Daubert- Proofing Your Experts

George (Tex) Quesada

SOMMERMAN & QUESADA, L.L.P.
3811 Turtle Creek Boulevard, Suite 1400
Dallas, Texas 75219-4461

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quesada@textrial.com

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I. INTRODUCTION

Experts are one of the most valuable and difficult tools in a litigator's arsenal. Preparing your expert for pre-trial challenges is imperative to any complex litigation.

Experts are expensive. After an expert is retained, briefed, prepared, designated, and deposed, they can cost several thousand dollars. It would be a financial drain to have the expert disqualified just prior to trial and could spell disaster for a client's case.

An attorney who hires an expert must attempt to determine the admissibility of that expert's opinions. This paper will examine how the trial and appellate courts have recently treated experts in various types of cases. It will also explore strategies for using experts in identifying potential parties, developing theories of liability, and through the discovery process. Finally, the paper includes a discussion on general strategies for keeping and excluding experts.

II. HIRING EXPERTS

A. Deciding to Hire an Expert

Because retained experts are expensive, it is necessary to consider the overall potential cost of the expert when compared to your client's potential recovery. They should only be used when the value of their opinions is compared to the damages alleged. Also consider whether individuals who already have personal knowledge of the incident or unretained experts may be used instead of paying for a retained expert. Sometimes treating physicians and first responders (i.e., law enforcement) may have the requisite knowledge, skill, and expertise to provide expert testimony about the issues present in your case.

Finally, consider the nature of your case and the complexity of the issues at hand. The cost of an expert may not be justified when the issues before the potential jury are not complex. Remember, the rules of evidence set standards for expert admissibility — one of which is helpfulness to the jury. So, consider whether the issues in your case are ones a lay person could understand when presented with a clear presentation of the evidence. If there are complexities regarding policy, design, medical causation, or other areas outside general public knowledge, you probably need an expert.

B. So You Decide You Need an Expert — Who do you get?

Once you decide you need an expert, you will need to determine what type of expert you need. To do this you will need a clear understanding of exactly what issues you are seeking expert testimony to prove. Once you have that understanding, start thinking about the educational skills, experience, and training an expert in that particular area would need. Remember, experts must be qualified by education, training, skill, experience, or knowledge in the area you seek to admit their testimony.

There are multiple places to locate experts and multiple things to consider when deciding who to hire. Some ways to locate potential experts include:

- Asking other professionals;
- Using an expert search service;
- Asking people in the applicable industry;
- Researching recent publications relevant to the subject matter at issue.

Here is a list of some general expert search web sites and services:

- www.jurispro.com
- www.hgexperts.com
- www.expertwitness.com
- www.expertpages.com

Once you have located potential experts, you need to figure out who is best suited for the job. Consider logistics. Ask potential experts about their upcoming availability due to existing

personal and professional commitments. You want to hire someone who is not already over burdened with other commitments to ensure accessibility. Also ask about costs, billing schedules, and previous experience as an expert in similar matters. Additionally, although not dispositive on the ultimate issue of admissibility, ask if the expert has ever had his/her opinions excluded or limited by a court.

C. Now that You Know Who – What's next?

Once you have located and retained an expert, you need to provide the expert with information on which to base his/her opinions. That information is going to come from the discovery and other evidence gathering you have done.

Talk to the expert and see what type of information he/she typically relies on to render opinions. If there is still time left before discovery expires, make sure to serve discovery on any area where you find gaps after speaking with the expert. Additionally, as evidence comes in over the course of litigation, make sure you continue to provide it to your expert.

III. RECENT CASES INVOLVING EXPERTS

The best way to explain when an expert should be used and when they have been excused is by example. Below are examples of cases where experts have been excluded, admitted, used, and unused.

Peters-Martin v. Navistar Intl. Trans., 2011 WL 462657 (4th Cir. 2011) (not designated for publication) arises from a truck wreck in which the braking system was allegedly defective. The Court of Appeals affirmed the trial court's decision to exclude plaintiff's expert witness on the braking system. According to the Court of Appeals, the expert was excludable as he never examined the braking system in question, had not performed any testing of exemplar braking systems, and could not point to a specific defect in the braking system. *Pluck v. BP Oil Pipeline Co.*, ____ F.3d. _____ (6th Cir. 2011) (2011 WL 1794293) (not yet published) is a suit against a pipeline company alleging that a resident developed Non-Hodgkins Lymphoma as a result of exposure to benzene from various pipeline spills. The Court of Appeals affirmed the trial court's decision to exclude plaintiff's expert witness on causation, and affirmed summary judgment in favor of the pipeline defendants. The trial court excluded the expert in this toxic-tort case because the expert could not establish the dose received by Plaintiff, and because his reliance upon the differential diagnosis as a methodology was not revealed/discussed until a supplemental declaration/report. As the expert could never ascertain the plaintiff's level of benzene exposure or determine whether she was exposed to quantities of benzene exceeding the EPA's safety regulations, he was unable to base an opinion upon the appropriate dosage threshhold. The use of a differential diagnosis was not revealed until after the expert designation deadline and the witness' deposition.

Doe 93 v. Secretary of Health & Human Services, ____ F. CL ___ (Fed. CL 2011), (2011 WL 1615238) (not yet published) considered the method of proof necessary to link transverse myelitis (TM) to an influenza vaccination administered to a 61-year old patient. The plaintiff's expert was a neurologist who had authored sixty (60) to seventy (70) publications, taught at Georgetown Medical School and run the Georgetown Multiple Sclerosis Center. In reversing a Special Master's decision, the Court of Claims allowed the expert testimony even

Milward v. Acuity Specialty Products, Inc., ___ F.3d. ___ (1st Cir. 2011) (2001 WL 982385) (not yet published) involves claims of a type of leukemia (AML) arising from benzene exposure in the workplace. The trial court excluded testimony from plaintiff's expert establishing a causal link between benzine exposure and a particularly rare type of AML. The Court of Appeals reversed the trial court's exclusion holding that a "weight of the evidence" methodology in which the expert considered the bulk of peer-reviewed scientific literature on the matter met the *Dolbert* requirement.

though there is a dispute in the medical literature as to the various causes of plaintiff's TM. The court found that the expert had adequately considered and explained the other possible causes of plaintiff's condition.

U.S. v. Kalymon, 541 F.3d 624 (6th Cir. 2008), is a deportation matter. Kalymon's citizenship was revoked after evidence surfaced that he had persecuted Jews during World War II and misrepresented his actions on his visa application. Kalymon claimed that the witnesses used by the Government were not reliable. The court found the experts were reliable. It explained that the witnesses were not used as experts on the war, but instead as experts on the procedures used by officials to investigate and report the wartime activities of potential displaced persons. In fact, one of the experts actually helped to develop the procedures.

Kunz v. DeFelice, 538 F.3d 667 (7th Cir. 2008), involved a § 1983 action for an alleged brutal interrogation. Kunz called an expert witness to testify about his ability to recall and narrate events on the night in question, given the fact that he had used a small amount of heroin earlier in the evening. The appellate court affirmed the district court's exclusion of the witness and explained that this "was a singularly unimpressive witness." It emphasized, that despite being titled a "PharmD" he only had one year of classes (with only one class in pharmacology), the degree was not actually in pharmacology, that his previous experience was working as a nutritionist, and that he had formulated his opinion in this case based only on one article (which contradicted his conclusion).

Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009), involved claims of a design defect raised against the manufacturer of a clothes dryer which allegedly caused a fatal house fire. The trial court entered a judgment against the manufacturer for $14 million based on the jury's verdict. At trial, the parent's expert testified the manufacturer's design incorporating a corrugated lint transport tube into the air circulation system was defective and resulted in the deadly fire. The manufacturer objected to the expert's testimony , arguing the opinions were not reliable and instead based on unfounded assumptions and, on appeal, argued the testimony was legally insufficient to support the jury's liability finding. After going to great lengths to describe how the dryer worked (and even providing a cross-section of a dryer vent) the Texas Supreme Court overturned the jury's verdict, concluding the expert's testimony was legally insufficient because the expert did not personally test his theory for reliability.

In *Sigler v. American Honda Motor Co.*, 532 F.3d 469 (6th Cir. 2008), the court found error in a trial court's exclusion of expert opinion concerning preexisting conditions exacerbated by a car wreck. The expert testimony assumed that the vehicle was traveling over 20 miles per hour and also assumed that the plaintiff struck her head on the interior of the vehicle during the collision. In making the decision to exclude the expert, the district court relied on hearsay expert reports submitted by Honda that stated that the collision would not have occurred at that speed and found that the expert's declaration would not aid the jury. On appeal, the court found both that there was evidence to support the expert's assumptions and that the lower court should not have considered the inadmissible evidence provided by Honda.

Commercial cases can also illustrate the point. In an antitrust action, the plaintiff relied on an expert's testimony to show price fixing based on indexes used throughout the industry and the defendant claimed that the expert's testimony was unreliable because the index was inaccurate. *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008). The court found that the expert's testimony was admissible, stating that the defendant's challenge confused the credibility and accuracy of the expert's opinion with its reliability. The court explained that the defendant did not argue that the expert's opinion was entirely unsupported or that calculations were drawn out of thin air, instead the defendant's claims that the index should not have been used – an argument going to the weight of the evidence and not to admissibility.

In *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003), an air conditioning repairman was found semi-conscious in the parking lot of dealership where he had been working on the air conditioners located on the roof of the dealership. He had apparently fallen from the roof, but had no memory of the incident. The court held expert testimony was not supported by evidence where experts "postulate[d]" that the repair man was electrocuted, stumbled backwards over a gas pipeline, and fell from the roof. It explained that expert opinions must be supported by facts in evidence and not conjecture. The court argued a jury would only be able to speculate as to whether Pitzner did actually fall from the roof, whether he actually came into contract with a high-voltage wire on the roof, and whether and how possible acts or omissions of Marathon were a substantial factor in causing Pitzner's injuries.

The plaintiffs in *Salvas v. Wal-Mart Stores, Inc*., 893 N.E.2d 1187 (Mass. 2008), used used an expert to review employee time sheets to show that employees suffered missed breaks, time shaving, and off-the-clock work. Wal-Mart challenged the admissibility of the opinion, claiming that the expert opinion was unreliable because it failed to show specific instances of injury. The court, disagreed, holding that the plaintiffs' burden was only to show by preponderance of the evidence that there was an over-all, class-wide practice of the missed breaks, time shaving, and requiring off-the-clock work. Additionally, the court explained that so long as the business records of Wal-Mart were admissible, then the expert's efforts to count and summarize them were also admissible unless the expert's methods of counting and summarizing those records were themselves unreliable.

Kempf Contracting and Design, Inc. v. Holland-Tucker, 892 N.E.2d 672 (Ind. Ct. App. 2008), arose from a fatal workplace injury. A landowner sued a general contractor for injuries

Finally, in *Baxter v. Temple*, 949 A.2d 167 (N.H. 2008), a renter sued for lead exposure to a then 14-month old child from the paint in an apartment. The renter offered an expert to show that the child's cognitive ability was damaged by the lead exposure, but the lower court excluded the expert, finding that the testimony would confuse the jury instead of assisting it, and

received after being struck by a sub-contractor's vehicle and utilized a vocational economic analyst to show a reduction in earning capacity and work life expectancy. The expert based his opinion on a definition of physical disability used by the American Community Survey and databases compiled by the government to determine the earning capacity of people with a physical disability who have attained a bachelor's degree. However, the expert did not look at data regarding people with physical disability in the plaintiff's specific profession or with the same disability as the plaintiff. The court found that the plaintiff did not meet the burden of establishing the reliability because there was no evidence that the process had been tested or subjected to peer review, no known or potential error rate, and no testimony as to whether standards existed to control how the process was used by people in the vocational economic field. The court went on to clarify that it was not holding that the methodology used by the expert was not scientifically reliable, only that the plaintiff failed to produce sufficient evidence to show that it was reliable.

A biomechanical engineer's opinion was the subject of *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008). The defendant in car wreck case called a biomechanical engineer to testify that the forces involved in the collision could not have caused the plaintiff's alleged injuries. The plaintiff challenged the admission of the expert's testimony claiming it was not based upon an adequate factual and scientific foundation. The court found that the lower court abused its discretion in allowing the expert to testify because there was no "evidence that biomechanics was within a recognized field of expertise," and the expert formed his opinion without knowing 1) the vehicles' starting positions, 2) the speeds at impact, 3) the length of time that the vehicles were in contact during impact, or 4) the angle at which vehicles collided.

dismissed the claims. On appeal, the court found that the expert's testimony was reliable as the evaluations of the child were done following a clear methodology involving both core and satellite tests, each having been tested, peer reviewed, and had a known error rate and the evaluations were performed consistently with one another.

IV. PATHS TO ALLOWING YOUR EXPERTS' OPINIONS AND EXCLUDING YOUR OPPONENTS'

Under every state's analysis, an expert is admitted or excluded on a case by case basis. Yet there are standards for admitting experts. Most states use the *Daubert* standards or some modification of those standards. Others have set their own standards.

A. *Daubert* in the States

While a majority of states have either adopted *Daubert* or a similar test, a good many have not. Therefore, these approaches may only be helpful if you live in a *Daubert* or *Daubert*-leaning state, or a state with rules of evidence on expert testimony modeled after the federal rules.

A 50 state survey of the law pertaining to expert testimony follows:

1. States applying *Daubert* or a similar test

Alaska: *Marron v. Stromstad*, 123 P.3d 992 (Alaska 2005) (adopting *Daubert*, *Joiner's* abuse of discretion standard, but rejecting *Kumho Tire*). It has not considered whether to adopt *Joiner's* scrutiny of the reasoning process. **Arkansas**: *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512 (Ark. 2000) (adopting *Daubert*); *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003) (adopting *Kumho Tire* and *Joiner*). **Colorado**: *People v. Shreck*, 22 P.3d 68 (Colo. 2001) (repudiated *Frye*; *Daubert* factors may be considered). **Connecticut**: *State v. Porter*, 698 A.2d 739 (Conn. 1997) (adopting *Daubert*); *State v. Perkins*, 856 A.2d 917 (Conn. 2004) (adopting *Joiner's* abuse of discretion standard). It has not considered whether to adopt *Joiner's* scrutiny of the reasoning process or *Kumho Tire*. **Delaware**: *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513 (Del. Super. Ct. 1999) (adopting *Daubert*, *Kumho Tire* and *Joiner's* abuse of discretion standard); *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826 (Del. Super. Ct. 2000) (adopting *Joiner's* scrutiny of the reasoning process). **Georgia**: OCGA § 24-9-67.1 (state courts may draw from *Daubert*, *Joiner*, and *Kumho*); *Moran v. Kia Motors Am., Inc.*, 622 S.E.2d 439 (Ga. Ct. App. 2005) ("*Daubert v. Merrell Dow Pharmaceuticals* provides guidance as to the admissibility of expert testimony…"). **Idaho**: *State v. Merwin*, 962 P.2d 1026 (Idaho 1998) (applying standards similar to *Daubert*). **Indiana**: *McGrew v. State*, 682 N.E.2d 1289 (Ind. 1997) (while not controlling, *Daubert* coincides with the requirements of Ind. R. Evid. 702(b)). **Iowa**: *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994) (*Daubert* requirements consistent with Iowa's approach). **Kentucky**: *Mitchell v. Com.*, 908 S.W.2d 100 (Ky. 1995) (adopting *Daubert*), overruled on other grounds by *Fugate v. Com.*, 993 S.W.2d 931 (Ky. 1999); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000) (adopting *Kumho Tire* and *Joiner's* abuse of discretion standard); *Ragland v. Com*., 191 S.W.3d 569 (Ky. 2006) (*Joiner's* scrutiny of the reasoning process). **Louisiana**: *State v. Foret*, 628 So.2d 1116 (La. 1993) (adopting *Daubert*); *Darbonne v. Wal-Mart Stores, Inc.*, 774 So.2d 1022 (La. Ct. App. 2000) (adopting *Kumho Tire*); *Lanasa v. Harrison*, 828 So.2d 602 (La. Ct. App. 2002) (adopting *Joiner's* abuse of discretion); *Lemaire v. CIBA-GEIGY Corp*., 793 So.2d 336 (La. Ct. App. 2001) (adopting *Joiner's* scrutiny of the reasoning process). **Maine**: *State v. Williams*, 388 A.2d 500 (Me. 1978) (expert evidence must be relevant and assist the trier of fact); *Green v. Cessna Aircraft Co.*, 673 A.2d 216 (Me. 1996) (*Daubert* requires expert evidence to be

