought a *Daubert* motion to exclude the insurer's expert testimony. The district court granted Deere's motion and excluded the expert's testimony as unreliable.

Key Language
- "Defendant's expert criticized the opinions of plaintiff's expert as 'highly speculative, self-contradictory, and generally not supported by the evidence available for review and analysis.'" 585 F. Supp. 2d at 1112.
- "[The expert] has presented no publications or data to suggest that his theory presented in this case—*i.e.* that a Deere 9660 STS combine (or any combine for

that matter) can generate a static electrical discharge capable of igniting accumulated soybean debris—is 'generally accepted.' This factor, therefore, weighs against the admissibility of Dr. Roberts' testimony." *Id.* at 1114.

- "[The expert] openly admitted that his underlying theory has not been subjected to peer review or publication." *Id.* at 1114.
- "[Plaintiff] brought to the Court's attention that there may be some constraints on [his expert's] ability to submit his theory for peer review based on a confidentiality order from the previous litigation in which [the expert] generated some of the information necessary to support his theory. As such, while the Court does not necessarily hold that this factor weighs against the admissibility of [the expert's] testimony, the fact remains that there is no evidence of peer review or publication to support [the expert's] admittedly 'new' theory." *Id.* at 1114.

United States v. Littlewind

2008 WL 2705493 (D. N.D. 2008)

Factual Summary

In a criminal proceeding, the victim intended to alter her previous statements and the prosecution wished to introduce an expert to explain why the victim's original statements and trial testimony differed. Defendant challenged the admissibility of expert's testimony, and the court granted the motion.

Key Language

- "The Court must also consider whether the theories have been subjected to peer review. [The expert's] curriculum vitae reflects numerous publications; however, the Court cannot determine from the list whether the theories and opinions relevant here have been published and subjected to peer review. Similarly, [the expert's] written summary does not reference any previous studies conducted by him or other experts in the field." 2008 WL 2705493, at *1.
- "[The expert] may, in fact, be an expert in this area; however, the Court is unable to conclude his opinions are sufficiently supported based on the record before it." *Id.*

Schwab v. Nissan N. Am., Inc.

502 F. Supp. 2d 980 (E.D. Mo. 2007)

Factual Summary

In a product liability case arising from a 2002 Nissan Xterra rollover, Plaintiffs identified three experts to offer opinions regarding the alleged propensity of the 2002 Nissan Xterra roof to collapse during foreseeable rollover accidents. Plaintiffs' experts conducted two tests: a two-sided roof strength test and a Jordan Rollover System ("JRS") test, which Defendants successfully sought to exclude.

Key Language

- "Plaintiffs' experts cite to one two-page paper as evidence of peer review of the two-sided test. The two-page paper cited by plaintiffs as a peer reviewed article does not include any underlying supporting data that would be necessary to conduct a rigorous review of the test methodology." 502 F. Supp. 2d at 985.
- "Without any of the underlying supporting data there could not be any meaningful peer review by anyone in the automotive industry." *Id.*
- "Even if the two-page paper could be found to be peer reviewed, it would not be helpful in this case because the paper references a two-sided test where the roll angles used were not the same as the roll angles used when the two-sided test was performed on the Xterra in this case." *Id.*
- "The JRS test has been discussed in a small number of publications but there is no evidence before me that these articles have been subjected to peer review. There is not sufficient data in any of the articles presented into evidence for any third party to peer review JRS test." *Id.* at 988.

Wagner v. Hesston Corp.

2005 WL 1540135 (D. Minn. June 30, 2005)

Factual Summary

In a product liability lawsuit, Plaintiff commenced an action after he was injured by a hay baler manufactured by Defendants. Plaintiff was injured while baling hay when he leaned over the baler frame and placed his left hand in the hay that was covering the baler's pick-up tines. The tines began to move suddenly and Plaintiff's hand was pulled into the compression rollers. Plaintiff elected to self-amputate his left hand. Plaintiff claimed that the baler was defectively designed and manufactured and alleged claims of strict liability, negligence, and breach of express and implied warranties. Plaintiff proffered two experts who intended to testify that the baler was defective, but the district court excluded the proposed testimony as unreliable.

Key Language

- "Peer review is considered because 'submission to the scrutiny of the scientific community' is a com-

ponent of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." 2005 WL 1540134 at *5.

- Plaintiff "seems to acknowledge a lack of peer review and publication of Sevart's theories by blaming 'indifference on the part of farm safety specialists to the subject of why farm accidents happen.' Nonetheless, he argues that 'in a broad sense' guarding theories have been subject to peer review 'due to their sheer simplicity and longevity' and points to the fact that guards have been patented. In addition, [Plaintiff] relies on the fact that Sevart has published several articles regarding machine guarding in general in American Society of Agricultural Engineers…. Finally, [Plaintiff] argues that his theories obtained peer review during the Quillen litigation." *Id.*
- "The Court also notes that cross-examination and review by an opposing party's experts in litigation does not act as a substitute for peer review." *Id.*
- The plaintiff "argues that the emergency stop devices in general have been peer reviewed in the agricultural machinery community. In support, [Plaintiff] points to a 1958 publication 'Modern Safety Practices'…. [Plaintiff] also discusses generally the fact that emergency stop devices have been patented and relies on the fact that Sevart has published several papers regarding machine safety…. In sum, the Court finds that [Plaintiff] has submitted minimal evidence of peer review and publication and find that this factor weighs against the admissibility of his testimony regarding the proposed emergency stop device." *Id.* at *8.

Glastetter v. Novartis Pharms. Corp.

107 F. Supp. 2d 1015 (E.D. Mo. 2000)

Factual Summary

Plaintiff alleged that a drug, Parlodel, caused an intracerebral hemorrhage (ICH). Plaintiff's experts offered general and specific causation opinions relying upon differential diagnosis methodology. Defendant moved for summary judgment, arguing that Plaintiff's experts' testimony was unreliable. The district court granted Defendant's motion.

Key Language

- "[P]laintiffs' experts' reliance on case reports is not sufficient to make their causation opinions, reliable under *Daubert*." 107 F. Supp. 2d at 1028.
- "[A] number of courts have concluded that case reports are not a scientifically reliable basis for a causation opinion." *Id.* at 1030.
- "[T]he theory that Parlodel can cause ICH has been subjected to peer review and publication, but, so far as the Court can determine, only in the form of unreliable case reports." *Id.* at 1045.

McPike v. Corghi S.p.A.

87 F. Supp. 2d 890 (E.D. Ark. 1999)

Factual Summary

Plaintiff brought action against manufacturer of tire changing machine to recover for injuries sustained when the tire exploded. Plaintiff's expert, a metallurgist, not a mechanical engineer, proffered testimony that the machine was defective because the table top had no means of restraining the wheel and acted as a "launch pad," the inflation control pedal was improperly positioned, and the table design obscured the tire and prevented the operator from seeing whether the under-bead was seated. The expert offered an alternative design that had been adopted by other manufacturers. The district court denied Defendant's motion to preclude the testimony.

Key Language

- In following the Eighth Circuit's reasoning in *Peitzmeier* dealing with the same expert, the court noted significant differences. "Unlike the record in *Peitzmeier*, the record here reveals that [the expert's] analysis is not merely some untested 'theory' that has not been accepted or subjected to peer review." 87 F. Supp. 2d at 894.
- "The record reveals that [the expert's] proposed changes have been adopted and incorporated by various manufacturers over the last several years." *Id.*

Pillow v. Gen. Motors Corp.

184 F.R.D. 304 (E.D. Mo. 1998)

Factual Summary

Plaintiff brought action alleging that van he was driving was defectively designed when, during a collision, the brake pedal moved backward and his ankle was injured. Plaintiff's expert proffered testimony that the forces placed on the front end of the van and the brake master cylinder were transmitted through the brake system and this design was defective and suggested that an alternative design repositioning them sideways at an angle or in a manner that would not place the forces on the brake. Plaintiff's expert's theories had been subjected to negative peer review by Defendant's experts but had not otherwise been published. This factor, coupled with other *Daubert* factor failures, includ-

ing the fact that the expert's theories had never been tested, made such theories unreliable.

Key Language

- "[T]he court considers whether [the expert's] theories have been subjected to peer review. [The expert's] theories have not been published… it does not necessarily correlate with reliability and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published." 184 F.R.D. at 308.
- "Additionally, plaintiff has not established that [the expert's] theories have been subjected to any other form of meaningful and favorable peer review." *Id.*

Nat'l Bank of Commerce (of El Dorado, Ark.) v. Dow Chem. Co.

965 F. Supp. 1490 (E.D. Ark. 1996)

Factual Summary

Infant's guardian claimed that in utero exposure to pesticide caused birth defects. Physician and chemist failed to offer scientifically based opinions that exposure to Dursban while mother was pregnant caused multiple birth defects. Here, the court discredited the physician's four peer reviewed articles that described four case studies, because she failed to disclose that litigation was involved in each case and because the articles failed to address opinions of other experts in those cases who attributed the birth defects to genetic causes. The experts' opinions were excluded and Plaintiff's case was dismissed on summary judgment.

Key Language

- "Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability… and in some instances well-grounded but innovative theories will not have been published." 965 F. Supp. at 1495.
- "Some propositions, moreover, are too particular, too new, or of too limited interest to be published." *Id.*
- "The fact of publication (or lack thereof) in a peer reviewed journal thus will be relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.*
- "Establishing that an expert's proffered expert testimony grows out of prelitigation research or that the expert's research has been subjected to peer review are the two principal ways the proponent of expert testimony can show that the evidence satisfies the first prong of Rule 702." *Id.* at 1517.
- "Where such evidence is unavailable, the proponent of expert scientific testimony may attempt to satisfy its burden through the testimony of its own experts. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." *Id.*

Ninth Circuit

United States v. Stefan

431 F.3d 1147 (9th Cir. 2005)

Factual Summary

Defendant was convicted of conspiracy to commit wire fraud, conspiracy to manufacture counterfeit securities, and of processing, manufacturing, and uttering counterfeit securities. Defendant appealed the conviction and raised four issues, among them, whether the court abused its discretion in allowing the testimony of an expert handwriting analyst. The Ninth Circuit affirmed all of the district court's orders and decisions.

Key Language

- "The court cited to numerous journals where articles in this area subject handwriting analysis to peer review by not only handwriting experts, but others in the forensic science community. Additionally, the Kam study, which evaluated the reliability of the technique employed by Storer of using known writing samples to determine who drafted a document of unknown authorship, was both published and subjected to peer review. The court also noted that the Secret Service has instituted a system of internal peer review whereby each document reviewed is subject to a second, independent examination." 431 F.3d at 1153.
- "We cannot say that the district court abused its discretion in admitting the expert handwriting analysis testimony." *Id.* at 1154.

Greenberg v. Paul Revere Life Ins. Co.

2004 U.S. App. LEXIS 388 (9th Cir. Jan. 12, 2004)

Factual Summary

Plaintiff claimed bad faith termination of disability payments. Defendant appealed from a judgment in

favor of Plaintiff. Plaintiff called an expert in claims handling. Defendant objected to that expert, inter alia, on *Daubert* grounds

Key Language

- The district court was not required to do a *Daubert* assessment (peer review, publication rates, etc.) for this type of expert because it is "'the kind of testimony whose reliability depends heavily on the knowledge and experience of the expert' rather than the kind of theory behind it."

Clausen v. M/V New Carissa

339 F.3d 1049 (9th Cir. 2003)

Factual Summary

A vessel caused an oil leak, and oil from the leak was found in a bay that was a rich area for oysters. Within weeks of the spill approximately 3.5 million oysters died. A federal and state agency report concluded that oil from the vessel was present in the tissue of each of the oysters. Plaintiffs were owners of a commercial oyster farm in the bay. The only issue in the litigation (because the statute imposed strict liability) was causation—did the oil cause the death of the oysters? Each side retained what the Ninth Circuit described as a "heavyweight" in the field of shellfish disease. The defense unsuccessfully challenged Plaintiff's expert on *Daubert* grounds, and the Ninth Circuit upheld the trial court's ruling.

