ONCE BITTEN, TWICE SHY: KNOWING YOUR EXPERTS' *DAUBERT* HISTORY

George (Tex) Quesada
SOMMERMAN & QUESADA, L.L.P.
3811 Turtle Creek Boulevard, Suite 1400
Dallas, Texas 75219-4461
214/720-0720 (Telephone)
214/720-0184 (Facsimile)

EXPERTS WHO TRAVEL WITH THEIR OWN MOTION IN LIMINE: KNOWING THE *DAUBERT* HISTORY

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ONCE BITTEN, TWICE SHY:
KNOWING YOUR EXPERTS' *DAUBERT* HISTORY

I. SCOPE OF PAPER

All expert witnesses have a past. The ability to find and utilize that past is important when deciding whether to retain or impeach an expert witness. This paper outlines some of the areas which may be fruitful for this sort of research.

II. *DAUBERT* HISTORY - GENERALLY

A. Positive Treatments

"The trial court found [the expert witness] to be 'very impressive' and that 'his knowledge of automobiles, and his whole field of expertise, was outstanding.' We agree with this assessment." This example, from *Ledet v. Roy*, 540 S. 2nd 105, 107 (LA App. 3rd Cir. 1989) is the sort of review one wishes from a Court of Appeals.

It is possible to find opinions in which experts' methods and credentials have been explicitly approved, if not praised, by various courts. All things being equal, these are the sorts of experts who should be retained. What could be better than having an expert who was described as "undoubtedly qualified" as described in *Cross v. Wyeth Pharmaceuticals, Inc.*, 2011 WL 3498305 (M.D. Fla. 2011)? This was the defendant's expert whose testimony the judge described as, "helpful, reliable, and supported by [his] extensive education and experience in the relevant field of medicine." Another example is *Columbia Health Services of El Paso, Inc. v. Columbia-HCA Healthcare Corp.*, 1996 WL 812934 (W.D. Tex) in which the expert economist was found to have "impeccable credentials."

These experts are out there and can be retained. Consider seining Westlaw, Lexis and other legal search sites for opinions which explicitly approve a particular expert witness.

B. Negative Comments

Some courts' comments are not as charitable toward expert witnesses. You may want to think twice before retaining an expert whose opinions have been characterized as "unpublished, unverified . . . untested . . . not supported by any analysis which the trial court can identify as scientific." *Demaree v. Toyota Motor Corp*., 37 F. Supp. 959 (W.D. Ky. 1999). Another expert's opinions were excluded as being "unsupported, unscientific" and "pure speculation." *Abarca v. Franklin County Water District*, 813 F. Supp. 2d 1199.

Consider the comment in *Kunz v. DeFelice*, 538 F.3d 667 (7th Cir. 2008), involving 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).

C. The Court's History

While not squarely within the scope of this paper, remember to look at the court's history in dealing with various *Daubert* challenges. It is possible, but not likely, that the court has actually passed on the qualifications and methodology of the expert in question. It would be very helpful to find that information and know whether this judge tends to favor or disfavor a particular expert witness.

Active trial courts deal with *Daubert* challenges on a regular basis. With the easy access to electronic dockets and local list servers, you may be able to identify and observe a *Daubert* hearing in front of your particular judge. By doing so, you can quickly identify and highlight many of the areas which a judge may be looking at when making her decision on other expert witnesses. Courts frequently have routines for dealing with routine expert witnesses. It is fair to assume that the judge has her own pattern or practice when dealing with routine witnesses such as economists, treating physicians or appraisers. Knowing a particular court's likes and dislikes when it comes to expert witnesses can be very helpful.

You may also want to consider hiring the expert witness who the judge's old firm used in a similar case.

III. SPECIFIC *DAUBERT* AREAS

There are a few areas of expert testimony which justify checking the *Daubert* track records.

A. Physicians/Bio-Mechanical

Non-treating physicians, as stand-alone experts or as some sort of "bio-mechanical" expert, seem to travel with their own problems. In *Lascola v. Schindler Elevator Corporation*, 2010 WL 971792 (E.D. La. 2010), Dr. Charles Bain was proferred as an expert witness concerning the plaintiff's alleged injuries. The court excluded Dr. Bain as unreliable, speculative and misleading. The court explained that, "By using himself as a sort of human guinea pig, he attempts to re-create multiple movements and reactions to movements of the human body" in response to movements of an elevator. The court noted that the good doctor was not

"anatomically similar" to the plaintiff, and the elevator's condition had changed since the time of the incident. The court also noted other opinions which had excluded Dr. Bain, including *Breaud v. Werner Enters., Inc.*, ruling on Mot. In Limine [Doc. 95], 03-860-JJB-SCR (M.D. La. 2006).

As an aside, discovery concerning Dr. Bain's financial condition was allowed in *Safeco Insurance Co. of America v. Vecsey*, 259 FRD 23 (D. Conn. 2009).