sufficiently tied to the facts). **Massachusetts**: *Com. v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994) (adopting *Daubert*); *Canavan's Case*, 733 N.E.2d 1042 (Mass. 2000) (adopting *Joiner* and *Kumho Tire*). **Michigan**: *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004) (noting that Michigan Rule of Evidence 702 has been amended explicitly to incorporate *Daubert's* standards of reliability). **Mississippi**: MISS. R. EVID. 702; *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003) (adopting *Daubert*). **Montana**: *State v. Clifford*, 121 P.3d 489 (Mont. 2005) (adopting *Daubert* for all expert evidence). **Nebraska**: *Schafersman v. Agland Coop*., 631 N.W.2d 862 (Neb. 2001) (expressly adopting *Daubert*, *Joiner*, and *Kumho Tire*). **New Hampshire**: *Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 813 A.2d 409 (N.H. 2002) (applying *Daubert* standard to New Hampshire Rule of Evidence 702 in a products liability case). **New Mexico**: *State v. Alberico*, 861 P.2d 192 (N.M. 1993) (adopting *Daubert*); *State v. Torres*, 976 P.2d 20 (N.M. 1999) (rejecting *Kumho Tire*). **North Carolina**: *State v. Goode*, 461 S.E.2d 631 (N.C. 1995) (rejecting *Frye*, and outlining three-prong test consistent with *Daubert's* principles). **Ohio**: *Miller v. Bike Athletic Co.*, 687 N.E.2d 735 (Ohio 1998) (discussing *Daubert* requirements with approval). **Oklahoma**: *Christian v. Gray*, 65 P.3d 591 (Okla. 2003) (expressly adopting *Daubert*, *Joiner*, and *Kumho Tire*). **Oregon**: *State v. O'Key*, 899 P.2d 663 (Or. 1995) (holding *Daubert* requirements instructive). **Rhode Island**: *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999) (while not adopting *Daubert*, stating that relevant standard is that set out in MO. REV. STAT. § 490.065(1) (2005), modeled after FED. R. EVID. 702 prior to its amendment effective December 1, 2000, and contains three paragraphs that are nearly identical to Federal Rules 703, 704, and 705.). **Nevada**: *Dow Chemical Co. v. Mahlum*, 970 P.2d 98 (Nev. 1998) (finding *Daubert* persuasive, but not controlling); *Santillanes v. Nevada*, 765 P.2d 1147 (Nev. 1988) (Nevada courts determine "admissibility of scientific *Daubert* explicitly, principles endorsed). **South Carolina**: *State v. Council*, 515 S.E.2d 508 (S.C. 1998) (declining to adopt *Daubert*, but outlined similar test). **South Dakota**: *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994) (adopting *Daubert*); *State v. Guthrie*, 627 N.W.2d 401(S.D. 2001) (adopting *Kumho Tire*); *Kuper v. Lincoln-Union Electric Co.*, 557 N.W.2d 748 (S.D. 1996) (adopting *Joiner's* abuse of discretion standard). **Tennessee**: *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997) (while not expressly adopting *Daubert*, factors considered useful). **Texas**: *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (*Daubert*); *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713 (Tex. 1998) (announcing test consistent with *Kumho Tire* and *Joiner's* scrutiny of the reasoning process); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002) (applying standard of review consistent with *Joiner's* abuse of discretion standard). **Vermont**: *USGen New England, Inc. v. Town of Rockingham*, 862 A.2d 269 (Vt. 2004) (reaffirming adopting *Daubert* and adopting *Kumho Tire*). **West Virginia**: *Wilt v. Buracker*, 443 S.E.2d 196 (1993) (adopting *Daubert*); *Gentry v. Mangum*, 466 S.E.2d 171 (W. Va. 1995) (rejecting *Kumho Tire*). **Wyoming**: *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999) (adopting *Daubert* and *Kumho Tire*); *Williams v. State*, 60 P.3d 151 (Wyo. 2002) (adopting *Joiner*).

Hawaii: *Acoba v. General Tire, Inc*., 986 P.2d 288 (Haw. 1999) (neither expressly approving nor rejecting *Daubert* criteria); *State v. Escobido-Ortiz*, 126 P.3d 402 (Haw. Ct. App. 2005) ("Although the Hawaii Supreme Court has not adopted the *Daubert* test in construing Hawaii Rule of Evidence 702, it has found the *Daubert* factors instructive."). **Missouri**: *State Board of Registration for the Healing Arts v. Edward W. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (declining to follow either *Frye* or

2. States which have not explicitly adopted *Daubert,* but have found *Daubert's* requirements instructive

evidence, like other evidence, in terms of its trustworthiness and reliability.") *Yamaha Motor Company, U.S.A. v. Arnoult*, 955 P.2d 661 (Nev. 1998) (admissibility of expert testimony lie within the discretion of the trial court). **New Jersey**: *Kemp v. State*, 809 A.2d 77 (N.J. 2002) (acknowledging *Daubert* and reiterating that a more relaxed standard than general acceptance is appropriate for cases in which the plaintiffs bear the burden of proving medical causality, such as toxic torts).

3. States which reject *Daubert* and continue to follow *Frye*

Alabama: *General Motors Corp. v. Jernigan*, 883 So.2d 646 (Ala. 2003). **Arizona**: *State v. Tankersley*, 956 P.2d 486 (Ariz. 1998). **California**: *People v. Leahy*, 882 P.2d 321 (Cal. 1994). **District of Columbia**: *Bahura v. S.E.W. Investors*, 754 A.2d 928 (D.C. 2000). **Florida**: *Flanagan v. State*, 625 So.2d 827 (Fla. 1993). **Illinois**: *Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 (Ill. 2002), *overruled on other grounds by* 821 N.E.2d 1184 (Ill. 2004). **Kansas**: *State v. Patton*, 120 P.3d 760 (Kan. 2005), *overruled on other grounds by* 144 P.3d 647 (Kan. 2006). **Maryland**: *Montgomery Mut. Ins. Co. v. Chesson*, 923 A.2d 939 (Md. 2007). **Minnesota**: *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000). **New York**: *People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994). **North Dakota**: *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994). **Pennsylvania**: *Grady v. Frito-Lay, Inc*., 839 A.2d 1038 (Penn. 2003). **Washington**: *State v. Copeland*, 922 P.2d 1304 (Wash. 1996).

