New Federal Rule of Evidence Rule 702: A Circuit-by-Circuit Guide to Overruled "Wayward Caselaw"

By: Eric Lasker and Joshua Leader (Editors)

Eric Lasker litigates a wide variety of complex civil matters, with a current focus on toxic torts, environmental litigation, and pharmaceutical product liability. He has successfully represented his clients' interests as lead counsel in multidistrict, serial, and mass tort litigation, in jury trials and bench proceedings, and in oral argument in multiple federal courts of appeal and state supreme courts. Along with George Mason University law professor David Bernstein, Mr. Lasker authored "Defending Daubert*: It's Time to Amend Federal Rule of Evidence 702,"*[1] *which triggered the Advisory Committee on Evidence Rules review of the text of Rule 702. At the Committee's invitation, Mr. Lasker participated in a 2018 roundtable discussion on a potential amendment to Rule 702, and he also testified before the Committee in 2022 in support of the amendment. Mr. Lasker is the founding Chair of the IADC's Rule 702 Sustainability Committee.*

Joshua Leader is a partner at Leader Berkon Colao & Silverstein LLP in New York City. He manages a diverse range of litigation in areas including complex commercial, securities, product liability, toxic tort, entertainment, employment, and intellectual property actions in both state and federal courts across the country. Josh approaches litigation from a holistic perspective, assisting clients in meeting their business goals, either through strategic litigation decisions or through litigation avoidance efforts. He is an active member of the IADC's Toxic & Hazardous Substances Litigation and Rule 702 Sustainability Committees.

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[1] 57 William & Mary L. Rev. 1 (2015).

ON December 1, 2023, Federal Rule of Evidence 702 was amended for the first time in twenty-three years to address what the Advisory Committee on Evidence Rules ("Advisory Committee") identified as a pervasive problem of "wayward caselaw" in which federal courts had been "far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow."[2] The language of Rule 702 now reads as follows (with changes in highlights and strikeouts):

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise ***if the proponent demonstrates to the court that it is more likely than not that***:

> a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> b) the testimony is based on sufficient facts or data;
> c) the testimony is the product of reliable principles and methods; and
> d) ~~the expert has reliably applied~~ ***the expert's opinion reflects a reliable application of*** the principles and methods to the facts of the case.

The amendments confirm three key elements of the Rule 702 admissibility standard that the Advisory Committee determined had been most frequently ignored in prior decisions. First, Rule 702 now makes clear that the court should not defer to the jury in factual determinations of whether the expert satisfies the admissibility criteria of the Rule. Second, the Rule explains that the court must find that the proponent of the expert testimony satisfies each of the four elements of Rule 702 by a preponderance of the evidence. Third, the Rule requires courts to go beyond the checkbox approach of simply confirming the existence of factual bases and an expert methodology to evaluate whether the expert's opinion reflects a reliable application of the methodology to the facts. And by expressly focusing the court's inquiry on the expert's opinion, this

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[2] Daniel J. Capra, Reporter, Mem. To: Advisory Committee on Evidence Rules Re: Public comment suggesting an amendment to Rule 702, at 4 (Oct. 1, 2016) *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER AGENDA BOOK, 262 (Oct. 21, 2016), available at https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf.

amendment further establishes that the court's gatekeeping responsibility is an ongoing one that continues through trial to guard against experts overstating the conclusions that can be reliably reached from their analyses.

As important as each of these amendments will be going forward, the new Rule 702 is equally important in what it says about the existing body of Rule 702 case law. Opponents of the amended Rule will no doubt seek solace in prior cases that take a more liberal view of the admissibility of expert testimony. But as *Daubert* itself explained in one of the remaining lasting legacies of that foundational opinion, "under the Federal Rules no common law of evidence remains."[3] It is the language of Rule 702, not case law, that governs. And any question of the continued significance of prior case law is laid to rest in the Advisory Committee Note and drafting history, which repeatedly call out this liberal-admissibility case law as wrongly decided.

The Advisory Committee was remarkably frank in its condemnation of prior case law. In its Advisory Committee Note, the Committee admonishes the "many courts [that] have held that the critical questions of sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight, not admissibility," finding that "[t]hese rulings are an incorrect application of Rule 702 and 104(a)."[4] The Note continues, "[t]he Committee concluded that emphasizing the preponderance standard in Rule 702 was made necessary by the Courts that have failed to apply correctly the reliability requirements of the rule."[5] The Note explains "[t]he amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000 [when the Rule was previously amended] – requirements that many courts have incorrectly determined to be covered by the more permissive Rule 104(b) standard."[6] And the Note specifically calls out courts that had abdicated their responsibility to rigorously review the expert's application of their stated methodology to the facts, noting that "judicial gatekeeping is essential because just as jurors may be unable, due to a lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods

[3] Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579, 588 (1993) (citation omitted).

[4] Advisory Comm. on Evidence Rules, Proposed Amendments to the Federal Rules of Evidence, Rule 702, advisory comm. Note 1.