Key Language

- The standard of review of the lower court's decision to admit or preclude evidence is an abuse of discretion standard. "We may only reverse the district court if we are left with the definite and firm conviction that the district court committed a clear error of judgment in admitting that testimony."
- The court noted with approval its previous holdings that "one very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research that they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purpose of testifying."
- In the case at bar, the proposed expert had developed his opinions expressly for the purpose of testifying, and the opinions had not been subjected to peer review. "[A] proffer of scientific testimony may still be deemed reliable enough to be admitted if neither of these criteria are met." There may be good reasons why a scientific study has not been published—it may be too recent, or not of broad enough interest.
- "Where peer review and publication are absent, 'the experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional organization, a published article in a reputable scientific journal and the like—to show that they have followed the scientific evidence method as it is practiced by (at least) a minority of scientists in their field.'"
- The court then went on to an extensive discussion of differential diagnosis, or the differential ruling out of other possible causes. "The case law specific to differential diagnosis recognizes that the absence of peer reviewed studies does not in itself prevent an expert from ruling in a diagnostic hypothesis…" The court cited with approval the Eighth Circuit's decision in *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202 (8th Cir. 2000), in which the Eight Circuit held that the first victims of a new toxic tort should not be barred from court because the scientific literature does not yet bear out their claims.
- Plaintiff claimed that there was "contact toxicity" with the oil that caused the oyster's death. Defendant claimed that such a theory was guesswork as it had not been established in the scientific literature. The Court agreed that it had not, but found that there was support for the method followed by Plaintiff's expert in coming to his conclusions, and therefore the conclusions were admissible.

Metabolife Int'l v. Wornick

264 F.3d 832 (9th Cir. 2001)

Factual Summary

Plaintiff herbal company asserted defamation, slander, and trade libel claims against Defendants for statements made during a televised "investigative report" on the safety of Plaintiff's herbal supplement. Plaintiff's product was described as unsafe because one of its principal ingredients was methamphetamine. The district court precluded Plaintiff's risk assessment experts from testifying at trial because they failed to adequately explain how the "scientific literature" supported their risk assessment methodologies. The Ninth Circuit reversed.

Key Language

- Plaintiff's experts were "convinced" that the herbal supplement was safe after they read several articles in scientific journals. "The district court was troubled by the titles of several articles cited, noting that it did not understand 'how articles such as these support the opinions of Metabolife's experts….'" 264 F.3d

at 844. Plaintiff argued on appeal that because the articles relied upon by Plaintiff's experts were published by peer-reviewed journals, Plaintiff's experts were not obliged to explain how those articles supported their opinions. According to Plaintiff, an expert only has to explain his methodology when that methodology has never been subjected to peer review.

- "Metabolife is correct that peer-review is highly probative under *Daubert II*, but here the articles were not written by the experts who now wish to interpret them. Metabolife's experts, through risk assessment methodology, are interpreting peer-reviewed articles written by other scientists. The district court, as gatekeeper, correctly noted that the methodology of their interpretation should be open to scrutiny." 264 F.3d at 844.
- "However, the district court abused its discretion…. In *Daubert II*, we said that scientific evidence, such as a risk assessment, that is prepared for litigation and not peer-reviewed itself, may be bolstered 'through the testimony of… [the] experts' who prepared the evidence. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source… to show that they have followed the scientific method….'" *Id.* at 845 (citing *Daubert II*, 43 F.3d at 1319).
- "Examining the declarations of the scientists who prepared the risk assessments, it is clear that they have facially complied with *Daubert II*'s verification requirement for evidence prepared in anticipation of litigation—the declarations explain the methodology of risk assessment and how the data found in peer-reviewed articles and adverse incident reports was used." *Id.*

United States v. Walton

1997 U.S. App. LEXIS 22430 (9th Cir. Aug. 20, 1997)

Factual Summary

Criminal defendant sought review of his conviction on the grounds that the court abused its discretion in excluding expert testimony regarding eyewitness identification. The court found no evidence to show that the witness's studies had been subjected to peer review and the results within the field of psychology conflicted as to the effect that stress had on one's ability to remember an eyewitness account. The Ninth Circuit affirmed the conviction.

Key Language

- "[T]he court found that no evidence had been submitted to show that [the psychologist's] studies had been subjected to peer review. [The expert offered a statement] that because his studies had been published, they would have been subject to peer review." 1997 U.S. App. LEXIS 22430, at *4.
- However, the expert "still produced no evidence that any of his studies had been reviewed by other psychologists." *Id.*
- "[T]he results within the field of psychology conflicted as to effect that stress has on one's ability to remember an eyewitness account. Because of the conflicting nature of the testimony, the district court did not abuse its discretion in finding that it would not assist the trier of fact and would, in fact, confuse and mislead the jury as to the real effect of stress on one's ability to remember an eyewitness account." *Id.* at 4–5.

McClellan v. I-Flow Corp.

2010 WL 1753261 (D. Or. 2010)

Factual Summary

In a pain pump litigation case, Defendants sought to exclude Plaintiffs' causation expert.

Key Language

- "Reliability under *Daubert* does not depend on 'the correctness of the expert's conclusions but [on] the soundness' of the methodology." 2010 WL 1753261, at *8.
- "Defendants suggest that plaintiffs' experts' unwillingness to submit their causation theories to peer review reveals the scientific unworthiness of their testimony and warrants the inference that their opinions are not based on 'good science.' I disagree…. [T]here are many reasons why experts may not engage in academic research or present an expert opinion for peer review." *Id.* at *21.
- "Even if the opinions for plaintiffs' experts lack peer review, I do not find their opinions unreliable on that basis." *Id.* at *22.
- "[P]laintiffs' experts identify objective, scientific sources and sufficiently explain how the evidence supports their opinions. Thus, the lack of peer review is an appropriate topic for cross-examination rather than grounds for exclusion." *Id.*

Newkirk v. ConAgra Foods, Inc.

727 F. Supp. 2d 1006 (E.D. Wash. 2010)

Factual Summary

Plaintiff alleged that his exposure to Defendant's pop-

corn caused him to develop bronchiolitis obliterans, progressive damage to the respiratory system. Defendant moved to exclude Plaintiff's causation expert testimony, and the district court granted the motion.

Key Language

- "The Court notes that [the doctor] does not cite to any support for many of his statements." 727 F. Supp. 2d at 1016.
- "In the previous section, the Court documented examples in which [the doctor] provides no indication of external support for his conclusions. In other parts of his reports and testimony, [the doctor] relies on existing data, mostly in the form of published studies, but draws conclusions far beyond what the study authors concluded, or [the doctor] manipulates the data from those studies to reach misleading conclusions of his own." *Id.* at 1018.
- "Although lack of peer review is not necessarily fatal to the admissibility of an expert opinion, '[i]n the absence of independent research or peer review, experts must explain the process by which they reached their conclusions and identify some type of objective source demonstrating their adherence to the scientific method.'" *Id.* at 1020.
- "More importantly in this case, [the doctor] does not even purport to adhere to the scientific method or assert that her conclusions should be extrapolated to other consumers in the absence of publication or peer review, as she herself qualifies her conclusions as follows: 'It is difficult to make a causal connection based on a single case report. We cannot be sure that this patient's exposure to butter flavored microwave popcorn from daily heavy preparation has caused his lung disease.'" *Id.*

Neal-Lomax v. Las Vegas Metro. Police Dep't

574 F. Supp. 2d 1193 (D. Nev. 2008)

Factual Summary

A man died during a scuffle with Las Vegas police officers. At the time the police tasered the obese man, he was on PCP. His estate brought an action against the police department and Taser alleging numerous defects. Taser brought *Daubert* motions against Plaintiff's experts, and the court granted all of the motions.

Key Language

- "Although [the expert] testified he read TI's experts' reports, Woodard was unfamiliar with studies that have applied the Taser to both animals and humans as mentioned therein." 574 F. Supp. 2d at 1204.
- "Despite his relative unfamiliarity with Tasers, Woodard did not educate himself on the Taser through reference materials." *Id.*
- "[H]is opinions must have some objective medical or scientific basis to which he may apply the facts of this case." *Id.*
- "When asked specifically whether he had any scientific, medical, or engineering peer-reviewed studies supporting the conclusion that the Taser caused or contributed to Lomax's death, [the expert] indicated he had no such materials." *Id.*
- "[Expert 2] previously published a paper reviewing thirty-seven cases of deaths following Taser use., yet his studies noted that '[b]ecause this report is a descriptive case series, causal links cannot be made. The interpretation of data is limited to establishing factors that may be associated with a risk of sudden death in the setting of Taser use.'" *Id.* at 1205.
- "An expert's failure to subject his method to peer-review and to develop an opinion outside the litigation does not necessarily render his opinion inadmissible. However, if these guarantees of reliability are absent, the expert must explain his methodology precisely and must 'point to some objective source' supporting his methodology." *Id.* at 1202.
- "[Expert 2] also could not cite to any peer-reviewed studies or papers supporting his opinion that Taser applications in drive stun mode decrease a person's ability to keep up with ventilatory compensation." *Id.* at 1207.

Harrison v. Howmedica Osteonics Corp.

2008 WL 906585 (D. Ariz. Mar. 31, 2008)

Factual Summary

While on vacation, Plaintiff fractured his femur and was given an intramedullary rod for fixation. Months later his implant failed, allegedly due to defective materials used to build the implant. Defendant brought a *Daubert* motion to exclude Plaintiff's expert from testifying, and the court granted the motion.

Key Language

- "As with testing, the only mention of peer review and publication in the record is [the expert's] averment, with no elaboration, that the surface treatments which he is advocating have been 'peer-reviewed.'" 2008 WL 906585 at *14.
- "Merely reciting a list of publications does not establish the level of peer review or publication which *Daubert* and its progeny contemplate. Among other things, it cannot be discerned from that list whether

any of the cited publications bear directly on the issues before this court." *Id.*

- "Thus, even if [a] publication establishes that 'abrasive waterjet preening' has been subjected to peer review and publication, the court fails to see how that shows the reliability of [the expert's] proffered opinions, which do not include that particular technique." *Id.*
- "[T]here is no indication that either of [the expert's] two reports, which were prepared in connection with this litigation, were peer reviewed." *Id.* at *15.
- "In *Martinez*, the court held that an expert's reports which were only peer reviewed 'in-house, through a co-worker at [the expert's] engineering firm[,]' did not 'rise to the level of publication or peer review contemplated in *Daubert* to test the soundness of methodology used in the analysis.' [The expert's] reports were not subjected to the minimal level of 'peer review' described in *Martinez*, let alone the 'usual rigors of peer review' employed in scientific and academic communities." *Id.* (citations omitted).

Thompson v. Whirlpool Corp.

2008 WL 2063549 (W.D. Wash. 2008)

Factual Summary

In July 2005, a fire broke out in Plaintiffs' Bellingham, Washington home, causing substantial damage. It is undisputed that the fire originated in the kitchen, in which two days earlier Plaintiffs had installed a new refrigerator, manufactured by Defendant. Defendant moved to exclude Plaintiff's origin and cause expert, and the court denied the motion.

Key Language

- "Next, Defendant contends that [the expert's] proposed testimony is unreliable because his 'causation theories have not been subjected to peer review; neither has [he] published on his theory regarding high resistance connections,' the rate of error of his theory is unknown because of his failure to test, and—Defendant contends—'[The expert] acknowledges he was unaware if his theory would be generally accepted in the scientific community.' Defendant's arguments in this regard seem to strain to fit into the four factors suggested by *Daubert*. Regardless, Plaintiffs succeed in rebutting, largely by referencing NFPA 921, which specifically recognizes that a high resistance electrical connection may cause a fire." 2008 WL 2063549, at *6.
- "The Court accepts this as sufficient demonstration that [the expert's] opinion that a high resistance electrical connection could have caused the fire at issue has been subject to peer review and enjoys general acceptance in the relevant scientific community." *Id.*

In re Apollo Group Inc. Secs. Litig.