4. States that have developed their own tests and do not follow *Daubert* nor *Frye*

Utah: *State v. Rimmasch*, 775 P.2d 388 (Utah 1989) (holding that a trial court must conduct the following three-step analysis to determine the admissibility of scientific evidence: (1) determine whether the scientific principles and techniques underlying the expert's testimony are inherently reliable; (2) determine whether the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts; and (3) determine that the proffered scientific evidence will be more probative than prejudicial); *But see Eskelson ex rel. Eskelson v. Davis Hosp. and Med. Ctr.*, No. 20080484, 2010 WL 841276 (Utah Mar. 12, 2010)(discussing *Rimmasch* in light of 2007 changes to the Utah Rules of Evidence and concluding the expert's "testimony regarding his experience as a physician constituted a threshold showing that his opinion was reliable" and that no more was required under the new Rule 702). **Virginia**: *Spencer v. Com*., 393 S.E.2d 609 (Va. 1990) (refusing to adopt the *Frye* general acceptance test, and holding trial court must make the threshold finding of reliability through reliance on expert testimony). **Wisconsin**: *State v. Davis*, 645 N.W.2d 913 (Wis. 2002) (explaining the admissibility of expert testimony depends on the witness's qualifications, whether the testimony will assist the trier of fact, and the relevancy of the testimony based on WIS. STAT. § 907.02-07 (2000)).

B. Identifying the Admissibility Issues.

The following are just some of the many arguments for excluding expert testimony in light of *Daubert* and its progeny. These approaches, while helpful in getting unreliable testimony excluded, are important considerations for protecting your own experts from disqualification. *Daubert* mandates that a judge becomes a "gate keep." They keep the gate locked so no expert can get to the jury without meeting certain criteria. There are a number of issues which must be considered with regard to expert opinions.

1. Qualifications

An expert can be excluded based on his/her lack of qualifications in a specific field. As recognized by *Daubert* and its progeny,

qualification is no longer the trial court's only primary focus. However, it is still a critical piece of the whole. The following cases explain the importance of locating the right expert for the issues in your case.

Rule 702 allows expert testimony in scientific, technical, or other specialized areas, provided that the "witness [is] qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702. However, the rule only provides "general guidelines" for determining if the witness' knowledge, skill, experience, training, or education qualifies him as an expert witness. *Jinro America Inc. v. Secure Investments, Inc*., 266 F.3d 993, 1004 (9th Cir. 2001). The determination is left to the trial court's discretion. *Id.* at 1005.

One need not be a scientist or a professional to qualify as an expert. In fact, an expert does not require a college degree in order for a witness to be deemed an expert. *See Glasscock v. Income Properties Servs.*, 888 S.W.2d 176, 180 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd by agr.) ("[A] college degree is not required by Rule 702 . . .").

Further, education in a particular field does not guarantee that the expert will qualify as an expert on all matters of that expert's field. *See Snapp v. Jean-Claude*, 710 N.W.2d 726 (Wis. Ct. App. 2006) (orthopedic surgeon was not qualified to testify regarding injury sustained during a vein graft merely because there is overlap between the areas of orthopedic and vascular surgery).

Pilgrim's Pride Corporation v. Smoak, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied), illustrates the point. The state appeals court found an investigating officer's conclusion that the defendant's negligence caused an automobile accident to be "no evidence." However, the officer's testimony concerning his own observations during the investigation were admissible. In this case Smock brought personal injury action against Pilgrims Pride and its employee truck driver who collided with Smoak's vehicle. At trial the investigating officer gave his opinion as to how the accident took place and who was at fault. The corporation failed to preserve error regarding the officer's qualifications. The corporation contended that, nonetheless, because the officer was not qualified as an expert to give his opinion on whose negligence caused the accident, his conclusion was no evidence to support a verdict and thus, no objection was required.

The court stated that no definite guidelines exist for determining whether a particular witness possesses the knowledge, skill, or expertise to qualify as an expert. The court found that the officer was not an accident reconstruction expert and, therefore, was not qualified to offer his opinion on whose negligence caused the accident. However, the court did find that the officer's opinion on causation was not based on any scientific, technical, or other specialized knowledge not generally possessed by a layperson. That was based on his own investigation and observations. Therefore, his opinion on causation was admissible.

Courts may exclude otherwise-qualified witnesses who proffer opinions outside their areas of expertise. The plaintiffs in *Ingraham v. Ka Motors America, Inc.*, 2007 WL 2028940 (W.D. Okla. 2007) hired an accident reconstructions and later asked him to render opinions concerning a vehicle restraint system. The Court noted the witness's expertise in reconstruction but declined to allow the testimony on the product liability issues. On the other hands, Courts may allow well qualified and broad-based witnesses to testify if the opinions are squarely within the areas of expertise. See, *Reynolds v. General Motors Corp.*, 2007 WL 2908564 (N.D. Ga. 2007) (radiologist allowed to testify about mechanics and effect of injury in product liability case), and *Zemaitatis v. Innovasive Devices, Inc.*, 90 F. Supp.2d 631 (E. D. Pa., 2000)(witness was a "jack-of-all-trades" but qualified to render opinions in limited areas).

2. Helpfulness to the Jury

The subject matter of an expert's testimony must "assist the trier of fact." FED. R. EVID. 702. Expert testimony is permitted in those situations in which the expert's knowledge and experience on a relevant issue are beyond that of the average juror. *See Laski v. Bellwood*, 132 F.3d 33 (6th Cir. 1997)(trial court erred in not allowing an expert because the evidence was beyond the knowledge of average jurors); *Lentz v. Mason*, 32 F.Supp.2d 733 (D.N.J. 1999)(expert was not needed to show that hazardous materials caused plaintiff's asthma attack).

However, an expert may still testify about matters within the jury's experience, if the expert will aid the jury in understanding even familiar matters and the expert's experience or training provides a more thorough or refined understanding. *People v. Cardamone*, 885 N.E.2d 1159 (Ill. App. Ct. 2008)(holding that the standard for admissibility it not whether the subject is beyond the understanding of the jury, but whether the expert's testimony will aid the jury's understanding); *State v. Struzik*, 5 P.3d 502 (Kan. 2000)(holding that an expert may testify on an issue if it assists the jury in understanding the material in evidence). Courts are not compelled to exclude expert testimony simply because it "cover[s] matters that are within the average juror's comprehension." *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996).

Courts have even maneuvered around hearsay limitations to allow experts to testify. *Toshiba Machine Co., America v. SPM Flow Control, Inc.*, 180 S.W.3d 761 (Tex. App.—Fort Worth 2005, pet. granted), discussed an expert witness and his ability to rely upon hearsay. In this case, an expert, who was to testify about the damages suffered by one of the businesses involved, contacted various clients of the company. The expert's purpose was to determine for himself why these particular clients had decided not to do business with the company, and the expert used those clients' responses in formulating his damages model. The Court of Appeals affirmed the trial court's decision to allow the testimony even though it was based upon hearsay statements. Affirming the judgment, the Court of Appeals noted "we cannot think of a more appropriate method to determine why sales were lost than to ask the customer."

Conversely, the court in *Justice v. Carter*, 972 F.2d 951 (8th Cir. 1992), held that an expert could not offer knowledge beyond that of an ordinary juror. The court affirmed the exclusion of expert testimony that was offered to explain the "workings, dynamics, on outcome of a hypothetical bankruptcy case" because such knowledge was not "beyond the grasp of the ordinary fact finder." *Id.* at 957. Further, the court noted, allowing the evidence to be admitted would lead to a "battle of the experts" that would waste resources and provide no enlightenment to the jury.