[5] *Id.*

[6] *Id.*

underlying an expert's opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reasonably support."[7]

The drafting history of the Committee's deliberations are equally damning of prior case law. In his initial legal memorandum to the Advisory Committee assessing the need to amend Rule 702 in response to a 2015 law review article, the Reporter to the Advisory Committee, Professor Capra concluded that "courts have defied the Rule's requirements," that "wayward courts simply don't follow the rule" and that, as a result, "Evidence Rules are being disregarded by courts."[8] Following its own extensive review, the Advisory Committee reached the same conclusion, bemoaning the "pervasive problem" that in "a number of federal cases … judges did not apply the preponderance standard of admissibility to [Rule 702's] requirement of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were one for the jury."[9] In the Report of the Advisory Committee to the Committee on Rules of Practice & Procedure, Committee Chair Judge Schultz explained that "[t]he Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence."[10]

We are thus left, following the amendment to Rule 702, not simply with new Rule language to be applied going forward, but with a large body of case law that has now been emphatically rejected and overruled. This case law had previously guided, if not governed, lower court expert admissibility rulings. To help navigate through this debris field, the International Association of Defense Counsel's Rule 702 Sustainability Committee has prepared the following Circuit-by-Circuit guide of wayward Rule 702 case law. This guide identifies key cases by judicial circuit and identifies the manner in which this prior precedent fails to meet the standards of Rule 702.

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[7] *Id.*

[8] *See supra* note 2, at 262.

[9] Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 13, 2020, at 3 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL AGENDA BOOK, 17 (Apr. 30, 2021), available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules – agenda_book_spring_2021.pdf.

[10] Hon. Patrick J. Schultz, Report of the Advisory Committee on Evidence Rules, at 5 *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY AGENDA BOOK, 445 (Jan. 5, 2021), available at https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

While the product of extensive work and analysis, this guide is not exhaustive – the decades of judicial defiance of the Rule's admissibility requirement would make any such effort unattainable. And of course, practitioners using this guide must use their own judgment in explaining to courts why the identified decisions should no longer be followed. But – we hope – the guide provides a quick reference that will help relegate this wayward caselaw to the dustbin of legal history and clear the field for the proper application of Rule 702 moving forward.

The First Circuit

By: Marie E. Chafe, Emily J. Slaman, and Daniel Walsh-Rogalski

Marie E. Chafe is a civil and commercial trial attorney with vast experience representing businesses in product liability matters involving wrongful death, catastrophic injuries, and consequential property damages. She has worked with general counsel, national counsel, and insurers to develop strategies for successful litigation defense. Marie is active in numerous legal organizations including IADC's Product Liability Committee. She is a National Director on DRI's Board of Directors, and is immediate past Chair of DRI's Women in the Law Committee as well as past President of the Massachusetts Defense Lawyers Association. She is dedicated to promoting equality in the profession and mentoring women in the law. She is descended from a trailblazer: her grandmother and namesake Marie E. Jessen, who was admitted to the Ohio Bar nearly 100 years ago by the famous Carrington Tanner Marshall.

Emily J. Slaman is an associate at Conn Kavanaugh Rosenthal Peisch & Ford in Boston and practices business litigation and white-collar defense involving breach of contract, fraud, and unjust enrichment claims. Emily regularly advises individuals and small businesses on litigation and pre-litigation strategies, as well as government investigation response.

Daniel Walsh-Rogalski is an associate at Conn Kavanaugh Rosenthal Peisch & Ford in Boston, Massachusetts. His main practice is working on a broad range of civil matters including business litigation, employment matters of all kinds, land use and real estate litigation, and probate litigation. Additionally, Daniel has experience drafting corporate governance documents, real estate contracts, and creating affirmative action plans for government contractors.

THE First Circuit does not have a large body of Rule 702 case law, but it is the home of one of the leading wayward cases, *Milward v. Acuity Specialty Products Group*.[1] In *Milward*, the First Circuit reversed the district court's exclusion of plaintiffs' general causation expert, who relied upon a "weight of the evidence" methodology in opining that the plaintiff's exposure to benzene was the cause of plaintiff's acute promyelocytic leukemia ("APL"). The district court had excluded the evidence based on the lack of any epidemiologic evidence associating benzene exposure with APL and its conclusion that the other evidence proffered by the expert showed only that causation was biologically plausible.

The First Circuit reversed, relying on case law and reasoning that has now been squarely rejected by the amended Rule. Citing back to one of the cases specifically criticized during the Advisory Committee's deliberations,[2] the First Circuit held that the district court had overstepped its role as gatekeeper, because "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."[3] The First Circuit continued: "When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury."[4] In so holding, the First Circuit improperly shifted the burden of proof to defendants and disregarded the plaintiffs' burden under Rule 702(b) and 702(d).