527 F. Supp. 2d 957 (D. Ariz. 2007)

Factual Summary

A group of investors brought a securities fraud claim against an education corporation alleging that the corporation kept its stock artificially high by not disclosing certain information from the Department of Education. When the information became public, the stock price fell dramatically. Defendants filed a motion to exclude Plaintiffs' experts. Some testimony was admitted, other opinions were not.

Key Language

- "Because publication in a peer-reviewed journal increases the likelihood that substantive flaws in the technique will be detected, '[t]he fact of publication (or lack thereof)… will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion in premised.'" 527 F. Supp. 2d at 960 (citations omitted).
- "[The expert's] analysis is related to his prelitigation research in econometrics, and the basic regression model he uses in this case has been subjected to peer review and publication." *Id.* at 963.

Martinez v. Terex Corp.

241 F.R.D. 631 (D. Ariz. 2007)

Factual Summary

Plaintiff's spouse was near an operating cement mixer when he was caught between the guard rail and the cement mixer and pulled under the cement mixer, trapping him, and causing his death. Defendant moved to strike Plaintiff's mixer design expert, and the court granted the motion in part and denied the motion in part.

Key Language

- "In reviewing the deposition testimony of [the expert] it also appears clear that his theory regarding an improper design or his alternative design of the total barrier guard system has never been subject to any material peer review or publication. For instance, [the expert] testified that he has never written any articles or published any works regarding guarding of equipment such as cement mixing drums." 241 F.R.D. at 638.

- "The only peer review done of [the expert's] reports submitted in this case was done in-house, through a co-worker at Mr. Finocchiaro's engineering firm. Such circumstances do not rise to the level of publication or peer review contemplated in *Daubert* to test the soundness of the methodology used in the analysis." *Id.*
- "Plaintiff argues that the basis supporting [the expert's] opinion can be found based upon the materials he reviewed and his educational and professional experience. While such factors are relevant, they certainly do not override the important factor of peer review and publication identified in the *Daubert* inquiry. As such, the lack of any peer review or publication regarding Plaintiff's design defect and alternative design theories cuts against the reliability of [the expert's] opinions." *Id.* at 639.

United States v. Yagman

2007 WL 4409618 (C.D. Cal. 2007)

Factual Summary

The government intended to call a U.S. Postal Inspector as an expert witness to identify handwriting on various documents. The defense sought to introduce testimony of a law professor who focuses on forensic handwriting analysis. The government sought to exclude his testimony. Plaintiff's expert had been excluded and affirmed in one circuit, and excluded and reversed due to his ability to testify "on the limitations of handwriting analysis" in another. The judge denied all motions and found both experts reliable.

Key Language

- "[T]he Ninth Circuit observed that the district court 'cited to numerous journals where articles in this area subject handwriting analysis to peer review by not only handwriting experts, but others in the forensic science community.'… Based on [previous Ninth Circuit Cases], as well as the other authorities cited in this opinion, it is clear that handwriting analysis is subject to peer review." 2007 WL 4409618, at *3.
- "Additionally, in *Prime*, the Ninth Circuit mentioned that the Secret Service has an internal peer review system. 431 F.3d at 1153. Similarly, [the postal expert] explained that the Postal Inspection Service has an internal review system in which the forensic document analysts review the work of their colleagues. Therefore, the Court finds that the technique has been subject to peer review and publication." *Id.*
- "At the time of the trial, [the expert law professor] had done virtually no further research or writing on the subject of the reliability of handwriting expertise since the University of Pennsylvania published his law review article in 1989…. Other than his new study, [the expert] has not produced any new publications since the *Paul* decision that would demonstrate his expertise on the field of handwriting identification." *Id.* at *11.
- In applying a Rule 403 weighing test, the court held that "[b]ecause [the expert law professor's] 2007 study has not been subjected to peer review or publication, the Court finds that its probative value is outweighed by its prejudicial effect. As a result, [the expert] may rely on the study if an expert in his field would reasonably rely on the study in forming an opinion, but [the law professor] may not use it as substantive evidence of his ultimate conclusions." *Id.*

Silong v. United States

2007 WL 2535126 (E.D. Cal. 2007)

Factual Summary

During birth, a baby suffered injury to the brachial plexus, allegedly from a Navy doctor pulling too hard on the baby. Plaintiff brought suit and sought to exclude Defendant's expert on causation. The district court allowed expert testimony.

Key Language

- "Peer review is a very significant factor to consider, though the requirement may also be met by 'precisely explaining how the experts went about reaching their conclusions and pointing to some objective source—a learned treatise,… a published article in a reputable scientific journal or the like—to show that they have followed a scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.'" 2007 WL 2535126, at *3.

United States v. Diaz

2007 WL 485967 (N.D. Cal. Feb. 12, 2007)

Factual Summary

In a RICO gang prosecution case, the immediate issue deals with the admissibility of firearms evidence.

Key Language

- "AFTE, the principal professional organization for firearms and toolmark examiners, publishes a peer-reviewed journal, the *AFTE Journal*. This journal has "always had a peer review process." There is a formal process for submission to the journal, including assigning manuscripts to other experts in the scientific community for technical review and the

requirement of a final review by the journal's editorial committee. There is also a post-publication peer-review process whereby interested persons may comment on published articles. This order concludes that the peer-reviewed literature factor supports admitting the testimony in this case." 2007 WL 485967, at *6.

- "It seems clear from the literature that spent cartridge cases can be identified by an experienced examiner as having come from a particular firearm regardless of how many times the firearm had been fired. For spent bullets, the literature indicates that individual characteristics can change after many firings but that the matching of spent bullets to a particular firearm is frequently done and well-accepted." *Id.*
- "The fact that articles submitted to the *AFTE Journal* are subject to peer review weighs strongly in favor of admission. Moreover, the conclusions reached by the peer-reviewed literature further demonstrate the reliability of the theory and process used by examiners in the field." *Id.* at *8.
- "Right now, however, the evidence in this record does not warrant dismissing traditional pattern matching in favor of CMS. Traditional pattern matching is reliable. As stated in the peer-reviewed literature: 'It is enough to state that CMS is not a new technique, nor in conflict with the traditional pattern matching that has characterized the discipline from the earliest of times. It is simply an extension, a manner of describing the pattern that is believed to be more concise, more easily understood, and allows for its use by others.'" *Id.* at *12.

United States v. Diaz

2006 WL 3512032 (N.D. Cal. 2006)

Factual Summary

In this criminal street-gang prosecution, Defendants invoked *Daubert* to exclude the government's narcotics-identification expert witnesses.

Key Language

- "The government's peer-reviewed literature supports the SFPD Crime Lab's procedure for identifying cocaine." 2006 WL 3512032, at *5.
- "This order finds that the SFPD Crime Lab's method of confirming the presence of cocaine during the relevant period has been subjected to peer review within the forensic science community. For the identification of cocaine, the forensic community accepts the use of the cobalt thiocyanate test as a screening test, and the gold chloride and platinic chloride tests as confirmatory tests. The significant amount of peer-reviewed literature establishes that microcrystalline tests are sensitive, efficient, and simple tests for the confirmation of cocaine." *Id.* at *6.
- "Based on this overwhelming evidence, it is clear that the theory that marijuana can be identified by observation of botanical features and a positive Duquenois-Levine color test has been peer reviewed in published articles." *Id.* at *11.

In re Silicone Gel Breast Implants Prods. Liab. Litig.

318 F. Supp. 2d 879 (C.D. Cal. 2004)

Factual Summary

The decedent was diagnosed with breast cancer approximately fourteen months after receiving breast implants. She later died from the disease. Her estate brought an action against Defendants, alleging that her implants caused or accelerated her breast cancer. Defendants filed four motions in limine seeking to exclude the testimony of Plaintiff's four causation experts and also filed a motion for summary judgment. The court granted Defendants' motion for summary judgment and granted in part and denied in part the motions to exclude Plaintiff's expert testimony.

Key Language

- "The statistical underpinnings of epidemiology are well tested. They have been subjected to peer review and publication." 318 F. Supp. at 896.
- "Dr. Batich's testimony is both reliable and relevant. His testimony regarding the in vivo breakdown products of PUF is based on his own published, peer-reviewed study and other published, peer-reviewed studies." *Id.* at 903.
- "Dr. Batich's testimony that polyurethane coating of PUF-coated implants hydrolyzes *in vivo* to produce TDA is admissible. He may discuss the available literature on the subject, including the amounts of TDA found by researchers in the blood and urine of patients shortly after those patients received PUF-coated implants. However, because he carried out his own 1989 *in vitro* study under extreme conditions, his own findings regarding the amount of TDA released would not be reliable or relevant and may be prejudicial." *Id.* at 903.
- "Since there is no reason to believe that the 'principles and methodology,' employed in the Hueper and Austrian studies were flawed, contrary studies are not a reason to preclude Lappe from relying on them." *Id.*

- "Lappe may not testify that his own research shows that TDA can accelerate a preexisting tumor because there is no evidence that he has published that research or subjected it to peer review." *Id.* at 912.
- "Shanklin has published hundreds of articles in scientific journals, some of which pertain to immunologic effects of silicone-containing devices. Shanklin admits that he has written only one article touching on the immunological effects of PUF-coated devices." *Id.* at 915.
- "Shanklin has published several articles about immune responses to silicone implants in humans, but he has not published anything about the effects of PUF-coated implants. However, as noted above, he intends to write 'a definitive article on the body's reaction to [PUF]-coated implants' based on over fifty cases he has studied, though he still has not written any such article as of April 9, 2004, the date of the hearing on these motions…. Shanklin is entitled to describe for the jury what he has observed in his fifty-patient sample." *Id.* at 916.
- "The basis for Shanklin's first premise—that Cagle was more susceptible to the effects of TDA because she was pregnant—is as follows. Shanklin represents that it is well-known that hormones released during pregnancy stimulate mammary cell growth and that there is a 'fairly extensive' body of scientific literature about the relationship between those proliferating cells and cancer. Plaintiff also provides abstracts from several published in vitro studies that show an association between cell proliferation and mutations caused by chemicals such as TDA." *Id.* at 917.

In re Phenylpropanolamine (PPA) Prods. Liab. Litig.

289 F. Supp. 2d 1230 (W.D. Wash. 2003)

Factual Summary

Defendants challenged the reliability of all of Plaintiffs' general causation expert opinions. They asserted the inadmissibility of the opinions to support a conclusion that PPA could cause hemorrhagic stroke, ischemic stroke, cardiac injuries, or, to the extent claims of this nature might exist, seizures or psychoses. The court concluded that the opinions were admissible as to hemorrhagic or ischemic stroke in either gender and any age group. In addressing hemorrhagic stroke in women between 18 and 49, the court found testimony relying on an epidemiologic study reliable, especially in conjunction with additional lines of evidence. The study grew out of pre-litigation research and was subject to peer review.

Key Language

- "Where not based on independent research, the testimony must be supported by objective, verifiable evidence that it rests on scientifically valid principles, such as peer review and publication in a reputable scientific journal. In the absence of independent research or peer review, experts must explain the process by which they reached their conclusions and identify some type of objective source demonstrating their adherence to the scientific method." 289 F. Supp. 2d at 1238.

Practice Tip

It should be noted that the study relied upon by Plaintiffs' expert was published in the *New England Journal of Medicine* and the Court found this to be prestigious publication "further substantiating that the research bears the indicia of good science." *Id.*

Cloud v. Pfizer, Inc.

198 F. Supp. 2d 1118 (D. Ariz. 2001)

Factual Summary

Decedent committed suicide while taking Zoloft for treatment of depression. Plaintiff claimed that the drug caused her husband to experience side effects about which Defendant failed to properly warn. Expert Dr. Healy's calculation of a relative risk of 2/19 for sertraline-suicide association has not been subject to peer review and the court cited to the court's experts in Miller v. Pfizer, Inc. whereby the independent experts could not replicate his findings. Plaintiff's psychiatrist relied upon Dr. Healy's work to support his conclusions but did not have information forming the basis of Healy's work. No studies supported the contention that Zoloft causes or increases the risk of suicides. The psychiatrist admitted that he is was unaware of any medical or scientific studies that show that Zoloft increases the risk of suicide or any causal relationship between the use of the drug and manic states and suicide. Defendant's motion for summary judgment was granted, as the expert's opinions were excluded.