In *Rizzo v. Corning, Inc*., 105 F.3d 338, 341(7th Cir. 1997), the court excluded a materials engineer's testimony because "[m]erely testifying to what he saw through a microscope would not even be expert testimony—anyone can look through a microscope and describe what he sees."

Much of the discretion for determining whether to exclude an expert's testimony on issues that are within the jury's comprehension is left to the trial court. *See Ancho v. Pentek Corp*., 157 F.3d 512, 519 (7th Cir. 1998). This discretion applies to the assessment of an expert's reliability, including what procedures the court uses to determine reliability, and in making the determination of reliability. *Dodge v. Cotter Corp*., 328 F.3d 1212, 1223 (10th Cir. 2003).

The question under Rule 702 is not whether the jurors know something about the area of expertise but whether the expert can expand their understanding of the area in any way that is relevant to the disputed issues in the trial.

3. Reliability

In *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42 (Tenn. Ct. App. 2004), the church challenged an expert

testifying about the car dealership's loss of profits when paint from a paint sprayer being used on the church was blown over to the dealership, damaging nearly 100 cars. In finding the expert's testimony unreliable, the court explained that part of the expert's calculations were based on unreliable foundational data, in part because he selected an inappropriate time frame of historical data to base his conclusions on, and also that while the rest of the expert's testimony was based on reliable data, the dealership's financial statements, his methodology in analyzing the information was flawed.

Expert testimony offered in *Rider v. Sandoz Pharmaceuticals Corp*., 295 F.3d 1194 (11th Cir. 2002), to show that medication taken postpartum caused women to suffer hemorrhagic strokes was found to have been unreliable. The court explained that studies relied on by plaintiff's expert to show that the drug caused systemic vasoconstriction, high blood pressure, or hemorrhagic stroke did not support his theory where one report was based on a woman whose symptoms were ultimately found to have been most likely caused psychosomatic problems and the other was based on a woman whose symptoms were the result of low blood pressure.

Similarly, in *Adams v. NCR Homes, Inc*., 141 F.Supp.2d 554 (D.D. 2001), homeowners claimed that the organic fill used on a sand quarry in order to build homes caused a methane gas seepage. The court found that homeowner's expert did not satisfy either the relevance or the reliability components of the *Daubert* test where the expert needed stereographic photographs to determine what areas had been excavated and contained the fill, but none had been made.

In *Butler ex rel. Butler v. City of Gloverville*, 52 A.D.3d 896 (N.Y. App. Div. 2008), the court found that plaintiff expert's testimony that simply stated that the lack of softer ground cover caused the child's injuries was conclusory.

Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007), involved a products liability case against a truck manufacturer. alleging. Both parties agreed the truck's rear leaf spring and axle assembly came apart and caused the drive shaft to dislodge from the transmission. They, however, disputed when and why the malfunction had occurred and whether it caused the collision at issue. The manufacturer argued the trial court erred admitting the testimony of Ledesma's metallurgical expert, claiming the testimony was unreliable. The Texas Supreme Court rejected the manufacturer's argument, explaining that the expert supported his causation theory with observations and measurements from the physical evidence and the manufacturer's own specifications.

In *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004), the Texas Supreme Court addressed the need for a qualified expert's explanation to close the analytical gap between the data relied on and the opinion offered. Ramirez brought a negligence action against Volkswagen alleging that a defect in the Passat that Haley Sperling had been driving had caused Sperling to lose control of the car. Ramirez proffered the testimony of accident reconstruction expert Ronald Walker to prove that a bearing defect in the left rear wheel assembly of the vehicle driven by the victim caused the accident. Volkswagen contested that Walker's testimony was unreliable because he did not present any scientific support for his opinion regarding how the separated wheel had remained in the rear wheel well during the accident.

The Texas Supreme Court held that even though the *Robinson* factors (based on *Daubert*) for measuring reliability of scientific evidence cannot be used with certain kinds of expert testimony, there still must be some basis for the opinion offered to show its reliability. Walker's explanation for the retention of the wheel in the rear wheel well during the accident was "the laws of physics." Walker did not conduct or cite any tests to support his theory on the accident and there were no other studies, publications or peer review to support his position. The Court found Walker's explanation – "the laws of physics"– did not close the analytical gap by explaining how the Passat's wheel could behave

as he described.

Also at issue in Volkswagen was the testimony of Dr. Edward Cox. Volkswagen asserted that Cox was not offered to opine on causation and his brief opinion that a defect had caused the accident constituted no evidence to support the verdict. Cox had testified that because there was grass in the grease in the wheel hub, the left rear wheel assembly must have come off before the Passat entered the median and therefore caused the accident. Cox did not attempt to explain how the left wheel remained "tucked" in the left rear wheel well throughout the accident. The Court found that Cox's testimony was an unsupported conclusion and cited no testimony, tests, skid marks, or other physical evidence to support this opinion. This failure to explain how the "tucked" wheel stayed in the wheel well was "near fatal" to Ramirez's proffered opinions on causation.

Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572 (Tex. 2006), the Supreme Court of Texas held that the trial court properly excluded an expert's testimony regarding causation in a products liability. The expert alleged that the design of the fuel system at issue could result in fires caused by hoses separating. The Court, applying *Robinson*, found the expert's testimony unreliable because his methodology and analysis were unreliable. The expert, although experienced, only showed that the product's design could result in the hoses defectively separating. He failed to show by any reliable testing that the hoses had separated in the present case to cause the accident.

State Farm Lloyds v. Mireles, 63 S.W.3d 491 (Tex. App.—San Antonio 2001, no pet.), held expert's testimony was unreliable and irrelevant to the issue of whether a plumbing leak caused foundation damage six to eight feet away. The Court of Appeals found that the consulting engineer's opinion regarding leaks causing remote damage was "not amenable to a strict application of the *Robinson* factors." *Id.* at 499. However, applying *Gammill*'s analytical gap analysis, the Court found the expert unreliable and irrelevant because he failed to show any proof of his experiences with similar situations and could not rule out other related causes.

By comparison, *State Farm Fire and Casualty Co. v. Rodriguez*, 88 S.W.3d 313 (Tex. App.—San Antonio 2002, pet. denied), held an expert's testimony that a plumbing leak caused foundation damage was reliable. The Court of Appeals commented that State Farm did not object to the expert's qualifications, data, or methodology. Instead State Farm argued that the expert was inherently unreliable because he referenced one of his opinions as a "wild ass guess," and could not attribute 100% of the damage to the potential causes. The Court noted that while the expert's "wild ass guess" comment did not help the Rodriguez's case, it did not make his opinion unreliable. The Court evaluated the entire substance of the testimony rather than one phrase, and found there were not any analytical gaps.

4. Relevancy

Remember Federal Rules of Evidence 401, 402, and 403 are also applicable to expert testimony. Testimony must be relevant to be admissible. FED. R. EVID. 401, 402. Irrelevant testimony— testimony that does not make the existence of a fact of consequence more or less probable— is inadmissible.

Further, Federal Rule of Evidence 403 applies even when expert evidence is found to be relevant and reliable. According to Rule 403, evidence is inadmissible if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or cumulative evidence. FED. R. EVID. 403.

U.S. v. Benally, 541 F.3d 990 (10th Cir. 2008), affirmed the exclusion of an expert who would have questioned the voluntariness of a confession. The court found that because the expert never interviewed the defendant and was not providing an opinion as to the truth of this particular confession, the testimony, essentially that all confessions should be disregarded, was prejudicial beyond what probative value it might have provided.