This incorrect understanding of the burden imposed on the proponent of expert testimony under Rule 702 has continued to be cited in First Circuit case law, all of which insofar as they are based on such reasoning, should be considered overruled by the 2023 Amendments to Rule 702.[5]

In addition to the continued improper reliance on *Milward*, other cases in the First Circuit

[1] 639 F.3d 11 (2011).

[2] Smith v. Ford Motor Company, 215 F.3d 713, 721 (7th Cir. 2000).

[3] *Milward,* 639 F.3d at 23 (citing *Smith*, 215 F.3d at 718).

[4] *Id.*

[5] *See*, *e.g.*, Pritt v. John Crane Inc., 2022 WL 13843411, *4 (D. Mass. Aug. 3, 2022); Ionics, Inc. v. Massaro, 266 F. Supp.3d 461, 470 (D. Mass. 2017); E.E.O.C. v. Texas Roadhouse, Inc., 215 F. Supp.3d 140, 164 (D. Mass. 2016); Coffin v. AMETEK, Inc., 2020 WL 5552113, *8 (D. Maine Sept. 16, 2020); West v. Bell Helicopter Textron, Inc., 967 F. Supp.2d 479, 487 (D. N.H. 2013).

reflecting a misapplication of Rule 702 are set forth below.

Bricklayers and Trowel Trades Intern. Pension Fund v. Credit Suisse Securities (USA) LLC[6]

In this securities fraud action, the First Circuit Court of Appeals reviewed a district court's exclusion of an expert, who had conducted an event study in support of plaintiffs' damages model. Defendant argued that plaintiffs' expert had improperly used variables in his model that were obtained at random in violation, which was contrary to standard methodology and produced an abnormal result.[7]

The First Circuit concluded that the expert's failure to include a specific analysis of dummy variables used for the calculation should not discount an expert's opinion.[8] The court held that though the variables selected by the expert may have affected the outcome of the event study, this "may be a dispute that should be resolved by the jury."[9]

Though the First Circuit ultimately excluded the expert testimony for other reasons, the court's reasoning in deferring to the jury the question whether the expert's opinion reflected a reliable application of his methodology is contrary to Rule 702(d).

United States v. Jackson[10]

Defendant Laveneur Jackson appealed from his conviction for possessing a firearm as a prohibited person, alleging that the district court erred in admitting the expert testimony of Special Agent John Forte.[11] Agent Forte provided testimony about where the guns in question were likely manufactured. To provide that testimony, he relied on reference materials, including periodicals, books, online research, and notes gathered by other examiners.[12] Defendant Jackson moved to strike that expert testimony, arguing that it was not based on "scientific, technical, or other specialized knowledge" nor was the testimony the product of "reliable principles and methods."[13]

The First Circuit held that the district court did not abuse its discretion in admitting Forte's opinions. Quoting *Milward*, the court held that where the factual underpinning of an expert's opinion is weak, but the methods are otherwise found to be reliable, such an issue is "a matter affecting the weight and credibility of the

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[6] 752 F.3d 82 (1st Cir. 2014).
[7] *Id*. at 87.
[8] *Id*. at 93 (internal citations omitted).
[9] *Id.*
[10] 58 F.4th 541 (1st Cir. 2023).
[11] *Id.* at 548.
[12] *Id.*
[13] *Id.*

[expert's] testimony – a question to be resolved by the jury."[14]

The clarified language of the amended Rule 702 made clear that a judge (as gatekeeper) must determine, by a preponderance of the evidence, whether an expert's testimony is based on sufficient facts or data to be admissible. The basis for an expert's testimony is a question of admissibility for the judge and not a question of weight to be evaluated by the jury.

United States v. Pena[15]

Defendant was convicted by a jury in district court for the District of Massachusetts for possession of cocaine with intent to distribute and for possession of a firearm during or in relation to a drug crime. He was sentenced to 120 months imprisonment, which he appealed.

Plaintiff's argument on appeal was that the district court admitted the prosecutor's expert testimony concerning a fingerprint analysis without making any evaluation of the scientific standard used in reaching its conclusions. The First Circuit Court of Appeals held that there was no abuse of discretion by the district court allowing the expert's fingerprint testimony. In reaching that decision, the First Circuit noted the trial court had criticized the defendant's motion to exclude for relying solely on "one article from the Fordham Law Review, and that's not enough to carry the weight of the exclusion motion."[16]

With that analysis, the party seeking to exclude the evidence was improperly given the burden of proof to establish that an expert should not be admitted. Rule 702 quite clearly delineates that the party proffering the evidence has the burden of proof.