Key Language

- "If the evidence is not based upon independent research, this Court must determine whether there exists any 'other objective, verifiable evidence that the testimony is based on scientifically valid principles.'" 198 F. Supp. 2d at 1129–30.
- "Generally, peer review meets this requirement yet it may also be met by: 'precisely [explaining] how [the experts] went about reaching their conclusions

and pointing to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.'" *Id.* at 1130 (citing *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994)).

United States v. Everett

972 F. Supp. 1313 (D. Nev. 1997)

Factual Summary

Criminal defendant challenged police officer's testimony regarding Drug Recognition Evaluation (DRE) on the grounds that the DRE program did not meet *Daubert* requirements. Court denied Defendant's motion but held that the officer's conclusions could not be fact but could be his observations and clinical findings.

Key Language

- The scientific community here is a limited one. "It consists primarily of behavioral psychologists, highway safety experts, criminalists and medical doctors concerned with the recognition of alcohol and drug intoxication." 972 F. Supp. at 1323.
- Experts "have prepared numerous reports and papers for presentations before various organizations, including the American Association for Automotive Medicine, the International Conference on Alcohol, Drugs and Traffic Safety, The University of California, Los Angeles, the American Journal of Optometry & Physiological Optics, the Journal of Optometric Association, and the American Academy of Forensic Sciences." *Id.* at 1324.
- Publication does not require articles in all medical journals, or even leading medical journals publishing articles of general interest. "Presentation of papers at conferences and conventions subjects the content of those presentations, and the opinions expressed therein, to the peer review of those interested in the physiological implications of drug and alcohol abuse." *Id.*

Hall v. Baxter Health Care Corp.

947 F. Supp. 1387 (D. Or. 1996)

Factual Summary

Plaintiff, among others, asserts that silicone from breast implants migrated and degraded, causing a systemic syndrome which they generally referred to as "atypical connective tissue disease." ACTD is an untested hypothesis and is not supported in the literature. Plaintiff attempted to offer contradicting expert testimony, in that one expert was expected to testify based upon her "reanalysis" that there had been no valid epidemiological studies regarding the relationship of silicone breast implants and disease. This opinion had not been subjected to peer review and conflicted with the general consensus in the scientific community. Defendants' motion in this regard was granted.

Key Language

- Expert's "reanalysis of the silicone epidemiology has never been subjected to peer review." 947 F. Supp. at 1406.
- Expert's "theory has not been espoused by any other scientist whose work has been subjected to the peer review process." *Id.*
- "Peer review and publication weigh heavily in the calculus of the reliability of expert testimony because such peer review 'increases the likelihood that substantive flaws in methodology will be detected.'" *Id.*

Sanderson v. Int'l Flavors & Fragrances, Inc.

950 F. Supp. 981 (C.D. Cal. 1996)

Factual Summary

Plaintiff brought suit against Defendant for alleged injuries resulting from exposure to various perfumes. Her alleged injuries included sinus inflammation, toxic encelopathy, dysosmia, small airways disease, and multiple chemical sensitivity. Plaintiffs' experts opined that her injuries were caused by aldehydes in fragrance. Plaintiff could not make showing that experts' testimony was reliable because it was based upon peer reviewed research and analysis. Plaintiff could not identify any published work showing that fragrances or aldehydes cause any of the injuries Plaintiff claimed to have developed. Motions for summary judgment and to exclude Plaintiff's expert witnesses granted.

Key Language

- "[E]ven if the expert has never done any relevant research of his own, his testimony could be reliable if he relies on the published work of others…." 950 F. Supp. at 994.
- "Here, plaintiff cannot make such a showing, because there is *no* published work showing that fragrance products or aldehydes cause any of the injuries which plaintiff claims to have." *Id.* "Indeed, her opposition admits that there is no such literature." *Id.*
- "Even if an expert did not rely on published, peer-reviewed research in coming to his conclusions,

his testimony is not necessarily unreliable." *Id.* The expert would have to explain precisely how he or she reached his or her conclusion and point to an objective source. Here, "plaintiff cannot make any of these alternative showings either, because there are no learned treatises or professional associations that say fragrance products or aldehydes can cause the injuries which plaintiff claims to have." *Id.*

Casey v. Ohio Med. Prods.

877 F. Supp. 1380 (N.D. Cal. 1995)

Factual Summary

Decedent's estate brought products liability action against defendant manufacturer of halothene, alleging that decedent acquired chronic active hepatitis by reason of exposure to halothene. The district court precluded the causation testimony of Plaintiff's medical expert, an occupational health physician. The court noted that Plaintiff's expert relied solely on the studies of others in formulating his causation opinion; he conducted no studies of his own.

Key Language

- Plaintiff's expert identified only one study upon which he relied. The court observed that the study was not an epidemiological study, but rather, a compilation of case reports. "Such case reports are not reliable scientific evidence of causation, because they simply described reported phenomena without comparison to the rate at which the phenomena occur in the general population or in a defined control group; do not isolate and exclude potentially alternative causes; and do not investigate or explain the mechanism of causation. Even if some credibility were given to the study, it does not have the degree of clarity required for a validation of its results or its methodology which is sufficient for objective and independent peer review." 877 F. Supp. at 1385.

Frosty v. Textron, Inc.

891 F. Supp. 551 (D. Or. 1995)

Factual Summary

Decedent was killed in a helicopter crash, and his estate brought a products liability action against the manufacturer of the helicopter piloted by the decedent. Defendant contended Plaintiff's lawsuit was time-barred under Oregon's statute of repose. In response to Defendant's summary judgment motion, Plaintiff submitted affidavits by a helicopter pilot and a mechanic to establish that the useful safe life of the subject helicopter exceeded 15 years. The district court deemed the opinions of Plaintiff's proffered experts unreliable and awarded Defendant summary judgment. The court emphasized that the experts' testimony comprised nothing more than personal opinion.

Key Language

- "Because no technique or underlying theory for the conclusion has been asserted, it is impossible to determine if the technique or the theory used, if any, has been tested or subjected to peer review or publication. It is also impossible to determine the known or potential rate of error." 891 F. Supp. at 554.

Tenth Circuit

United States v. Baines

573 F.3d 979 (10th Cir. 2009)

Factual Summary

A man was arrested and eventually convicted with the use of partial fingerprint analysis. He challenged the admissibility of the evidence under *Daubert*. Upon review, the Tenth Circuit held that the fingerprint analysis was sufficiently reliable to be admissible under *Daubert*. Despite a lack of peer review supporting the expert's methodology, the court emphasized the flexible nature of Rule 702 and *Daubert* and allowed the testimony.

Key Language

- "The second *Daubert* factor is whether the theory or process has been subject to peer review and publication. We find little in the record to guide us in consideration of this factor. Defendant argues persuasively that the verification stage of the ACE-V process is not the independent peer review of true science. [The Agent's] testimony included some references to professional publications, but these were too vague and sketchy to enable us to assess the nature of the professional dialogue offered. In short, the government did not show in this case that this factor favors admissibility."573 F.3d at 990.
- "The Rule 702 analysis is a flexible one, as both *Daubert* and *Kumho Tire* teach. The *Daubert* factors are 'meant to be helpful, not definitive,' and not all of the factors will be pertinent in every case. On the whole, it seems to us that the record supports the district judge's finding that fingerprint analysis is sufficiently reliable to be admissible." *Id.* at 991 (citations omitted).

United States v. Rodriguez-Felix
450 F.3d 1117 (10th Cir. 2006)

Factual Summary
Defendant was convicted of drug trafficking. The government relied heavily on eye-witness testimony and Defendant claimed mistaken identity. The district court denied the admissibility of Defendant's expert psychologist concerning the limited reliability of eyewitness testimony. Defendant was convicted and the Tenth Circuit affirmed on appeal.

Key Language
- "On a fundamental level, [the doctor's] report is unclear as to whether his testimony would rely on his own research or that of other psychologists. In either case, the report was insufficient to allow the district court to 'assess the reasoning and methodology underlying the expert's opinion….'" 450 F.3d at 1125 (citations omitted).
- "The description of [the doctor's] research is wholly inadequate—it fails to indicate whether it has been subjected to peer review, whether it has been published, and whether it has been accepted by other psychologists in the field." *Id.*
- "[O]ther than generalized assertions regarding the factors which can affect an eyewitness's identification, the report fails to sufficiently reference specific and recognized scientific research, which underlies [the doctor's] conclusions, such that the court could determine if this foundational research had been subjected to peer review, and, if so, whether it had been accepted in the community. *Id.* at 1126.
- "The requirements of *Daubert* are not satisfied by casual mention of a few scientific studies, which fail to demonstrate that an expert's conclusions are grounded in established research, recognized in the scientific community, or otherwise accepted as scientific knowledge." *Id.*

Bitler v. Colo. Compensation Ins. Auth.
400 F.3d 1227 (10th Cir. 2004)

Factual Summary
Plaintiff was severely burned by a gas explosion, which occurred in the basement of his home. He filed a products liability lawsuit against the defendant manufacturer of the gas control in his basement water heater and a jury found in his favor and awarded damages. Defendant appealed and argued that the district court erred in admitting Plaintiff's expert testimony under *Daubert*. The Tenth Circuit affirmed the district court's decision.

Key Language
- "Although such a method is not susceptible to testing or peer review, it does constitute generally acceptable practice as a method for fire investigators to analyze the cause of fire accidents." 400 F.3d at 1235.

Truck Ins. Exch. v. MagneTek, Inc.
360 F.3d 1206 (10th Cir. 2004)

Factual Summary
Fire subrogation lawsuit alleging that fire was caused by defective fluorescent light ballast. On motion, the district court precluded Plaintiff's experts' theories as to the cause of the fire on *Daubert* grounds. The expert had opined that the temperature of the ballast was sufficient to cause one of the furring strips in the ceiling to catch fire due to long-term heating. The district court concluded that this theory was not reliable and that it had not been reliably applied to the facts of the case.

Key Language
- Plaintiff submitted three publications to support its theory of the cause of the fire. However, "all three cast doubt on the general scientific acceptance, the methodology and the adequacy of the experimentation underlying the theory." Thus, it was within the trial court's discretion to reject the theory as unreliable. The court reviewed each of the articles in detail. 360 F.3d at 1211.
- "We are faced with a situation similar to that in *Mitchell* [165 F.3d at 783], where this court held that, 'the analytical gaps in [the experts] opinions are too broad for their testimony to endure the strictures of *Daubert* and Rule 702.'" *Id.* at 1212.
- "[T]he district court's gatekeeper role requires it to examine the basis for challenged expert testimony to determine its reliability looking beyond the testimony of the witnesses before it to the scientific foundation for that testimony." *Id.* at 1213.

Miller v. Pfizer, Inc.
356 F.3d 1326 (10th Cir. 2004)

Factual Summary
Pharmaceutical product liability case alleging that antidepression drug caused teenager to commit suicide. After discovery, the court retained independent experts to review the contentions of the parties' experts, and "to examine whatever medical or scientific literature is necessary to render their professional opinions." The independent experts generally discredited Plaintiff's expert's theory and methodology. The trial court ultimately pre-

cluded Plaintiff's causation expert (a neuropsychopharmacologist) on *Daubert* grounds. On appeal, Plaintiffs argued that the district court improperly deprived their expert of an opportunity to respond to the concerns of the independent experts.

Key Language

- "In analyzing the peer review and publication factor, the court concluded that although [the expert] had published peer review articles expressing the theory that [the drug] causes suicide, his specific calculations of the risk of suicide had not been subjected to peer review." The court went on to comment on the unreliability of the method of the expert's study.

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

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

Factual Summary

Plaintiff claims that he was injured due to a combination of exposure to high altitudes and diesel fumes. Plaintiff was granted summary judgment on liability based on a statute, and the trial was limited to causation and damages. Plaintiff's expert testified that Plaintiff's injuries were due to "exposure to a unique environment" that caused a "complicated chain of events" culminating in brain injury. Defendant appealed its unsuccessful challenge to the expert's testimony on *Daubert* grounds. The dispute centered on whether the scientific literature supported the expert's opinions.