In *U.S. v. Mikos*, 539 F.3d 706 (7th Cir. 2008), the court found testimony that characteristics of a spent bullet did not rule out defendant's weapon was relevant. While

An injured motorist in *Gaillard v. Jim's Water Service, Inc*., 535 F.3d 771 (8th Cir. 2008), argued admission of his income tax returns were prejudicial and should have been excluded under Rule 403. The court found that the plaintiff's past income was highly relevant to his loss of income claim and, more to the heart of plaintiff's objection, the evidence that he filed supplemental returns changing his reported income upwards after the accident showed his character for untruthfulness, attacked the extent and severity of his claimed injuries, and impeached the credibility of his expert, who testified that he normally relies on tax filings as the most reliable source of wage verification, but did not use plaintiff's returns in this case. The court held that because the tax returns were highly relevant, the prejudice they caused was not enough to exclude the evidence.

5. Novel Theories and Conflicting Experts

New theories can prove problematic. Some courts have recognized that a new approach can pass *Daubert* muster, especially when there are new breakthroughs in a field and ongoing research as in *Reynolds v. General Motors Corp*., 2007 WL 2908564 (N.D. Ga., 2007), and *True v. Pleasant Care, Inc.*, 2000 WL 33706383 (E. D. N.C. 2000). Many other courts have rejected what they consider to be "Novel Theories."

For instance, the Tenth Circuit rejected a new theory of how wood may become ignited in *Truck Ins. Exch. v. Magnetek, Inc.*, 360 F.3d 1206 (10th Cir. 2004). The Court noted that while there was some research which seemed consistent with the experts' opinions, the studies cited in support were too dissimilar from the facts to allow admission of the opinions.

In *Cooper Tire and Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006), the plaintiffs sued Cooper Tire alleging a defendant argued the testimony was prejudicial under Rule 403, the court found the jury was entitled to hear the testimony because its value outweighed possible prejudice.
manufacturing defect caused tire failure. The plaintiffs' experts opined that the manufacturing defect was caused by wax contamination at the time the tire was manufactured. The Texas Supreme Court found this novel theory unreliable because the underlying data was unreliable when examined against the *Robinson* factors. Consequently, the Court held expert testimony about the novel theory was "legally no evidence of a manufacturing defect."

Consistency between and among the experts is also an issue. Some opinions allow admission of seemingly conflicting theories, *Pries v. Honda Motor Co. Inc.* 31 F.3d 543, 546 (7th Cir. 1994) ("it does not count against [plaintiff] that her experts do not agree *about how she came to be outside the car"); Vasallo v. American Coding and Marking Ink Co.*, 784 A. 2d 734, 740 (N.J. Super. 2001) ("the [medical] reports advance alternative and not necessarily inconsistent theories...."). N.J. Super. 207, 216 important.

Other Courts see inconsistency between experts as a fatal to a *Daubert* analysis. Consider *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, (Tex. 2005), in which the grandmother of two boys killed in a car wreck sued GM, claiming the boys' death was caused by a design defect in the car which allowed gasoline to siphon from the fuel system. The jury found that one of the boys' deaths had been caused by the defect and awarded $10 million. On appeal, the Texas Supreme Court found there was no evidence that the second fire in the car was caused by a defect because proof of causation rested on the testimony of two unreliable experts. Iracheta's experts' testimony conflicted with each other, and each stressed "both the extent and the limits of his own expertise and that of the other." *Id.* at 465. Furthermore, one expert was not qualified to testify as to where the siphoning occurred and his testimony "had no basis outside his own assertions, which were irreconcilably

self-contradicting." *Id.* at 471. This conflict, along with the conflict between the two experts' testimonies, was "fatal to Iracheta's claim" and so there was "no evidence that siphoning at the front could have caused the second fire in the way every witness testified it occurred." *Id.* at 470. Thus, the Supreme Court of Texas reversed and rendered a take-nothing judgment: "[i]nconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support." *Id.*

Consistency is a key for experts. Experts who change their opinions mid-litigation can be disqualified. Make sure your experts know this before they render their opinions.

In *McHone v. Polk*, 392 F.3d 691 (4th Cir. 2004), the court upheld the exclusion of an expert who changed his opinion about whether defendant in a murder trial had the specific intent to kill. The court explained that the expert's testimony was conclusory because he did not explain what materials he relied on in changing his opinion.

"A last minute, material alteration in the expert's testimony is just as damaging as the complete failure to list an expert." *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App.—Houston[1st Dist.] 1995) *writ denied with per curiam opinion,* 923 S.W.2d 569 (Tex. 1996) (citing *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993)).

On the other hand, in *McKenzie v. Supervalu, Inc*., 883 So.2d 1188 (Miss. Ct. App. 2004), the court held that an expert's testimony was admissible despite changes made during trial. The court explained that when the reports of speed and distance changed, the expert recalculated his opinion using the same methods and formulas and therefore neither the subject matter of the substance of the expert's testimony changed.

V. OTHER ISSUES IN EXPERT ADMISSIBILITY

In *First United Pentecostal Church v. Guideone Specialty Mut. Ins. Co.*, 189 F.App'x 852 (11th Cir. 2006), the court held GuideOne preserved error when it made a timely objection to the expert's testimony and the district court clearly ruled at the time to allow the testimony.

6. Material Changes

A. Supplementation

In *Hicks v. State*, 948 A.2d 982 (Conn. 2008), the state was not unduly prejudiced when a motorist untimely disclosed his expert testimony on speed of his vehicle because the disclosed testimony of the state's expert was clear that the state's position was that the motorist was traveling above the speed limit, the state deposed the motorist's expert prior to trial, the state's expert had a chance to review that deposition, and the jury found the motorist ten percent at fault.

Klotz v. Warick, 53 A.D.3d 976 (N.Y. App. Div. 2008), plaintiffs were not prejudiced by defendants' untimely disclosure of a forestry expert when defendants added the expert after plaintiffs amended their complaint to include adverse passion, which depended upon on the age of certain trees.

B. Timeliness of Objections

Rivenburgh v. CSX Transp., 280 F.App'x 61 (2d Cir. N.Y. 2008), found that CSX did not preserve its objection to expert testimony on the cause of Rivenburgh's injury. The court explained that although CSX filed a pre-trial motion in limine to preclude expert testimony, the district court had expressly reserved ruling on the motion and it was not preserved because CSX did not make a timely objection on expert testimony grounds when the testimony received into evidence.

The fact GuideOne did not renew its objection when the expert continued testifying did not affect preservation because under Federal Rule of Evidence 103(a), once the court makes a definitive ruling either admitting or excluding evidence, the party does not need to renew their

objection to preserve the claim of error for appeal. In *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004), a challenge was made after the cross-examination of an expert. The trial court overruled the challenge and on appeal, the parties argued that the challenge came too late. The Texas Supreme Court disagreed, holding the objection timely because it came immediately after cross-examination and explained the basis for reason for the objection. The offering party had a chance to respond to the objection at that time. Thus, the objection preserved the complaint. The court held the testimony should have been excluded because did not explain how certain factors affected his calculations.

C. Epidemiological Issues

U.S. v. W.R. Grace, 504 F.3d 745 (9th Cir. 2007), reversed a trial court's decision to exclude expert opinion testimony where it was clear that the study discussed by experts was not an epidemiological study intended to show causation. The experts did not intend to use the study to show causation, but rather to show correlations between exposure and pleural abnormalities. The expert opinions could be given without disclosure of the study.