United States v. Sandoval[17]

Multiple defendants appealed from federal convictions stemming from their participation in the transnational criminal organization, "MS-13." Defendants alleged, among other things, that the district court abdicated its gatekeeping role in admitting the expert testimony of an FBI agent.[18] The expert testimony at issue was offered by the government to provide evidence of the history, structure, and organization of MS-13.[19]

Defendants moved to exclude the proposed testimony on the grounds that the agent's testimony was not based on sufficient facts and data and was not based a reliable application of the expert's

[14] *Id.* (quoting *Milward,* 639 F.3d at 11).
[15] 586 F.3d 105 (1st Cir. 2009).
[16] *Id.* at 110.
[17] 6 F.4th 63 (1st Cir. 2021).
[18] *Id.* at 83.
[19] *Id.*

methodology.[20] The district court denied the defendants' motion, finding that the agent's background and experience was sufficient for him to testify on the topics at issue. The court did not assess the reliability of the agent's methodology in reaching his opinions.[21] In the appeal, the First Circuit held that the district court properly fulfilled its gatekeeping role, and acted within its discretion, to admit the expert testimony even without a determination that the expert reliably applied his methodology to the facts of the case.[22] The court's decision appears to be, at least in part, based on the fact that the witness's expertise was based on experience rather than scientific observations.

Rule 702 (d) emphasizes that expert opinions "must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[23] Here, the First Circuit incorrectly suggests that this requirement does not apply when a witness's expertise is experience-based.

United States v. Shea[24]

Five defendants were convicted after a jury trial in the U.S. District Court for the District of New Hampshire on charges of conspiracy to commit robbery, operating a racketeering enterprise, carjacking, and firearm offenses. Four defendants were sentenced to life imprisonment, and each defendant appealed. At issue in the case was the admissibility of DNA evidence which tied defendants to the crime scene. There was a lengthy hearing assessing admissibility of the DNA expert's evidence, which was ultimately admitted.

The district court held that any flaws in the expert's application of an otherwise reliable methodology "went to weight and credibility and not to admissibility."[25] The First Circuit Court of Appeals upheld the district court's decision to allow the evidence in under this basis, holding that it did not constitute an abuse of discretion.[26]

This decision demonstrates an incorrect application of Rule 702's burden of proof.

Carmichael v. Verso Paper, LLC[27]

Plaintiff, a former employee, filed suit against Defendant, his

[20] *Id.* at 84.
[21] *Id.*
[22] *Id.*
[23] Fed. R. Evid. 702.
[24] 211 F.3d 658 (1st Cir. 2000).
[25] *Id*. at 668.
[26] *Id.*
[27] 679 F. Supp.2d 109 (D. Me. 2010).

former employer, claiming his termination violated state and federal law for disability discrimination. Defendant moved for summary judgment, arguing that plaintiff could not establish his ability to perform the essential functions of the position. Plaintiff submitted an expert report which opined on the plaintiff's ability to perform the essential functions of his position.

Defendant sought to exclude the expert report, arguing that the expert's testimony was not grounded in a scientific foundation required under Rule 702. The district court disagreed, allowing the expert's opinion and holding that "at trial, [defendant] is free to vigorously explore whether [expert's] opinions, both at the trial itself and at the deposition, are sufficiently well grounded to be persuasive."[28]

In rending that decision, the trial court did not conduct any analysis of the sufficiency or reliability of the expert's methodology. With that, the court shifted the burden of proof standard to the defendant, which was tasked with the obligation to disprove the foundation of the expert's opinions on cross examination.

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[28] *Id.* at 117.

The Second Circuit

By: Joshua K. Leader, Melanie Brother, Ryan Hersh, and Patrick Fitzmaurice

Joshua K. Leader is a partner at Leader Berkon Colao & Silverstein LLP in New York City. He manages a diverse range of litigation in areas including complex commercial, securities, product liability, toxic tort, entertainment, employment, and intellectual property actions in both state and federal courts across the country. Josh approaches litigation from a holistic perspective, assisting clients in meeting their business goals, either through strategic litigation decisions or through litigation avoidance efforts. He is an active member of the IADC's Toxic & Hazardous Substances Litigation and Rule 702 Sustainability Committees.

Melanie Brother is a litigation associate in the Philadelphia office of Leader Berkon Colao & Silverstein LLP. Her practice focuses on product liability and toxic tort defense and business and commercial litigation. She has extensive experience taking and defending depositions, conducting discovery and managing cases to settlement, arbitration and/or trial. Melanie is licensed to practice in New Jersey, Pennsylvania, and West Virginia.

Ryan Hersh is a litigation associate in the New York office of Leader Berkon Colao & Silverstein LLP. His practice focuses on product liability and commercial litigation in state and federal courts. He has experience in all phases of litigation, including discovery, motion practice, trial, and appeal.

Patrick Fitzmaurice was an associate in the Philadelphia office of Leader Berkon Colao & Silverstein LLP during the writing of this article. He is now a Director at Maron Marvel Bradley Anderson & Tardy.

A. Second Circuit Court of Appeals

THE Second Circuit's nearly 20-year-old decision in *McCullock v. H.B. Fuller*[1] appears to be the source of many of those decisions that run afoul of Federal Rule of Evidence 702's express mandates.