Key Language

- "We will not disturb the district court's ruling unless it is 'arbitrary, capricious, whimsical or manifestly unreasonable' or when we are convinced that the district court 'made a clear error of judgment or exceeded the bounds of permissible choice under the circumstances.'"
- The Court approved of the approach taken by Plaintiff's expert—addressing general causation and specific causation. The defense contended that the literature did not support the expert's conclusions on general causation, and that on specific causation, the expert did not take into account alternative possible explanations.
- In view of the United States Supreme Court decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Tenth Circuit undertook a review of the underlying scientific literature to analyze whether the district court abused its discretion in allowing the general causation testimony. In an important comment, the court stated: "In cases such as this one, where one party alleges that an expert's conclusions do not follow from a given data set, the responsibility ultimately falls on that challenging party to inform (via the record) those of us who are not experts on the subject with an understanding of precisely how and why the expert's conclusions fail to follow the data set. Any Failure by the challenging party to satisfy that responsibility is at that party's peril."
- The standard that the Circuit Court applied was whether there was "too great an analytical gap" between the literature and the expert's conclusions. The review is 'deferential' and "our role as judges is not to second guess well qualified and highly trained medical experts on difficult judgment calls within their field of expertise; our role is merely to insure that the district court did not abuse its discretion…."
- In dissent, a circuit court judge wrote that the while the review of the literature did not prove the expert wrong, the appropriate standard is whether it proved him right. The dissenter felt that a review of the literature did not prove the expert right. "[The expert] may in fact be correct. It may be an inspired insight. But a courthouse is not the proper forum to present inspiration. Only when the insight is properly supported by research, is it admissible at trial."

Vanover v. Altec Indus.

82 F. App'x 8 (10th Cir. 2003)

Factual Summary

Decedent was electrocuted while operating an aerial lift. A product liability lawsuit ensued. As to the design defect claim, Plaintiff claimed that a device should have been incorporated into the aerial lift that would have allowed the boom to be lowered to the ground so that CPR could have been given to the decedent after the electricity had gone through his body. The district court barred expert testimony as to the design claim on *Daubert* grounds.

Key Language

- The proposed expert's alternative design theory did not satisfy *Daubert*. The expert "is not a designer of boom trucks or aerial lifts; he has no education or experience with such lifts; his proposed design is untested and unpublished."

Mitchell v. Gencorp Inc.

165 F.3d 778 (10th Cir. 1999)

Factual Summary

Plaintiff's estate claimed that as a result of exposure to

chemicals manufactured by Defendant, decedent developed chronic myelogenous leukemia (CML) and died. Plaintiffs presented five witnesses who opined that they surveyed the available literature and drew certain conclusions from the scientists who performed original work. They made no efforts to subject their opinions to peer review or publications. Defendant pursued a motion to exclude these expert witnesses from testifying, as their opinions were unreliable. The Tenth Circuit sustained the district court's grant of summary judgment.

Key Language

- "[A] trial court may consider whether the theory has been subjected to peer review. Although not dispositive, subjecting a theory to the scrutiny of the scientific community may help validate an otherwise infirm theory by decreasing the likelihood that substantive flaws in the methodology exist." 165 F.3d at 780.
- "By failing to subject their opinions to peer review, the experts missed the opportunity to have other scientists review their work and warn them of possible flaws in their methodology." *Id.* at 784.

Summers v. Mo. Pac. R.R. Sys.

132 F.3d 599 (10th Cir. 1997)

Factual Summary

Plaintiff railroad employees alleged that they sustained permanent inhalation injuries by reason of short-term exposure to diesel exhaust fumes. Plaintiff's expert diagnosed plaintiffs as suffering from "chemical sensitivity." According to defendant's expert, what plaintiff's expert really diagnosed was "multiple chemical hypersensitivity syndrome" ("MCHS"), a condition which the scientific literature has yet to endorse as a valid diagnosis. The district court concluded that plaintiffs' expert's true diagnosis was that of MCHS, and granted the defendant's *Daubert* motion.

Key Language

- "The scientific foundation for managing patients with this syndrome has yet to be established by traditional clinical investigative activities that withstand critical peer review.... [T]he scientific and clinical evidence supporting the pathophysiological mechanisms and treatment regimes as articulated by these practitioners is lacking. It is the position of the American College of Occupational and Environmental Medicine (ACOEM) that the MCHS is presently an unproven hypothesis and current treatment methods represent an experimental methodology...." 897 F. Supp. at 536.

Farris v. Intel Corp.

493 F. Supp. 2d 1174 (D. N.M. 2007)

Factual Summary

Plaintiff asserted that he developed rhinitis (inflammation of the nasal mucosa) and other diseases as a result of his exposure to ammonium hydroxide fumes while working as a pipefitter for a subcontractor at Defendant's plant. Defendant brought a *Daubert* motion to exclude Plaintiff's causation expert, explaining the cause of various diseases. The judge granted the motion as to most diseases, and denied the motion as to rhinitis due to peer review materials submitted not by Plaintiff, but rather by Defendant.

Key Language

- "Ironically, however, Defendant has presented the Court with a medical text that saves a portion of the very testimony it works so hard to exclude." 493 F. Supp. 2d.at 1184.
- "[Defendant's submitted study] is (sic) also contains the precise type of generally accepted and peer reviewed research necessary to support a general causation opinion in a toxic tort case." *Id.*
- "Thus, while [plaintiff's expert's] general causation opinions regarding sinusitis and vertigo are not grounded in any methodology identified in the record as tested, subjected to peer review, and generally accepted in the medical community, much less any epidemiological or toxicological article, report, or study, his opinion concerning rhinitis does have recognized support in the medical community. Therefore, the Court concludes that [his] opinions about sinusitis and vertigo do not satisfy *Daubert*'s requirements but his opinion about rhinitis does." *Id.*

Lohmann & Rauscher Inc. v. Ykk Inc.

477 F. Supp. 2d 1147 (D. Kan. 2007)

Factual Summary

In a breach of contract, breach of express warranty, and breach of implied warranties action, Defendant moved to exclude Plaintiff's expert on liability and for summary judgment. The court denied the *Daubert* motion and granted the summary judgment motion in part.

Key Language

- "Because neither party has introduced evidence regarding any testing, peer review, publication, or potential rates of error associated with peel testing, the court does not find the specifically enumerated *Daubert* factors to be particularly helpful." 477 F. Supp. 2d at 1159.

Ingram v. Solkatronic Chem., Inc.

2005 WL 3544244 (N.D. Okla. Dec. 28, 2005)

Factual Summary

Plaintiffs filed a claim alleging exposure to arsine gas when a cylinder ruptured at a nearby Defendant-owned facility, creating an accidental release. Plaintiffs claim to have suffered adverse health effects after the release and attribute their symptoms to the exposure to arsine gas. Plaintiffs produced three experts to validate their claims of arsine-induced injury. Defendant challenged Plaintiffs' experts under Rule 702 and retained three of their own experts to rebut Plaintiffs' experts. The court conducted a *Daubert* hearing for the proposed experts and granted in part and denied in part Defendant's motion to strike the testimony of Dr. Gad. The court also denied Defendant's motion to strike Dr. Hastings' testimony. The court limited the testimony of Plaintiffs' experts with respect to the causation opinions.

Key Language

- "That the expert failed to subject his method to peer-review and to develop his opinion outside the litigation is not dispositive, but if these guarantees of reliability are not satisfied, the expert must explain precisely how he went about reaching his conclusions and point to some objective source… to show that he has followed the scientific method, as it is practice by (at least) a recognized minority of scientists in his field." 2005 WL 3544244, at *4 (citations omitted).
- "Dr. Hastings acknowledged at his deposition that he had no knowledge of the toxicological effects of arsine gas prior to engaging in a literature review for the purposes of this case." *Id.*
- "Although Dr. Hastings conducted an extensive review of the applicable literature on the subject of arsine toxicity, that review apparently produced no published support for the theory of biotransformation offered by Dr. Hastings. He acknowledged as much during his deposition." *Id.* at *5.
- "The court has independently reviewed the articles cited by Dr. Hastings and finds no support for his theory therein…. When asked, Dr. Hastings noted that he had, likewise, found no literature in support of the underlying premise of his biotransformation theory, that arise injury is possible without hemolysis." *Id.*
- "When an expert purports to offer an opinion based upon his review of existing literature, it is that critical the proposed expert carefully review the methodology utilized by the scientist conducting the study to ensure the quality of the assumptions and data therein. Such a review is impossible when the expert has no knowledge of the procedures followed in acquiring the information contained in the MSDS. in this case, Dr. Hastings had no way to evaluate the quality of the research, if any, underling the information contained in the MSDS, and that document, as a result, does not bolster his opinion." *Id.* at *6.
- "Faced with the absence of unequivocal published support for their expert's theory of biotransformation, Plaintiffs emphasize the preliminary nature of the research on arsine. They correctly point out that the absence of scholarly support for a scientific proposition is not necessarily fatal to a proposed expert's ability to offer testimony. Other circuits have similarly held that *Daubert* makes room for methodologically sounds, albeit unpublished, scientific views." *Id.*
- "While it is not dispositive that Dr. Hastings's biotransformation theory is not confirmed by existing published research on the subject of arsine, its absence from the body of knowledge on arsine toxicity is not without significance." *Id.* at *7.
- "In the absence of published support, however, the Court must find other indicators of reliability, and, in this regard, the manner by which Dr. Hastings developed his theory of biotransformation takes on particular importance." *Id.*

Morales v. E.D. Etnyre & Co.

382 F. Supp. 2d 1252 (D. N.M. 2005)

Factual Summary

Plaintiff filed a complaint for personal injuries in negligence and strict liability after Plaintiff was severely burned by hot asphalt while operating a black topper road machine manufactured by Defendant. Defendant filed a motion to prohibit Plaintiff's expert testimony and filed a motion for summary judgment. The court found that Plaintiff's expert met the requirements under *Daubert* and denied Defendant's motions to exclude the expert testimony and for summary judgment on Plaintiff's defective design claims. However, the court granted Defendant's motion for summary judgment on the defective manufacture, marketing, sale, and distribution claims.

Key Language

- "Puschinsky [plaintiff's proposed expert] is not a published author in subjects related to his field. Puschinsky has, however, been a contributor to items published in his field… to several publications of the American Petroleum Institute, and has developed

and presented a seminar for industry through that same Institute." 382 F. Supp. 2d at 1257.
- "The fact that the expert's opinions have not been tested or subjected to peer review 'is a consideration but not a requirement' in evaluating the testimony's admissibility. The court concluded that the expert's methodology was appropriate." *Id.*

Hauck v. Michelin N. Am., Inc.

343 F. Supp. 2d 976 (D. Colo. 2004)

Factual Summary

Plaintiff was injured in a multi-vehicle traffic accident when a Jeep Cherokee went out of control, crossed the median, and collided with Plaintiff's van. Plaintiff's van in turn collided with a tractor trailer. Plaintiff was treated for serious injuries and American Family, the plaintiff's auto insurer, provided benefits to Plaintiff. American Family intervened and sought reimbursement from Defendant Michelin. The driver of the Jeep Cherokee had a 1985 Michelin X tire on his right rear wheel. At some point during the accident, the tread of the Michelin tire separated from the tire. According to Plaintiff, the tire tread separation caused the accident and Plaintiff's injuries. Plaintiff asserted four claims against Defendant: strict liability, negligence in manufacture of the tire; breach of warranties of merchantability and fitness for a particular purpose. Plaintiff brought an expert witness to support his theory on the tire failure. Defendant moved to strike Plaintiff's expert based on *Daubert* and also filed a motion for summary judgment. The court granted both of Defendant's motions.