Paul Lewis is a bio-mechanical expert whose opinions have been routinely allowed into evidence. Examples of such cases include *Cartwright v. American Honda Motor Company, Inc.*, 2011 WL 3648565, the United States magistrate judge went through a fairly lengthy analysis as to why she was allowing Mr. Lewis' opinions to be presented to the jury on behalf of the plaintiffs in a one-vehicle roll-over case. A more extensive opinion allowing Mr. Lewis' testimony is *Bullett v. Dymler Trucks North America, LLC*, 2010 WL 4530417 (D. Colo. 2010).

B. Accident Reconstruction

Many experts in the field of accident reconstruction have a long track history. One expert's opinions "should have been excluded under a *Daubert* analysis" according to the Court of Appeals (though the error was "harmless"). *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999). The expert, Mr. William Kennedy, had his opinions excluded in *Ingraham v. Kia Motors America, Inc.*, 2007 WL 2028940 (W.D. Okla. 2007), though it appears that BNSF is now using the expert according to *Belisle v. BNSF Railway Co.*, 2010 WL 1424344 (D. Kan. 2010).

Mr. Andy Irwin was recognized as an expert and allowed to testify in the field of accident reconstruction in *Frazier v. Crete Carrier Corp.*, 2001 WL 880254 (Tex. App.—Amarillo 2001) and *Bocanegra v. Vicmar Services, Inc.*, 320 F.3d. 581 (5th Cir. 2003). He had difficulty with the admissibility of his opinions in other areas, such as the production of a re-creation, *Harris v. State*, 152 S.W.3d 786 (Tex. App.—Houston [1st Dist.] 2004) and "sanity testing" in a product liability action. *Wright v. Ford Motor Co.*, 508 F.3d. 263 (5th Cir. 2007).

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 decedant's 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.

C. 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 sufferers 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 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.

D. Trucking Experts

It is not unusual to find opinions concerning a particular expert witness who specializes in commercial vehicle issues. Some of these expert witnesses are regional in nature, but many of them appear in many courts across the country. Here are a few examples that I found:

Anita Kerezman was designated on behalf of the plaintiffs in *Hetrick v. National Steel Corp.*, 205 WL 755743 (N.D. Ohio 2005). Ms. Kerezman's opinions were proffered on the

standard of care expected of truck drivers. In response to the defense's challenge, the court limited Ms. Kerezman's testimony, finding that she failed to "show a nexus between the accident and either the physical condition of the tractor/trailer or any management deficiencies on the part of" the defendants. She was not allowed to testify concerning proximate cause between the driver's actions/inactions and the wreck because her report failed "entirely to take into consideration the physical evidence relating to another vehicle's opportunity to stop short of the collision."

Ms. Kerezman's opinions were also limited in *Chesler v. Trinity Industries, Inc.*, 2002 WL 1822918 (N.D. Ill.) in which she offered opinions concerning a driver's violations of the Federal Motor Carrier Safety Regulations, his speed, his negligence and whether this was a "preventable accident." Ms. Kerezman was allowed to offer expert opinions concerning stopping distance/time, industry practices, log entries and whether the speed was excessive under the conditions.

Dave Stopper is frequently used as an expert witness in commercial vehicle cases, and his opinions and methodology were explicitly approved in *Evans v. Washington Metropolitan Area Transit Authority*, 674 F. Supp. 2d 175 (U.S.D.C., DC 2009). The court limited some of Mr. Stopper's proffered testimony because it would invade the province of the jury and did not allow Stopper to weigh the conflicting evidence even though it is "a normal part of a reconstruction expert's duties," but otherwise approved of the approach that Stopper took in evaluating the case.

In *Slaughter v. Barton*, 2003 WL 24100297 (W.P. VA. 2003), the court found that Stopper's testimony "is based upon sufficient facts, is a product of reliable principles and methods, and that Mr. Stopper has applied these methods and principles reliably to the facts of this case."

Not all exclusions are created equally. Whitney Morgan has had his opinions limited in *Belk v. Dzierzanowski*, 571 F. Supp. 2d 1346 (N.D. GA 2008) and *Francois v. Colonial Freight Systems, Inc.*, 2008 WL 80399 (S.D. Miss. 2008), not because of a failure of methodology, but because the defendants had already stipulated to liability. However, Morgan's expert opinions as a "motor carrier safety consultant" were limited in *Suzlon Wind Energy Corp. v. Fitzley, Inc.*, 2009 WL 3784390 (S.D. Tex. 2009) because he lacked personal knowledge concerning the standards for selecting carriers to transport various equipment. Morgan did not hire cargo carriers or work for brokers/third party logistics providers during the relevant time period and lacked a sufficient foundation for his opinions.

E. Economists

Economists are frequently called as expert witnesses in a variety of cases, and can quickly compile a *Daubert* track record. One economist, Ron Vollmar's opinions were allowed in *Bray International, Inc. v. Computer Associates International, Inc.*, 2005 WL 2505924 (S.D. Tex. 2005) and again in *Synergetics, Inc. v. Hurst*, 477 F.3d. 949 (8th Cir. 2007). His opinions were also allowed in *Cement-Lock v. Gas Technology Institute*, 2007 WL 42468888 (N.D. Ill. 2007), *Floyd v. Hefner*, 556 F. Supp. 2d 617 (S.D. Tex. 2008). On the other hand, Mr. Vollmar's opinions were excluded in *CQ, Inc. v. TXU Mining Co., L.P.*, 565 F.3d. 268 (5th Cir. 2009).