In *McCullock*, the plaintiff brought negligence and strict-liability claims against a hot-melt glue manufacturer for an alleged throat injury sustained from breathing fumes from the manufacturer's hot-melt glue. Over the manufacturer's objections, the court permitted the plaintiff to offer testimony from a medical doctor on causation. The Second Circuit affirmed:

> Disputes as to the strength of [the doctor's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.[2]

In doing so, the Second Circuit misapplied Rule 702. By deferring the decision on admissibility—including apparent issues with methodology—the court failed to perform its role as a gatekeeper. Unfortunately, it also laid the foundation for subsequent decisions to similarly misapply Rule 702.

In the following years, the Second Circuit continued to misapply Rule 702 when considering the admissibility of proffered expert testimony. In *Borawick v. Shay*,[3] a tort action involving alleged child abuse, the court cited *Daubert* for the proposition that "there should be a presumption of admissibility of [scientific] evidence."[4] The Second Circuit continued misapplying Rule 702 in *Boucher v. U.S. Suzuki Motor Corporation*,[5] where it permitted a proffered vocational expert in a products liability action brought by an injured motorcyclist after falling from a motorcycle. It noted that "[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony."[6]

While the Second Circuit has at times attempted to course-correct

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[1] 61 F.3d 1038 (2d Cir. 1995).
[2] *Id.* at 1044 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 2798 (1993).
[3] 68 F.3d 597 (2d Cir. 1995).
[4] *Id.* at 610.
[5] 73 F.3d 18 (2d Cir. 1996).
[6] *Id.* at 21 (internal citations omitted).

the problematic language found in these cases, it has all too often followed them.[7] District courts have done the same. Below is a survey of some of those courts' decisions.

BPP Wealth v. Weiser Capital Management[8]

In an action for breach of contract, conversion, civil conspiracy, trademark infringement and unjust enrichment, the Second Circuit affirmed the district court's decision to admit proffered expert testimony regarding damages over objections to the expert's methodology.

Although the court correctly noted the district court's "broad discretion" in deciding whether "to admit expert testimony," the Second Circuit incorrectly explained that "[w]hile expert testimony should be excluded if it is 'speculative or conjectural,' or based on assumptions that are 'so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison,' 'other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[9]

This is an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the Court.

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[7] *Compare* Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002) ("Thus, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.") *and* Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2d Cir. 2005) ("After the *McCullock* court reviewed a number of factors underlying the opinion of the plaintiff's expert, the court stated that '[d]isputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.' Ruggiero is over-reading that passage.") *with* Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 214 (2d Cir. 2009) (noting that "contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony") *and* Nimely v. City of N.Y., 414 F.3d 381 (2d Cir. 2005) (noting a "presumption of admissibility" for expert testimony).

[8] 623 F. App'x 7 (2d Cir. 2015).

[9] *Id.* at 10 (internal citations omitted).

B. District Court Cases

AngioDynamics, Inc. v. C.R. Bard, Inc.[10]

AngioDynamics involved a causation and damages expert in an antitrust action. Although the Court ultimately decided to exclude the expert's testimony due to faulty "benchmarking analysis," it cited the following as guidance for its decision – "the question whether plaintiffs have met their burden of proving comparability should be left to the trier of fact to resolve because comparability challenges generally involve weighing facts"[11] and "[e]ven if the data relied on by the expert is 'imperfect, and more (or different) data might have resulted in a 'better' or more 'accurate' estimate in the absolute sense, it is not the district court's role under Daubert to evaluate the correctness of facts underlying an expert's testimony.'"[12]

Under Rule 702, the court failed to fulfill its responsibility for deciding if the underlying factual assumptions made by the expert were sufficient based upon a preponderance of the evidence. The credibility of the information may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB[13]

In a bench trial of a breach of contract action regarding home equity loans, in which the court evaluated a damages expert with specialties in loans, the court stated that "'*[p]articularly in a bench trial*, [v]igorous cross-examination, presentation of contrary evidence, and careful ... [attention to] the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[14]

The manner of trial – bench or jury – has no bearing on the proper application of Rule 702. For either, the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC[15]

A merchandizing company sued an estate seeking declaratory judgment that products did not infringe intellectual property. The estate brought a counterclaim alleging false endorsement, trademark infringement, dilution, and interference with prospective economic advantage, and proffered

[10] 537 F. Supp.3d 273 (N.D.N.Y. 2021).
[11] *Id.* at 342.
[12] *Id.* at 338.
[13] 920 F. Supp.2d 475 (S.D.N.Y. 2013).
[14] *Id.* at 502 (emphasis added).
[15] 364 F. Supp.3d 291 (S.D.N.Y. 2019).

an expert regarding consumer confusion.