D. Subjective Tests

In *Bocanegra v. Vicmar Services, Inc*., 320 F.3d 581 (5th Cir. 2003), the trial court excluded two expert reports that addressed both the effect marijuana use and the cause of the accident. The trial judge opined the reports did not pass the *Daubert* test, did not prove causal connection between marijuana and the incident, and did not prove the driver was impaired because quantity and quality of marijuana was unknown. The Fifth Circuit reversed, holding that the trial court erred in excluding the report because the driver admitted he had ingested marijuana within a twelve hour period prior to the accident, the expert showed published and accepted studies that have demonstrated that marijuana use impairs cognitive functions for at least twelve hours, and due to the expert's knowledge and training in toxicology, his testimony would have been helpful to a fact finder. Concerning the quality or quantity of marijuana the driver used, the Court found that, while there are certain variables that will always be present (such as exact dosage), individuals smoke marijuana to get high, and a person who takes "five or six hits," as the driver did here, will be impaired. *Id.* at 589. The only question goes to the degree of impairment, which goes to the weight given to the testimony, not its admissibility. Thus, the Court of Appeals found the trial court's exclusion to be an abuse of discretion.

E. Probability v. Possibility

Experts must understand the difference between inadmissible opinions based upon possibilities and admissible opinions based upon probabilities. In *Friedman v. Safe Sec. Services, Inc*., 765 N.E.2d 104 (Ill. App. Ct. 2002), the court found that expert testimony that office tenant's rape was caused by a breach of the standard of care applicable to the security company was speculative because the expert opinion assumed the attacked entered the building after the security guard began duty, for which there was no evidence.

The court in *Bartosh v. Gulf Health Care Center-Galveston*, 178 S.W.3d 434 (Tex. App.—Houston[14th Dist.] 2005, no pet.) upheld a trial court's exclusion of a medical expert's testimony. The expert "stated that he was hired to speculate on what may have caused [decedent's] health to deteriorate, that he gave his best speculation regarding possible causes, and that he was just offering an opinion on what might have happened." *Id.* at 442.

F. Opinion on Ultimate Issue

Courts will typically allow experts to testify about the "ultimate issue", as In *Kieffer v. Weston Land, Inc*., 90 F.3d 1496 (10th Cir. 1996). There the court found that although the expert was unable to formulate an opinion on the

ultimate issue of what caused plaintiff's burn but did speculate that either the wrong type of plug or an improperly attached plug could have caused the burn, the expert testimony was admissible because the required evidence (the plug) was missing due to defendant's own action.

In *Paradigm Oil, Inc. v. Retamco Operating, Inc*., 242 S.W.3d 67 (Tex. App.—San Antonio 2007, pet. denied), court of appeals reviewed the factual sufficiency of a damages award which was in part based on an expert's opinion about the amount of damages sustained. The expert's testimony identified the information he reviewed and relied upon, summarized his general method of analysis, and rendered an opinion on the amount of damages. The court of appeals recognized Rules 704 and 705 permit an expert to testify to the ultimate issue and give opinions without disclosing the underlying facts or data. Even given this recognition, the court of appeals reversed, holding the evidence was insufficient because the expert's testimony was speculative and conclusory.

VI. SPECIFIC TYPES OF EXPERTS

A. Accident Reconstruction

Experts in the field of accident reconstruction must frequently navigate the *Daubert* gauntlet. In *Gonzalez v. Gov't Employees Ins.*, 2010 WL 446549 (La. Ct. App. Feb. 9, 2010), a passenger in a single-car automobile wreck alleged defects in the roadway and nearby railroad tracks caused her injuries. Officer Peggy Thibodeaux testified about her observations of the wreck scene at trial, including giving her opinion that the car may have gone airborne after crossing the railroad tracks. The plaintiff objected to the officer's qualifications to testify about issues of accident reconstruction and the trial court ruled the officer could only testify regarding her observations as an accident investigator. The court of appeals affirmed, finding the officer's ten years in the traffic division and accident investigation classes qualified her in accident investigation. It also held the officer did not go outside her area of expertise and discuss accident reconstruction issues in the testimony offered at trial.

Kilhullen v. Kansas City Southern Railway, 8 So.3d 168 (Miss. 2009), arose from train-truck collision. The widow of a tractor-trailer driver brought a wrongful death action against a railroad and railroad engineer. At issue on summary judgment was whether vegetation and other objects near the right-of-way limited the deceased visibility of a train approaching the crossing and proximately caused the wreck. The widow responded to summary judgment with the affidavit of a registered professional engineer. She later filed an affidavit from an accident reconstructionist who agreed with the opinions rendered by the engineer. The court struck the reconstructionist's affidavit based on a previous discovery order and struck the engineer's affidavit claiming *Daubert* prevented him from rendering opinions regarding accident reconstruction. Applying an abuse of discretion standard, the Mississippi Supreme Court reversed the lower court finding the engineer possessed the professional qualifications to take the required measurements and calculate the line of sight based on an accepted mathematical equation. It emphasized witness knowledge and experience, not artificial classifications, govern whether he is qualified to render opinions.

In *Locke v. Young*, 973 So.2d 831 (La. Ct. App. 2007), an injured motorcyclist brought an action against a pizza delivery driver who hit him while turning left across traffic to enter a parking lot. Prior to trial, the court granted the plaintiff's motion to exclude the testimony of expert Stephen Killingsworth who opined the speed of the motorcycle was a factor in the wreck. Killingsworth based his opinion of the plaintiff's speed on an assumption of the motorcycle's position at the time the delivery driver began to turn left. The position of the motorcycle was not based on physical evidence but rather on statements from the defendant driver who said he did not see the motorcycle

and a car was turning out of an entrance further down the road. Additionally, the plaintiff's expert testified Killingsworth's approach did not meet accepted scientific methodology. Based on these facts, the court of appeals affirmed the exclusion.

Another case, *Smith v. Yang*, 829 N.E.3d 624 (Ind. Ct. App. 2005), concerned opinions offered by an accident reconstructionist, Stephan Neese who averred "faked left syndrome" (reaction to steer a car to the left rather than right when a driver's space is invaded) led to the wreck. Neese's affidavit cited a periodical from 1988 which recognized the syndrome and pointed to the description of the wreck from the parties and investigating officer. The reviewing court affirmed the exclusion of the expert's affidavit, finding there was no evidence the theory could be tested, had been subjected to peer review, or the article cited was accepted as reliable authority.

In *Zimmerman v. Powell*, 684 N.W.2d 1 (Neb. 2004), the plaintiff in a car wreck case appealed the jury's verdict assessing him 49% responsible for the wreck at issue. Over the plaintiff's objections, the trial court allowed the defendant's reconstructionist to testify the plaintiff was driving over the speed limit at the time of the collision. The Nebraska Supreme Court found the trial court failed at its gatekeeping duty by allowing the testimony and that its failure prejudiced the plaintiff. It explained the expert did not identify what data he needed to calculate speed or where he obtained the data he ultimately used to make his speed calculations.

Finally, *Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79 (Tex. App.—Houston [1st Dist.] 2009, no pet.), reviewed a trial court's decision to allow expert testimony in a wrongful death action against a trucker and trucking company. The defendants offered the testimony of a deputy who served as the county's accident reconstructionist. The plaintiff moved to strike the expert's testimony because it was based on an unreliable method. The deputy testified that he would need to determine the coefficient of friction (using information about the vehicle tires) to determine who caused the wreck. To calculate the coefficient of friction, the deputy "eyeballed" the tires and performed testing with a Camber rather than the Mustang involved in the wreck. The trial court allowed the deputy to testify and the officer concluded that the driver of the decedent's vehicle caused the wreck. The appellate court affirmed the lower court, finding the deputy's methods reliable and grounded in procedures of science.