Key Language

- The court noted that Dr. Ziernicki failed to "provide or refer to any persuasive technical literature or any recognized authority to support the underpinnings of his theory, or to show that 'global' delamination would not occur from localized impact damage is a recognized principle in the technical community." 343 F. Supp. 2d at 984.
- "When challenged to identify technical literature or authority to support this view, Dr. Ziernicki cited to three publications: a set of tire standards published in the Code of Federal Regulations (CFR), an article referred to as the 'Pirelli' article and a study by the National Highway Traffic Safety Administration ('NHTSA') of the Firestone Wilderness AT tires. The Court has reviewed these articles,… and finds that none of the three publications specifically refer to the concept of 'global' or total delamination, nor do they provide scientific or technical support for the proposition Dr. Ziernicki advances." *Id.*
- "[B]ased solely on his visual comparison, Dr. Ziernicki concluded that since the NHTSA report states that the Firestone Wilderness AT tires showed poor adhesion within the shoulder of the tire at the belt edge, the Michelin X tire also had a 'global nature of adhesion problem' which shows that 'the adhesion problem is a result of a manufacturing or a design defect, rather than associated with the impact to the tire.'" *Id.* at 985. The court did not find this type of analysis to be grounded in reliable technical or scientific principles. It further noted that "Dr. Ziernicki's theory that global delamination cannot occur except where there is a manufacturing defect therefore is simply unsupported by any reliable technical or scientific literature or authority presented to this Court, or by any test results, or by any peer review." *Id.*

Cohen v. Lockwood

2004 U.S. Dist. LEXIS 5989 (D. Kan. Apr. 8, 2004)

Factual Summary

In a medical malpractice case, Plaintiff claimed that during her bilateral implant mammoplasty and bilateral axillary brachioplasty with liposuction, Defendant negligently cut or partially cut her long thoracic nerve. Plaintiff claims that this resulted in permanent thoracic neuropathy as well as an overall decrease in functionality of her left arm. Defendant filed motions to exclude testimony from Plaintiff's experts and Plaintiff filed motions to exclude testimony of Defendant's experts. The court denied each of the motions except one limiting a portion of the testimony of one of Plaintiff's experts, Dr. Ginsberg.

Key Language

- "As to defendant's argument that Dr. Brown did not provide the specific articles supporting his opinions, his opinions appear to be based on reasoned medical analysis. Further, the lack of the specific articles is not fatal and goes to the weight, not the admissibility, of his testimony, as an expert may base his opinion on experience alone." 2004 U.S. Dist. LEXIS, at *11.
- "Lack of textual authority on the issue of general causation goes to the weight, not the admissibility of an expert opinion, when the expert has performed a reliable differential diagnosis." *Id.* at *14.

City of Wichita v. Trustees of The Apco Oil Corp. Liquidating Trust

2003 U.S. Dist. LEXIS 24812 (D. Kan. Dec. 31, 2003)

Factual Summary

Plaintiff city brought a private party action against various business and individual potentially responsible parties pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Hazardous substances were disposed of at the potentially responsible party's (PRPs) respective facilities during each of the PRP's tenure as owner or operator. The city's expert witness on groundwater modeling and contaminant fate and transport modeling issues used a CDM's proprietary computer codes DYNFLOW and DYNTRACK to develop models to simulate the areal location, movement, and size of plumes of contaminants emanating from sources at the site, including, but not limited to, sources representing the businesses operated by Defendants. The Court declined to admit most of the city's expert's proposed testimony as unreliable.

Key Language

- "While the evidence was conflicting about whether DYNFLOW and DYNTRACK had been peer-reviewed, it is clear beyond question that [expert's] particular use of DYNFLOW and DYNTRACK in connection with his allocation modeling for the Site had never been peer-reviewed. There was no evidence that his allocation modeling technique was accepted by the scientific community. Similarly, since [the expert's] allocation modeling technique was unique to this case, there could be no known rate of error. These are merely examples of problems associated with Smith's modeling techniques." 2003 U.S. Dist. LEXIS 24812, at *201.

Miller v. Pfizer, Inc.

196 F. Supp. 2d 1062 (D. Kan. 2002)

Factual Summary

Parents sued manufacturer of antidepressant medication, Zoloft, alleging that medication caused their 13-year-old son to commit suicide. Defendant challenged both general and specific causation methodology of Plaintiff's expert. Expert relied heavily on case reports and his own studies without randomized controlled studies or epidemiological studies. Court held that although expert's testimony had been subject to limited peer review, it did not satisfy *Daubert* requirements given that expert's tests and studies did not represent generally accepted methodology, since he did not include controls, volunteers were aware of his expected outcome, and expert misapplied or failed to apply six of seven postulates required to establish strength of association. Plaintiff's expert witnesses' testimony found inadmissible.

Key Language

- "Although neither article proposed new or modified methods to determine causality and the editors and reviewers did not endorse [the expert's] methodology, both pieces were peer-reviewed and deemed suitable for publication." 196 F. Supp. 2d at 1073.
- "On the other hand, [the expert] has not subjected to peer review his calculation, based on his Meta Analysis of Pfizer's data, that Zoloft carries a relative risk of suicide of 2.19. Thus, while the theory behind [the expert's] work has been subject to limited peer review and publication, his relative calculation has not." *Id*.
- "Regardless of the reason *why* [the expert's] numbers have not been subject to publication and peer review, the lack of peer review means that the Court simply does not have the assurance of reliability that this *Daubert* factor would normally provide."

Ruff v. Ensign-Bickford Indus., Inc.

171 F. Supp. 2d 1226 (D. Utah 2001)

Factual Summary

Residents of community brought action against explosives manufacturer, alleging that release of royal demolition explosive and its breakdown properties from explosives manufacturing plant caused non-Hodgkin's lymphoma cancers. They claimed that they developed cancer by eating produce grown in the contaminated soil and from eating fish grown in ponds on their properties. The expert's opinion concerning the royal demolition explosive (RDX) pathway (dose and exposure to MNRDX, DNRDX, TNRDX and hydrazines) had been the subject of peer review and cited over 41 times in the Science Citation Index. Plaintiffs' expert's testimony held to be admissible.

Key Language

- "[I]t is undisputed that the [expert's] pathway was selected for publication in 1981 and that, more importantly, it was peer-reviewed. In addition, the [expert's] pathway has been cited over 41 times in the Science Citation Index which catalogs the frequency of publications cited in peer reviewed literature." 171 F. Supp. 2d at 1235.

McCollin v. Synthes, Inc.

50 F. Supp. 2d 1119 (D. Utah 1999)

Factual Summary
Plaintiffs brought action against two manufacturers of orthopedic bone screws used in Plaintiff's spinal fusion surgery. Plaintiff filed suit after viewing 20/20 broadcast that suggested that the use of implants was improper because the FDA had not approved same for use in the spinal pedicles. Defendant moved for summary judgment, arguing that osteopath's opinion that the device caused injury to plaintiff was unreliable, as it was not based on any scientific method. The district court granted the motion.

Key Language
- The expert's "armchair-quarterback style evades meaningful testing, eludes peer review, and makes error rates incalculable…. Opinions based on his ill regard for the use of the pedicle screw fixation device are at best conclusory, and, at worst, just bad science and junk medicine." 50 F. Supp. 2d at 1127.

Koch v. Shell Oil Co.
49 F. Supp. 2d 1262 (D. Kan. 1999)

Factual Summary
Plaintiffs brought suit against manufacturer of feed containing an additive containing larvicide. Plaintiffs claim that exposure to the additive Rabon caused death of cattle and health problems in Plaintiffs. Plaintiffs' experts developed a test they believed could detect residual Rabon deposits in fat tissue, and relied upon such evidence to support their opinion that the Rabon caused Plaintiffs' health problems. Defendant moved for summary judgment on the grounds that such expert opinions were unreliable, as the test for Rabon was not accepted methodology. The district court granted Defendant's motion.

Key Language
- The expert who developed the Rabon test "testified that he had not ever submitted this methodology for peer review to determine its validity, reliability, and reproducibility. Therefore, this factor also weighs against the admissibility of [his] testimony." 49 F. Supp. 2d at 1268.
- The expert "developed this 'common sense' procedure himself, the procedure has not been submitted for peer review, and there is nothing before the court which would indicate that this procedure has ever been used again." *Id.* at 1269.

Ballard v. Buckley Powder Co.
60 F. Supp. 1180 (D. Kan. 1999)

Factual Summary
Plaintiff sued blasting company to recover for structural damage allegedly caused to her house by blasting activity being conducted for construction of nearby highway. Defendant moved to exclude testimony of Plaintiff's expert witness based on the speculative nature of his opinions. The expert was unaware of the location of the blast or depth of explosives used—he only knew the type of explosives used. Following an inspection 10 months after the fact, he just simply opined that the damage to the house was consistent with the blast. The expert did not rely upon anything to show that his method or basis for determining causation had been tested or subjected to peer review. Court granted Defendants' motion for summary judgment.

Key Language
- "Nothing is cited to show that [the expert's] method or basis for determining causation has been tested or subjected to peer review." 60 F. Supp. at 1184.

In re Breast Implant Litig.
11 F. Supp. 2d 1217 (D. Colo. 1998)

Factual Summary
Subsequent to breast implant cases being consolidated, manufacturers brought motion in limine to exclude Plaintiffs' proffered expert testimony on the basis that the causation testimony regarding auto-immune diseases was inadmissible. In part, Plaintiffs' experts relied upon individual experience and their review of the medical literature and concluded that silicone breast implants cause disease. District court granted Defendants' motions.

Key Language
- "The generally accepted view in the scientific community is that [the expert's] methodology [case reports and animal studies] can be used to generate hypotheses about causation, but not causation conclusions." 11 F. Supp. 2d at 1231.
- "Even if some credibility were given to the study, it does not have the degree of clarity required for a validation of its results or its methodology which is sufficient for objective and independent peer review." *Id.*
- "Peer review and publication weigh heavily in determining the reliability of expert testimony because such review 'increases the likelihood that substantive flaws in methodology will be detected.'" *Id.* at 1235.

United Phosphorus v. Midland Fumigant
173 F.R.D. 675 (D. Kan. 1997)

Factual Summary
Plaintiff corporation brought a trademark infringement lawsuit against Defendant for allegedly relabeling an inferior product with Plaintiff's label. Plaintiff sought to preclude Defendant's economic expert from testifying to the economic value of Plaintiff's trademark. Finding suspect the methodology by which Defendant's expert valued Plaintiff's trademark, the district court granted Plaintiff's *Daubert* motion.

Key Language
- "Where proffered expert testimony is not based on independent research, the party must come forward with other objective, verifiable evidence that the testimony is based on 'scientifically, valid principles,' *e.g.*, peer review and publication, *Daubert II*, 43 F.3d at 1318. Here, however, Hoyt concedes he has not published any article about the valuation of trademarks. Thus, his opinions and analysis regarding trademark valuation have not been subjected to the rigors of peer review…. His report is simply devoid of any 'objective, verifiable evidence' from which the court could conclude that the methodology Hoyt created in this case is accepted by any other economist." 173 F.R.D. at 686.

Cochrane v. Schneider Nat'l Carriers, Inc.
980 F. Supp. 374 (D. Kan. 1997)

Factual Summary
In wrongful death action, parents of decedent expected to rely upon expert economist's testimony regarding value of household services in determining pecuniary loss. Economist opined that loss of son is equivalent to sustaining a loss of a full-time guidance counselor on their household staff. Defendant challenged the expert's opinions as unreliable and not supported by relevant economic literature. Court granted Defendant's motion.

Key Language
- Plaintiff's economist "conceded in his deposition that his article was 'theoretical' and that the method had not been subjected to any empirical research; thus, the method has not been tested and no potential error rate is known." 980 F. Supp. at 379.

Eleventh Circuit

McCorvey v. Baxter Healthcare Corp.
298 F.3d 1253 (11th Cir. 2002)

Factual Summary
A catheter erupted following prostate surgery and Plaintiff brought products liability action based on product defect, as the catheter failed during normal operation. Among other things, the engineer's conclusions were wholly speculative because he was unable to cite to any scientific literature to support his theories. Although the circuit court reversed the district court's granting of summary judgment, it affirmed the exclusion of an engineering expert's affidavit opining that the catheter was defective, as his opinions were unreliable.