The court held that "'[a] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith. . . . [O]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[16]

This is an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard for admissibility is not bad faith, but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

In re *AXA Equitable Life Insurance Company COI Litig.*[17]

The court was presented with actuarial experts in a class action dispute over life insurance policies. The court performed an analysis of whether the experts offered improper legal conclusions – and excluded those portions – but as to questions of proper methodology for the experts' calculations, the court deferred those questions to the jury, stating: "[a]s to the other issues raised in Plaintiffs' motion, the Court concludes that they go to the weight, not the admissibility, of the experts' testimony or raise limitations on their testimony that may adequately be policed through objections at trial."[18]

The court incorrectly applied Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

B & R Supermarket v. Mastercard International[19]

The United States District Court for the Eastern District of New York cited to "liberal admissibility standards" in incorrectly permitting a proffered plaintiff's expert to testify regarding class certification and damages in a case involving federal and state antitrust violations.

Incorrectly addressing the standard, the court noted "[n]evertheless, 'in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or

[16] *Id.* at 324 (internal citations omitted).
[17] 595 F. Supp.3d 196 (S.D.N.Y. 2022).
[18] *Id.* at 255.
[19] No. 17CV02738MKBJO, 2021 WL 234550 (E.D.N.Y. Jan. 19, 2021).

methodology will warrant exclusion.'"[20]

The court misapplied Rule 702 on the basis of "liberal admissibility standards." Such a standard is inconsistent with Rule 702.[21]

Bernstein v. Cengage Learning, Inc.[22]

Bernstein was a class action alleging violation of publishing agreements for failure to pay royalties in which plaintiff proffered an expert regarding the framework for royalty allocation and damage calculation. The court noted that "[t]he Second Circuit has recognized the 'principle that Rule 702 embodies a liberal standard of admissibility for expert opinions. The federal courts employ 'a presumption of admissibility of expert evidence,' such that 'the rejection of expert testimony is the exception rather than the rule. Notwithstanding that presumption, however, '[t]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied[.]'"[23]

The court continued:

> Nevertheless, the Second Circuit has recognized that a district court's inquiry under *Daubert* is limited, and '[a] minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible.' The Court 'should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions. '"This limitation on when evidence should be excluded accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.' While 'vigorous cross-examination, presentation of

[20] *Id.* at *10 (quoting *In re* Fosamax Prods. Liab. Litig., 645 F. Supp.2d 164, 173 (S.D.N.Y. 2009)).

[21] The "liberal standard of admissibility" or similar language is used in numerous other cases in the Circuit, conflicting with Rule 702. *See, e.g., In re* Zyprexa Prod. Liab. Litig., 489 F. Supp.2d 230, 282 (E.D.N.Y. 2007); Billone v. Sulzer Orthopedics, Inc., No. 99-CV-6132, 2005 WL 2044554, at *3 (W.D.N.Y. Aug. 25, 2005); MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, No. 09 Civ. 3255, 2012 WL 2568972, at *15 (S.D.N.Y. July 3, 2012).

[22] No. 19CIV7541ALCSLC, 2023 WL 6303424 (S.D.N.Y. June 9, 2023).

[23] *Id.* at *9 (internal citations omitted).

> contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,' 'a trial court should not abandon its gatekeeping role and rely only upon cross-examination to expose any flaws in a proposed expert's testimony where the expert's methodology is untestable.' Ultimately, under the *Daubert* analysis, the Court has the discretion 'needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact.[24]

While this case cites many of the correct principles of application of Rule 702, it also incorrectly applies Rule 702 because a presumption of admissibility or liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702.

Brush v. Old Navy LLC[25]

This civil rights action involved a forensic psychologist seeking to testify about plaintiff's alleged PTSD from an alleged illegal search. Defendants challenged the manner in which the expert diagnosed the Plaintiff with PTSD. The court permitted the expert testimony on the topic of PTSD and held that "[a]ny deficiencies in those opinions may be adequately addressed through rigorous cross-examination."[26]

The court misapplied Rule 702 as the court, not the jury, must analyze whether an expert's methodology supports the conclusions.

BS BIG V, LLC v. Philadelphia Indemnity Insurance Co.[27]

Plaintiffs alleged an insurance company breached an insurance policy by refusing to indemnify plaintiffs for water damage to insured property. In evaluating a challenge to an expert regarding cause of property damage, the court noted that "'[a]lthough a district court should admit expert testimony only where it is offered by a qualified expert and is relevant

[24] *Id.* at *10 (internal citations omitted).

[25] No. 2:21-CV-00155, 2023 WL 5311434 (D. Vt. Aug. 17, 2023).

[26] *Id.* at *6.

[27] No. 19CIV4273GBDSLC, 2022 WL 4181823, at *4 (S.D.N.Y. Sept. 13, 2022).

and reliable, exclusion remains the exception rather than the rule.'"[28]

Again, this is an incorrect application of Rule 702 because a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702.