An El Paso economist, Everett Dillman's future wage loss calculations have been allowed in a number of cases, including *Buno v. U.S.*, 64 F. Supp. 2d. 627 (W.D. Tex. 1990), *Southern Pacific Transportation Co. v. Hernandez*, 804 S.W.2d. 557 (Tex. App.—San Antonio 1991, no writ) and *Gutierrez v. Kent Nowlin Construction Co.*, 99 NM 394, 658 P.2d. 1121 (N.M. App. 1981). On the other hand, Dr. Dillman's opinions attempting to quantify the value of non-economic losses have been excluded. *Celotex Corp. v. Tate*, 797 S.W.2d. 197 (Tex. App.—Corpus Christi 1990, no writ); *Guzman v. Guajardo*, 761 S.W.2d. 506 (Tex. App.—Corpus Christi 1988, no writ).

IV. PRACTICAL APPLICATIONS

A. Court-Mandated Methods

Sometimes, courts will require a methodology from one area which can be used in another area. In a longshoreman's act case, the United States Supreme Court mandated that future economic wage losses be reduced back to present value. Courts were ordered to calculate "(1) the amount the employee would have earned during each year that he/she could have been expected to work after the injury, and (2) the appropriate discount rate, reflecting the safest available investment." *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537, 103 S. Ct. 2541, 76 Led. 2d 768 (1983). The opinion requires that the trier of fact apply the discount rate to each of the estimated installments in the lost earned income and then add up the discounted installments to determine the total award. Where the parties do not supply evidence about the discount rate, trial courts are authorized to use a discount rate of two percent (2%) per year. *Ramirez v. New York City Offtrack Betting Corp.*, 112 F.3d 38, 42 (2nd Cir. 1997).

Pfeifer's approach is routinely followed by the various courts of appeals in *Jones Act* and *FELA* cases. *See, Ammar v. United States*, 342 F.3d 133 (2nd Cir. 2003); *Culver v. Slater Boat Co.*, 722 F. 2d. 114 (5th Cir. 1983), one can easily transfer the *Pfeifer* methodology to other future wage calculations. There will be times that such an approach does not yield the maximum recovery for an injured plaintiff, but by keeping the economist's approach within the *Pfeifer* parameters, one can rest assured that there is an approved methodology, and the expert can cite to his or her track record in following the relevant court-required approach.

The *Pfeifer* method has been applied in non-*Jones Act*, non-*FELA* cases, such as *Kasper v. St. Mary of Nazareth Hospital*, 135 F.3d. 1170 (7th Cir. 1998) (wrongful termination), *Hutton v. Essex Group, Inc.*, 855 F. Supp. 331 (D. N.H. 1994) (wrongful termination), *Andrulonis v. U.S.*, 724 F. Supp. 1421 (N.D. NY, 1989), *rev'd on other grounds*, 952 F.2d. 652 (2nd Cir. 1991) (FTCA) and *Trevino v. U.S.*, 804 F.2d. 1512 (9th Cir. 1986) (FTCA).

B. What is it called in different states?

The concepts behind *Daubert* are ubiquitous, but different states call those concepts by different names. How do you know what test to search for when performing a Westlaw or Lexis

search? Listed below is a short state-by-state table identifying the name(s) of the case in which the respective state adopted/rejected *Daubert*. Consider using an associate or summer law clerk to research the name of the expert in question and the state court opinion which may have excluded or allowed the witness's testimony.

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 J*oiner'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*, 682N.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* 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.L 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*).

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

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 *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 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). **Virgini**a: *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)).

C. On-Line Resources

Obviously, Lexis and Westlaw are invaluable tools when trying to check an expert's track record. Westlaw sells copies of motions to exclude. List servers and litigation support groups, such as AIEG, are also great labor savers. Pacer.gov will give access to copies of motions/orders related to witnesses, but one must know the name/style of the case in question.

You may also consider http://www.daubertontheweb.com/, Blog 702 and http://www.daubertuncensored.com/daubert_blog/.

One fee-for-service site, exonline.com, claims to be able to track experts by name and provide a *Daubert* history.

D. A Bio-Dynamic Example

Scott Krenrich is frequently proffered as an expert in the field of bio-mechanics. An emergency room physician by training, Dr. Krenrich recently was working for Bio-Dynamic Research Corporation (BRC) in San Antonio. Piecing together his *Daubert* history from a published opinion excluding his testimony, and coupled with valuable information from AAJ members located through the list server, I was able to determine that Krenrich's opinions had been excluded on at least four prior occasions.

A copy of the Motion to Exclude is attached to this paper.

V. CONCLUSION

Knowing an expert's track record helps arm the trial lawyer with another weapon to exclude the opponent's expert or to defend her own expert against a *Daubert* challenge. Frequent and frank discussions with experts, together with electronic research aids, can make acquisition of those weapons much easier and more efficient.