B. Experts in Products Liability

Product Liability cases are expert-dependant. Consider *Swanstrom v. Teledyne Cont'l Motors, Inc.*, No. 1080269, 2009 WL 4016078 (Ala. Nov. 20, 2009), in which the family of a deceased pilot brought an action against the manufacturers of an aircraft, its engine, and fuel pump. The crash occurred approximately five minutes after the plane took off from a refueling stop. The plaintiffs' experts, Sommer (an aviation-accident reconstructionist and engineer) and McSwain (a metallurgist and engineer), examined the wreckage and determined a defective fuel pump caused an in-flight fire which led to the crash. A toxicology report by the FAA found higher than normal levels of carbon monoxide and cyanide in the pilot's blood. After moving for summary judgment, the defendants moved to strike Sommer and McSwain's testimony arguing the evidence relied on by the experts equally supported finding pilot error caused the crash. The court excluded the toxicology report, Sommer's opinions based on the report, and entered summary judgment. It did not rule on the objections to McSwain's testimony.

On appeal, the Alabama Supreme Court upheld the exclusion of the toxicology report based on alleged errors in the chain of custody of the underlying samples and affirmed the exclusion of expert opinions based on the report. It also affirmed the exclusion of Sommer's opinions, finding he did not have any experience determining fire cause and origin or the poisonous effects of combustion products. Nonetheless, it ultimately reversed the decision

to grant summary judgment, finding McSwain's testimony in conjunction with other evidence raised a fact issue regarding the cause of the fire.

At issue in *General Motors Corp. v. Grenier*, 981 A.2d 531 (Del. 2009), was a jury verdict in favor of a former auto mechanic who suffered from mesothelioma. The mechanic argued dust from brake shoes and other Ford manufactured products caused his cancer. On a previous appeal Ford argued the trial court erred allowing the plaintiff's experts to testify. The court remanded for reconsideration, and the trial court again allowed the testimony. The Delaware Supreme Court affirmed the trial court, finding the opinions well reasoned. The experts testified exposure to friction products caused mesothelioma and Ford presented epidemiological studies demonstrating the opposite. The experts based their opinions on the facts: (1) friction products release respirable chrysotile fibers; (2) the fibers are the same size and shape as unrefined fibers; (3) fiber morphology is the primary reason for the carcinogenicity; and (4) comparable fibers were found in the lungs of other suffers of the disease who worker with friction products.

In *Blackwell v. Wyeth*, 971 A.2d 235 (Md. 2009), parents of an autistic child brought a strict liability action against the manufacturer of vaccines containing thimerosal. The trial court excluded the testimony of the parents' expert that thimerosal in vaccines was linked to autism because there was an analytical gap between the expert's studies. It also excluded testimony from the parents' experts on the grounds they were not qualified in the field of epidemiology. The court of appeals affirmed, finding the studies relied upon by one of the experts (who also conducted the studies) were not conducted using methods generally accepted by the scientific community. The opinion affirmed the trial court's decision to exclude other the other expert witnesses.

An amusement park patron brought a products liability action against the park for injuries sustained on a stand-up roller coaster ride in *West v. KKI, Inc.*, 300 S.W.3d 184 (Ky. Ct. App. 2008),. The trial court granted summary judgment, finding park safety expert William Avery qualified but his opinions inadmissible under *Daubert*. Avery examined the ride, park procedures, photographs, the maintenance manual, and rode the ride. He explained the ride could not be operated any differently but that it could include a warning about the nature of the ride for the general public. Avery could not give an opinion regarding the amount of force it took to cause the plaintiff's injuries. The appellate court affirmed the exclusion, finding the opinions unsupported and that the investigation left much to be desired.

A bus crash gave rise to *MCI Sales and Services, Inc. v. Hinton*, 272 S.W.3d (Tex. App.—Waco 2008, pet. granted)(Feb. 12, 2010). The motor coach occupants and their families brought an action against the company that imported, assembled, and sold the coach after it crashed and killed five of the passengers. In support of their defective design claims, the plaintiffs offered the testimony of structural engineer Lonney Pauls who opined about safer alternative designs for seatbelts in the coach. On appeal, MCI claimed Pauls was unqualified to give opinions about seatbelts and buses because he had never advised a bus manufacturer, never engineered a seatbelt installation, the design of a seat, or the design of seat anchors, and had no degree or experience in the area of occupant protection. The appellate court disagreed, finding Pauls qualified based on his experience as a mechanical engineer, his advanced study of structures/dynamics, his work for NASA, work for MCI's former owner Greyhound as a structural analysis, and previous work for MCI doing structural analysis on buses.

School busses were the subject of *Smith ex rel. Smith v. Clement*, 983 So.2d 285 (Miss. 2008), in which a school district filed a third party action against a company which converted the bus engines to run on propane. A student was badly burned as a result of the allegedly improper conversion. At summary judgment, the trial court struck the school district's expert's affidavit which opined the fire was caused by a leak in copper tubing improperly flared by the

third party defendant. The third party defendant offered an affidavit from its own expert who inspected the bus and stated that there were no reliable scientific principals or methods any engineer could use to render an opinion regarding who flared the tubing. The appellate court affirmed the exclusion, finding the proffered testimony inadmissible because the school district did not submit any evidence to contradict the manufacturer's allegations that the opinion was not based in science.

In *Fueger v. Case Corp.*, 886 N.E.2d 102 (Ind. Ct. App. 2008), the plaintiff brought a products liability case against a farm equipment manufacturer after receiving near fatal injuries while using a skid loader. At a summary judgment hearing the trial court admitted portions of the plaintiff's expert's deposition but struck the expert's affidavit before granting summary judgment on the products claims. The manufacturer argued the expert was not qualified, and his opinions on design defect were speculative and unreliable. The appellate court concluded the expert was qualified based on his experience as a professional engineer, safety engineer, specialized education in product safety, employment history, ownership of a farm, and experience working on a farm in his youth. It further held his opinions were reliable based on his inspection of the skid loader in light of his training, education, experience, knowledge, and skill.

985 Assoc., LTD. v. Daewoo Electronics Am., Inc., 945 A.2d 381 (Vt. 2008), concerned a building owner who sued microwave manufacturer for burning down his building. The owner offered testimony from two fire investigation experts on the issue of causation and the trial court granted the defendant's pre-trial motion to exclude the testimony as unreliable. The experts opined a defect in the microwave caused the apartment fire, and the defendant argued the opinions were unreliable because they did not identify a specific defect in the microwave. The Vermont Supreme Court reversed the trial court's decision, stating: "The opinions proffered by plaintiffs' experts here plainly do not present the type of 'junk science' problem that *Daubert* was intended to thwart." *Id.* at 385.

A student athlete injured by an "overspeed trainer" sued the manufacturer in *Burley v. Kytec Innovative Sports Equip., Inc.*, 737 N.W.2d 397 (S.D. 2007). The action was based upon warnings theory. The student offered testimony from a Dr. Berkhout, who opined that the instructions included with the equipment were seriously deficient. The trial court found Dr. Berkhout unqualified to opine about the product's instructions because he had no experience in drafting or evaluating instructions and warnings for sports equipment. The South Dakota Supreme Court reversed, holding that Dr. Berkhout's credentials (which included evaluating instructions in other areas) qualified him to offer testimony in the case at issue.

In *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117 (Tex. App.—Texarkana 2008, pet. filed), parents of a fire victim filed a products liability action against Wal-Mart alleging a defective halogen lamp caused a deadly apartment fire. The trial court granted summary judgment but considered the expert affidavit of Dr. Craig Beyler included in the parent's summary judgment response. Both parties appealed, and the appellate court reversed the summary judgment. In its appeal, Wal-Mart claimed Dr. Beyler's affidavit was inadmissible because it relied on an unsworn witness affidavit and was scientifically unreliable. The appellate court disagreed, explaining that the Rules of Evidence allow experts to rely on otherwise inadmissible evidence. It also found the affidavit sufficiently reliable based on Dr. Beyler's statements that he based his conclusions on eyewitness observations, physical evidence, and analysis of the fire, as well as his incorporation by reference of his original expert report which went into greater detail.