Cates v. Trustees of Columbia University in City of New York[29]

Participants in university defined contribution retirement plans alleged breach of fiduciary duties under ERISA. The court evaluated a challenge to experts regarding recordkeeping fees, selection of a recordkeeper, and investment decisions and noted that "'[t]here is a presumption that expert testimony is admissible ... and the rejection of [such] testimony is the exception rather than the rule.'"[30]

Further, "'in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion.'"[31]

The court continued: "While the Court is mindful of the many defects that Defendant contends exist in the opinions offered by Plaintiffs' experts, any defects in Minnich's methodology also go to the weight to be given to his testimony. ('[F]aults in [the] use of ... [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.')"[32]

The court's reasoning misapplied Rule 702 in various ways: such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702; and there is not a presumption of admissibility relieving the court of its role as gatekeeper if there is fault in the use of a methodology.

Cruz v. Kumho Tire Co.[33]

In this personal injury action, the court evaluated a challenge to engineers testifying about tire

[28] *Id.* at *4 (internal citations omitted).
[29] No. 116CV06524GBDSDA, 2019 WL 8955333 (S.D.N.Y. Oct. 25, 2019), *report and rec. adopted*, No. 16CIV6524GBDSDA, 2020 WL 1528124 (S.D.N.Y. Mar. 30, 2020).
[30] *Id.* at *6 (internal citations omitted).
[31] *Id.* (internal citation omitted).
[32] *Id.* at *12 (internal citation omitted).
[33] No. 8:10-CV-219 MAD/CFH, 2015 WL 2193796 (N.D.N.Y. May 11, 2015).

design. The court noted that "disputes regarding the nature and strength of an expert's credentials, an expert's use or application of his or her methodology, or the existence or number of supporting authorities for an expert's opinion go to the weight, not the admissibility of the expert's testimony.... [A]rguments regarding [the expert's] qualifications constitute the type of 'quibble' over an expert's experience, academic training, and other alleged shortcomings that the Second Circuit has held go to the weight and credibility of an expert's testimony instead of the admissibility of his opinions."[34]

Once again, this was an incorrect application of Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Depascale v. Sylvania Electric Products, Inc.[35]

This Eastern District of New York case involved a personal injury claim alleging exposure to chemicals and solvents at a worksite with a proffered expert regarding causation of injuries from exposure to chemicals.

In its decision, the court held that "[w]hen interpreting the requirements under *Daubert* and its progeny, the Second Circuit has noted that: '[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[36]

The court improperly applied Rule 702 in setting forth an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the court.

Engler v. MTD Products, Inc.[37]

The United States District Court for the Northern District of New York permitted a proffered expert

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[34] *Id.* at *6 (internal citations and quotations omitted).

[35] No. CV 07-3558, 2009 WL 10708730 (E.D.N.Y. Oct. 22, 2009).

[36] *Id.* at *3 (internal citation omitted).

[37] No. 13-CV-575 CFH, 2015 WL 900126, at *7 (N.D.N.Y. Mar. 2, 2015).

in a products liability action against a lawnmower manufacturer to testify regarding the sufficiency of any warnings and the existence of a manufacturing defect. The court called "well settled" the "presumption of admissibility of evidence" under Rule 702.[38]

However, a "presumption of admissibility" is inconsistent with Rule 702.

Feliciano v. CoreLogic Saferent, LLC[39]

In reviewing a challenge to a proffered defense expert on the collection of housing data in a class action regarding an alleged failure to ensure the accuracy of bulk tenant data before selling to landlords, the court denied the motion opining:

> While *Daubert* and its progeny assigns the district court a gatekeeping function in policing admission of expert testimony, exclusion remains 'the exception rather than the rule':
>
> > 'Although a district court should admit expert testimony only where it is offered by a qualified expert and is relevant and reliable, exclusion remains 'the exception rather than the rule,' '[T]he traditional and appropriate means of attacking shaky but admissible evidence' is not exclusion, but rather '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'
> >
> > 'Under *Daubert*, expert testimony should be excluded

[38] *Id.* (citing *Borawick*, 68 F.3d at 610. This "presumption" language unfortunately appears repeatedly in the caselaw. *See, e.g.,* Powell v. Schindler Elevator Corp., No. 3:14cv579 (WIG), 2015 WL 7720460, at *2 (D. Conn. Nov. 30, 2015); Advanced Fiber Techs. (AFT) Tr. v. J&L Fiber Servs., Inc., No. 1:07-CV-1191, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015); Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp.3d 78, 97 (S.D.N.Y. 2023) ("In the Second Circuit, there is 'a presumption of admissibility of evidence.'") (citation omitted); Crawford v. Franklin Credit Mgt. Corp., 08-CV-6293 (KMW), 2015 WL 13703301 (S.D.N.Y. Jan. 22, 2015); S.E.C. v. Yorkville Advisors, LLC, 305 F. Supp.3d 486, 503-04 (S.D.N.Y. 2018); *Cates*, No. 16CIV6524GBDSDA, 2020 WL 1528124 (S.D.N.Y. Mar. 30, 2020).

[39] No. 17 CIV. 5507, 2020 WL 6205689 (S.D.N.Y. June 11, 2020).