Key Language
- "Engineering expert was not scientifically reliable and his causation opinion was based wholly on speculation… [because]… the expert: did not test alternative designs for the catheter; did not talk to medical personnel; was unable to cite to scientific literature in support of his theories…." 2002 U.S. Dist. LEXIS 15460, at *5.

United States v. Great Lakes Dredge & Dock Co.
259 F.3d 1300 (11th Cir. 2001)

Factual Summary
Defendant appealed district court's reliance upon Habitat Equivalency Analysis (HEA) to assess the restoration under the National Marine Sanctuaries Act. The United States brought suit for damages under Act resulting from a grounded tugboat and dredge pipe. The Eleventh Circuit affirmed.

Key Language
- The underlying scientific data of the "HEA was appropriate… and satisfied *Daubert*." 259 F.3d at 1305.
- "[The] review of the evidence indicates, contrary to [Defendant's] assertions, that the HEA was peer reviewed and accepted for publication prior to trial." *Id.*

Allison v. McGhan Med. Corp.
184 F.3d 1300 (11th Cir. 1999)

Factual Summary
Plaintiff brought action against silicone breast implant manufacturers claiming that her diabetes, thyroiditis, and neuropathies were caused or exacerbated by the implants. The Court held a three-day *Daubert* hearing that resulted in the exclusion of all three causation witnesses on the basis of that the testimony was unreliable. Five animal studies and the Lightfoote study were inadequate to support the physician's theory that silicone is an adjuvant. The court noted that although the Lightfoote study was subject to peer review, this factor alone does not automatically establish admissibility. No one in the peer reviewed literature made the corre-

lation between silicone and inflammation and systemic disease. Preclusion of expert testimony affirmed.

Key Language

- "A finding that Lightfoote's animal study was peer reviewed does not mean it constituted an adequate basis for [the expert's] opinion that silicone breast implants cause systemic disease." 184 F.3d at 1313.
- "*Daubert* decisions in other courts warn against leaping from an accepted scientific premise to an unsupported one." *Id.* at 1314.
- "Publication in a peer reviewed medical journal for humans, however, does not alone establish the necessary link required under *Daubert*." *Id.*
- "Even assuming that [the expert's] work had been subjected to the most rigorous scrutiny by the scientific community, this factor would not nullify the court's findings of unreliable foundation, inadequate extrapolation, the lack of human models and 'fit.'" *Id.* at 1317.
- Case reports and case studies are "universally regarded as an insufficient scientific basis for a conclusion regarding causation because case reports lack controls." *Id.*

Clarke v. Schofield

632 F. Supp. 2d 1350 (M.D. Ga. 2009)

Factual Summary

Plaintiff brought suit on behalf of his deceased son. He claimed that the cause of his son's death, a blood clot, was caused when the son was beaten in prison by prison guards. Plaintiffs hired an emergency room physician to opine about the cause of death. Defendants challenged the admissibility of the doctor's testimony under *Daubert*. The district court excluded the expert's testimony.

Key Language

- "He points out nothing in the literature that deals with the specific questions in this case. For example, [the doctor] may be completely accurate when he quotes the medical literature which says that DVTs occur in 50 percent–70 percent of patients following knee surgery. That, however, helps very little when no firm evidence exists that Decedent ever had knee surgery." 632 F. Supp. 2d. at 1360.
- "[The doctor] has offered nothing to show that either of his theories have been peer reviewed or published. He does not contend that some medical panel has reviewed and approved his opinions. He has not offered his opinions for publication." *Id.* at 1361
- "The Court does not find general references to the medical literature very convincing and would much prefer to read the literature to get a complete picture of what it actually says." *Id.* at 1361.
- "[The doctor] could easily have brought copies of the literature to his deposition to attach as an exhibit or at least provided the medical citations. In fact, Fed R. Civ. P. 26(2)(B)(ii) requires this information in the initial expert report." *Id.* at 1361.
- "[The expert] wants to offer opinions in this Court, medical conclusions, that he would not make in his private practice because he recognizes that the specific findings, determining the existence and location of a DVT, fall outside his field of training and experience." *Id.* at 1357.

Kilpatrick v. Breg, Inc.

2009 WL 2058384 (S.D. Fla. 2009)

Factual Summary

The owner of a charter fishing guide service had arthroscopic surgery on his shoulder and was given a pain pump to control the pain. Two years later he claimed to experience severe shoulder pain and was then diagnosed with chondrolysis (a breakdown of cartilage in the joint). He brought suit, and Defendants moved to exclude his causation expert. The court granted the motion followed by summary judgment.

Key Language

- "The parties do not dispute that glenohumeral chondrolysis is a medical phenomenon that has emerged only recently, and that the first study suggesting its linkage with intra-articular pain catheters appeared only in 2006." 2009 WL 2058384, at *4.
- "[The expert] acknowledges that none of those articles were based on controlled, randomized epidemiological studies of human beings, which traditionally are considered the best form of statistical evidence for proving causation." *Id.*
- "It is true that a lack of epididemiological evidence is not fatal to [plaintiff's] case…. But this only heightens the need for [his expert] to present other forms of highly persuasive scientific evidence to lay a foundation for his expert opinions." *Id.*
- "Case reports are 'way down at the very bottom as far as medical strength of an article' and cannot establish medical causation." *Id.* at *5.
- "The Eleventh Circuit has likewise recognized that case reports on their own are not especially useful as proof of causation." *Id.*

Leathers v. Pfizer, Inc.

233 F.R.D. 687 (N.D. Ga. 2006)

Factual Summary

Defendant manufactured the drug Lipitor, which Plaintiff was prescribed by his general internist. Plaintiff contends that because of his use of Lipitor, he developed "statin-induced myopathy." Plaintiff alleges that Defendant knew that Lipitor had the potential to cause these permanent side effects, but that it inadequately warned consumers, among others, about these risks. Defendant filed a motion to exclude the opinions of Plaintiff's expert witness and a motion for summary judgment. Both motions were granted by the district court.

Key Language

- "He has not written or published articles or case studies nor has he conducted any other research in statins…. Dr. Firth indicates that he relied upon adverse incident reports and medical articles attached to his report in arriving at the opinion that Lipitor was the specific cause of Plaintiff's alleged injuries…. As an initial matter, adverse incident reports generally do not, standing alone, render an expert's opinion reliable under *Daubert*." 233 F.R.D. at 694.
- "At his deposition, Dr. Firth stated that he was unaware of any report or article that established a causal link between statins and Plaintiff's injury."

  Q: Are you aware of any… peer-review study which basically says from a causal factor that they've seen any evidence of people with no elevations who have some kind of muscle pain and weakness

  A: Has it been done? No, I've not seen it. I'd love to.

  Q: Are you aware of any peer-review studies or reports which would show with any kind of statistical reliance that people who take Lipitor who have no—who have no elevations and who have muscle pain and weakness have a continuing disability—

  A: No.

  Id.

  "In sum, Dr. Firth's opinion and the articles and reports on which he relies fall short of *Daubert*'s requirements." *Id.* at 695.

Abramson v. Walt Disney World Co.

370 F. Supp. 2d 1221 (M.D. Fla. 2005)

Factual Summary

Plaintiff filed a negligence action against Walt Disney World, alleging that she tripped and fell on an exhibit at Disney's Animal Kingdom Theme Park due to baseplates, posts, and rails that were defectively designed, installed, and maintained, and, coupled with inadequate lighting, constituted a danger to the public. Plaintiff offered a "safety consultant" expert to support her theory. Defendant moved to strike the designation of Plaintiff's "safety consultant" as an expert and further moved to prohibit his testimony. The court granted Defendant's motion to strike Plaintiff's expert.

Key Language

- "Defendant contends that Mr. Bogert's methodology is unreliable under *Daubert*, as he has not subjected his report and theories to peer review or publication…. It appears from the report that Mr. Bogert's opinion is based, as discussed above, on his review or numerous codes and regulations…. The difficulty in performing a *Daubert* analysis on this theory is that it was not arrived at by use of any 'technique' capable of being evaluated in the scientific community." 370 F. Supp. 2d at 1224.
- "Thus, there is no 'theory' to evaluate, unless it is the underlying assumption that anything that protrudes into an accessway is an obstruction and all obstructions are unsafe. This theory has not been published or subjected to peer review and is too general a statement to be deemed reliable, in any event." *Id.* at 1225.

Allstate Ins. Co. v. Hugh Cole Builder, Inc.

137 F. Supp. 2d 1283 (M.D. Ala. 2001)

Factual Summary

Subrogee bought action against contractor for damages allegedly caused by gas fire starter installed by heating contractor. Expert concluded that the fire originated in the area right of the fireplace's firebox and that the fire was caused by the conduction of heat through the fire starter pipe to the wood framing. Defendants challenged this expert's opinion as not based upon sufficient facts or data and as not otherwise reliable. Motion denied.

Key Language

- Expert's theory "had been subject to peer review and is generally accepted in the scientific community." 137 F. Supp. 2d at 1288.
- Expert relied upon the method of fire investigation prescribed by the National Fire Protection Association 921, *Guide for Fire and Explosion Investigations*, 3-2.1, which is an accepted authority.

Pickett v. IBP, Inc.

2000 U.S. Dist. LEXIS 19500 (M.D. Ala. Oct. 18, 2000)

Factual Summary

To prove damages at trial, Plaintiffs proposed to offer evidence regarding econometric models. Defendant believed that Plaintiffs were attempting to generate "peer review" in order to survive a *Daubert* challenge at trial. Defendant sought discovery regarding the facts or opinions regarding the non-testifying experts that Plaintiffs consulted with regarding the models. Discovery motion denied, as such information is not subject to discovery.

Globetti v. Sandoz Pharms. Corp.

111 F. Supp. 2d 1174 (N.D. Ala. 2000)

Factual Summary

Plaintiff alleged that a drug, Parlodel, caused a stroke. Plaintiff's experts offered general and specific causation opinions relying upon differential diagnosis methodology. Defendant moved for summary judgment, arguing that Plaintiff's experts' testimony was unreliable. The district court denied this part of Defendant's motion. [Please note that this Court took another view with respect to Parlodel. *See Glastetter v. Novartis Pharms. Corp.*, 107 F. Supp. 2d 1015 (E.D. Mo. 2000); *Eve v. Sandoz Pharms. Corp.*, 2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001).]

Key Language

- "Although defendant is correct that there is no epidemiological study showing an increased risk of AMI associated with bromocriptine, there is more than adequate evidence of a scientific nature from which a reliable conclusion can be drawn about the association. While an epidemiological study may be the best evidence, *Daubert* requires only that reliable evidence be presented, and that evidence here consists of the animal studies, the medical literature reviews, the ADRs reported to the FDA, the 'general acceptance' of the association reflected in several medical texts…. These all are recognized and accepted scientific methodologies, used for assessing the possible side-effects and hazards associated with particular drugs and the causes of disease. The fact that [Plaintiff's] AMI was caused by her ingestion of Parlodel can be reliably *inferred* from the facts known about the vasoconstrictive effect of bromocriptine." 111 F. Supp. 2d at 1178.

Edwards v. Safety-Kleen Corp.

61 F. Supp. 2d 1354 (S.D. Fla. 1999)

Factual Summary

Wrongful death action was brought against manufacturer of machine parts cleaner containing benzene, which decedent was allegedly exposed to at his workplace, allegedly causing myelodysplastic syndrome (MDS). Literature relied upon by Plaintiff and Defendant's experts did not state with any degree of certainty that MDS was caused by exposure to benzene or support Defendants' proposition that chromosome abnormalities were somehow required for MDS to have resulted from exposure to benzene. The literature is merely suggestive of causation. Experts were unaware of literature supporting conclusions and respective hypotheses had not been subject to review. Court held that Plaintiff's expert was able to offer general testimony regarding benzene as a leukemogenic agent but not specific causation. Defendant's expert's testimony precluded.

Key Language

- Defendant's oncology expert's theory had not been "subjected to peer review." 61 F. Supp. 2d at 1360.
- "Absent such factors, the Court does not see how [the expert] can support his conclusory relationship…. [The expert] has not established a scientific link or 'good grounds' for his assertion that the decedent could not have had a benzene chemotherapy-induced chromosomal aberrations." *Id.*

Wheat v. Sofamor, S.N.C.

46 F. Supp. 2d 1351 (N.D. Ga. 1999)

Factual Summary

Plaintiffs brought action against manufacturers of bone screw devices used in spinal implant surgeries, claiming back injuries resulting from defective spinal systems. Defendant challenged Plaintiffs' sole expert on causation, an anesthesiologist and pain management specialist. Defendants argued that the expert's conclusions are simply based on the temporal connection between implantation and pain and this connection is insufficient to prove causation. Defendant's motion for summary judgment granted.

Key Language

- "[T]here is no body of literature which addresses the relationship between the mere implantation of pedicle screws and back pain." 46 F. Supp. 2d at 1359.

Allapattah Servs. v. Exxon Corp.

61 F. Supp. 2d 1335 (S.D. Fla. 1999)

Factual Summary

Class action was brought by oil refiner dealers against refiner Exxon based upon Defendant's alleged failure to reduce wholesale prices to dealers in order to offset credit card fees as promised. Defendant moved to exclude dealers' expert testimony and dealers moved to exclude refiner's expert testimony. Despite fact that Plaintiffs' economist's opinions did not easily translate into *Daubert* criteria, his opinions concerning Defendant's business practices and plan to eliminate "non-keeper" dealers was supported in Defendant's own documents and actions. These opinions are not subject to peer review but were nonetheless reliable. Respective motions denied.

Key Language

- "Thus, while the margin analysis used would not ordinarily be the subject of peer review, publication or general acceptance in the scientific field, its use in the context of this case is appropriate in terms of general methodology." 61 F. Supp. 2d 1346–47.
- The expert's conclusions in the area of business plan and "non-keeper" deals "are not subject to peer review, a known or potential error rate, or the existence and maintenance of controlling standards. Rather, [the expert] makes inferences from Exxon's own proprietary documents which remain under seal and which are not subject to peer review." *Id.* at 1349.

Cartwright v. Home Depot U.S.A.

936 F. Supp. 900 (M.D. Fla. 1996)

Factual Summary

Plaintiff brought products liability action, claiming that she and her adoptive daughter developed asthma following exposure to latex paint. Toxicologist offered unsubstantiated data to conclude that chemical compounds in paints are known respiratory irritants and that the paint can cause asthma. In further support of his opinion, he cited as a conclusion that two genetically unrelated individuals developed asthma after a prolonged exposure to paint, and therefore the asthma is due to the exposure. Plaintiffs' physician made the diagnosis of asthma and then relied upon the toxicologist's conclusion that the exposure to paint exposure caused the asthma. Defendants' motion to preclude experts granted.

Key Language

- Plaintiffs' expert's "new theory [espoused from peer review literature] has not been the subject of any published peer review papers. Even though plaintiffs' physician had published material concerning irritant inducing asthma resulting from low level exposure, there was no basis to make a leap that low level exposure to irritants causes asthma." 936 F. Supp. at 903.
- "In this case, only one link in the chain of purported causation has published support. The literature does conclude that certain irritants can create respiratory problems, resulting in asthma. Plaintiffs cite no authority for the propositions that irritating chemicals in latex paints become bio-available in relevant amounts, that actual exposure levels from any particular uses of latex paint are high enough to cause any reaction, that prolonged, unspecified low level exposure to irritants can cause asthma, or that latex paints generally (or these paints in particular) cause asthma." *Id.* at 905.

Bowers v. Northern Telecom, Inc.

905 F. Supp. 1004 (N.D. Fla. 1995)

Factual Summary

Telephone operators brought suit against manufacturer of computer keyboard alleging that the use of the keyboards caused cumulative trauma disorders (CTDs), including carpal tunnel syndrome. Plaintiff proposed to offer the testimony of expert witnesses regarding the defective elements of the keyboards relating to general causation. Defendant brought motion for summary judgment, which was denied by the district court.

Key Language

- "In this case, rather than offering epidemiological studies, plaintiffs presented a litany of scientific literature, dating from the nineteenth century to the present, supporting the link between CTDs and tasks involving repetition, force, awkward positions and mechanical stress concentrations against soft tissue." 905 F. Supp. at 1010.
- "Plaintiffs also refer the court to articles discussing, albeit not definitively proving, the association between keyboard use in particular and CTDs." *Id.*
- "Given this evidence, the court concludes the lack of definitive epidemiological testing on this issue does not render the Plaintiff's expert testimony inadmissible. Rather, the relevant scientific literature supports the expert testimony and weighs in favor of admissibility." *Id.*

Williamson v. GMC

1994 U.S. Dist. LEXIS 20927 (N.D. Ga. Sept. 29, 1994)

Factual Summary

Wrongful death action involving automobile accident where Plaintiffs argued that a defective engine caused

the wheels to spin or to brake, to lose traction, and spin out of control. Plaintiffs relied upon expert who offered his opinion as to the "engine drag theory." Defendant made motion to exclude such testimony as unreliable, as it was a new theory that had not been properly tested and subjected to peer review. The district court granted Defendant's motion.

Key Language

- "Plaintiffs offer no peer testimony in support of the engine drag theory proposed by Sand [their expert]. In fact, they do not even submit data from their own tests. Additionally, [his] general theories on front-wheel drive automobiles have been subjected to peer review, and have been repeatedly rejected. The Court finds that the few tests of the engine drag theory conducted by [the expert's] peers do not indicate that the theory is reliable." 1994 U.S. Dist. LEXIS 20927.

Chikovsky v. Ortho Pharm. Corp.

832 F. Supp. 341 (S.D. Fla. 1993)

Factual Summary

Mother and child brought action against manufacturer of acne cream Retin-A to recover for birth defects, and manufacturer contended that such defects were genetic anomalies. In this case the proffered expert was to testify that topical Retin-A could produce birth defects; however, there were no peer-reviewed articles that discussed the issue. The articles that the expert witness produced regarding another acne medication's connection with birth defects were not enough to support the notion that Retin-A caused the same birth defects. Manufacturer moved for summary judgment. The district court held that the opinion by Plaintiffs' expert was inadmissible and granted the motion.

Key Language

- The expert "is not aware of any published article or treatise which reports any study that has found that Retin-A causes birth defects." 832 F. Supp. at 345.
- "Although publication is not the only factor a trial judge must consider, it does not seem that there is any published material linking topical Retin-A exposure during pregnancy to birth defects." *Id.*

District of Columbia Circuit

Meister v. Med. Eng'g Corp.

267 F.3d 1123 (D.C. Cir. 2001)

Factual Summary

Plaintiff brought action against silicone breast implant manufacturer, alleging that the implant caused scleroderma. Plaintiff's treating physician, a specialist in rheumatology and internal medicine, concluded that the silicone gel breast implants had caused Plaintiff's "atypical" scleroderma. The doctor produced no epidemiological studies in support of his contention. Although the doctor presented some case reports to show causation, they were not controlled studies in support of his analysis. At most, the literature cited to by the physician suggested a role for silicone in the development of scleroderma. The pathologist's testimony was also found to be unreliable because, although there are case studies evidencing a relationship between silica and scleroderma, the evidence merely shows an association between environmental factors and scleroderma and not a causal relationship. The district court permitted Plaintiff's experts to testify at trial but following a $10 million dollar verdict, granted Defendant's motion for judgment as a matter of law or a new trial.

Ambrosini v. Labarraque

101 F.3d 129 (D.C. Cir. 1996)

Factual Summary

Plaintiffs' lawsuit against Defendants was predicated on Plaintiff's ingestion of Bendectin and Depo-Provera while pregnant with her daughter. Plaintiffs alleged that the mother's ingestion of both drugs during her pregnancy ultimately caused their daughter's birth defects. In their motion for summary judgment, Defendants attacked the methodology by which Plaintiffs' expert epidemiologist causally connected Depo-Provera with Plaintiffs' daughter's birth defects. Reversing the district court's award of summary judgment to Defendants, the Court of Appeals held that the district court erred in precluding the proffered testimony of Plaintiffs' epidemiology expert.

Key Language

- The court downplayed the fact that the methodology employed by Plaintiffs' epidemiology expert was never subjected to peer review: "While publication in a peer-reviewed journal is not dispositive in evaluating whether an opinion is based on scientific knowledge, Dr. Strom persuasively explained the reasons why he had not published his findings. First, he stated that there was nothing novel in his work on this subject, and that he simply employed an 'absolutely conventional approach to reviewing a very detailed literature.' Second, he explained that there would be 'no reason in the world' to publish his findings because Depo-Provera is no longer prescribed

during pregnancy…. This second rationale is one of the factors contemplated by the Supreme Court in *Daubert* when it suggested that courts should bear in mind that some scientifically valid studies may not be published because of 'too limited interest.'" 101 F.3d at 136–37.

DAG Enters. v. Exxon Mobil Corp.

2004 U.S. Dist. LEXIS 27392 (D. D.C. Mar. 31, 2004)

Factual Summary

Plaintiffs contend that they were deprived of the opportunity to bid on gasoline service stations because of racial discrimination and fraud. Plaintiffs submitted a report of their proposed expert and Defendants sought to strike the designation of Dr. Jaynes as an expert and to preclude his testimony at trial. Among other things, Defendants claimed that Dr. Jaynes' testimony failed to meet the *Daubert* standard for reliability. The court found that Dr. Jaynes' ultimate conclusions were unreliable under *Daubert* and thus were barred from testimony at trial.

Key Language

- Dr. Jaynes testified that "[i]n light of the repository analysis in literature in discrimination and my own practical expertise in that, I did an evaluation of whether those acts could be understood as having operated without any discrimination…." 2004 U.S. Dist. LEXIS, at *6–7.
- Dr. Jaynes recalled physically consulting one book, *Common Destiny: Blacks in American Society*. He testified that he does not generally need to physically consult articles and books because had read them many times and had taught and lectured on them. *Id.* at *7.
- "Defendants state that they conducted a 'review of several sociology treatises and articles discussing extended case study,' but this review 'failed to identify and established guidelines or procedures for using such methodology.' They note, however, that their review suggests that 'a true extended case study' requires more than merely reviewing published research and applying it to a discrete set of facts, as Prof. Jaynes has done." *Id.* at *11.

Groobert v. President & Dirs. of Georgetown Coll.

219 F. Supp. 2d 1 (D. D.C. 2002)

Factual Summary

Surviving spouse offered expert testimony of artist in support of claim regarding what his wife would have earned from her job as a stock photographer. The district court permitted artist to testify as to art field, as personal experience was proper method for assessing reliability.

Key Language

- Defendant offered no evidence to refute Plaintiff's claim that "expert opinions in an art field simply must be based in large part on the experience and understanding of the expert witness." 219 F. Supp. 2d at 7.
- "There are no experiments that can be done or peer review in which to engage." *Id.*

Dyson v. Winfield

113 F. Supp. 2d 44 (D. D.C. 2000)

Factual Summary

Plaintiff's medical malpractice and products liability action against Defendants was predicated on her ingestion of Provera while pregnant with her son. Plaintiff's son was born with numerous birth defects and ultimately died at three and a half years of age. Defendants sought to preclude Plaintiff's medical expert from testifying that Provera can cause a wide variety of birth defects. Defendants stressed that the expert's opinion had never been subjected to peer review. The district court rejected Defendants' *Daubert* challenge to the proffered testimony of Plaintiff's expert.

Key Language

- "The defendant argues that Dr. Strom has failed to publish his conclusions and subject them to peer review…. [T]he *Ambrosini* court specifically addressed this issue, finding that 'some scientifically valid studies may not be published because of 'too limited interest,' The limited interest in Dr. Strom's opinion in *Ambrosini* and this case comes from the fact that Provera 'is no longer prescribed during pregnancy' due to its 'known effects on offspring when exposed in utero.' Repeating the *Ambrosini* court's declaration, 'there would be 'no reason in the world' to publish his findings.'" 113 F. Supp. 2d at 49.