> only if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison.... Absent this degree of unreliability, any other contentions that the assumptions are unfounded go to the weight, not the admissibility of the testimony.'[40]

The court's reasoning runs counter to Rule 702 because such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Frederick v. Deco Salon Furniture, Inc.[41]

Plaintiff proffered an expert on safety and design in support of allegations of injury from design, manufacture, sale, and distribution of a chair.

The court reasoned that "Rule 702 'embodies a liberal standard of admissibility for expert opinions.'"[42] It further noted that "[t]he Second Circuit has clarified that '[a]lthough expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.' Generally, '[a] district court has discretion under Federal Rule of Evidence 703 'to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony.'"[43]

Additionally, the court held that "'[in] deciding whether a step in an expert's analysis is unreliable, the

[40] *Id.* at *1–*2 (internal citations and quotations omitted).

[41] No. 3:16-CV-00060 (VLB), 2018 WL 2750319 (D. Conn. Mar. 27, 2018).

[42] *Id.* at *2 (internal citations omitted).

[43] *Id.* at *5 (internal citations omitted).

district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.' However, in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion."[44]

This case presents an incorrect application of Rule 702 because such a liberal standard of admissibility is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "unrealistic" or "serious flaws" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Gem Financial Services, Inc. v. City of New York[45]

In this §1983 and state civil rights case brought by store and owner against City of New York, the court was presented with a challenge to an expert on lost profits and noted that "expert testimony should be excluded as unreliable if the testimony 'is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or [is] in essence an apples and oranges comparison.' Other deficiencies in the expert's assumptions go to the testimony's 'weight, not ... admissibility.'"[46]

This case is another improper application of Rule 702 because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Grajeda v. Vail Resorts Inc.[47]

Biomechanical engineers were proffered as experts in a personal injury lawsuit. The court held that "[u]nder *Daubert,* the accuracy of Dr. Fisher's underlying data goes to weight, not admissibility, of his [photogrammetry] testimony. They

[44] *Id.* (internal citations omitted).
[45] No. 13CV1686RPKRER, 2022 WL 409618 (E.D.N.Y. Feb. 10, 2022).
[46] *Id.* at *8 (internal citations omitted).
[47] No. 2:20-CV-00165, 2023 WL 4803755 (D. Vt. July 27, 2023).

do not contain obvious inaccuracies suggestive of bad faith. To the extent Plaintiff wishes to contest the accuracy of Dr. Scher's measurements or assumptions, he may do so on cross-examination."[48]

This is an incorrect application of Rule 702 because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Holick v. Cellular Sales of New York, LLC[49]

Individuals sued employer for violations of the Fair Labor Standards Act and New York State Labor Law. The defendant proffered an expert regarding filing of tax returns. The district court stated that "'[n]onetheless, the admissibility of expert testimony should be viewed within the context of the entire rules of evidence and the presumption of admissibility of evidence.' 'Indeed, doubts about the usefulness of an expert's testimony should be resolved in favor of admissibility.'"[50]

The court misapplied Rule 702 as a presumption of admissibility is inconsistent with Rule 702.

Hutch Enterprises, Inc. v. Cincinnati Insurance Co.[51]

In an action involving an alleged breach of a commercial insurance policy, the district court denied a challenge to a proffered roofing expert, holding that "challenges to whether [an expert's] opinions were properly based on a complete picture of the condition of the roofs" in insurance coverage actions "implicate the weight that the jury may afford his opinions and can be explored on cross-examination."[52]

The court was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. The credibility of the information relied upon may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Junger v. Singh[53]

The Western District of New York reviewed challenges to expert witnesses, an economist and a cardiologist, in a medical malpractice and wrongful death action, and denied motions to preclude. In doing so, the court held that "[u]nless the information or

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[48] *Id.* at *9 (internal quotations omitted).
[49] No. 1:12-CV-584 (DJS), 2019 WL 13175461 (N.D.N.Y. Sept. 30, 2019).
[50] *Id.* at *2 (internal citations omitted).
[51] 16-cv-01010, 2019 WL 5783574 (W.D.N.Y. Aug. 12, 2019).
[52] *Id.* at *5.
[53] 514 F. Supp.3d 579 (W.D. N.Y. 2021).

assumptions that plaintiff's expert[ ] relied on were 'so unrealistic and contradictory as to suggest bad faith,' inaccuracies in the underlying assumptions or facts do not generally render an expert's testimony inadmissible…. Expert testimony should not be rejected simply because the conclusions reached by the witness seem subjectively improbable.... It is [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [that] are the traditional and appropriate means of attacking shaky but admissible evidence"[54]

Although credibility of information cited by the expert may be attacked on cross-examination, the factual assumptions which form the basis of the expert's opinion are also being challenged. Therefore, an analysis of these facts is a question of admissibility for a judge to determine by a preponderance of the evidence.

Lassen v. Hoyt Livery, Inc.[55]

Plaintiff proffered an expert regarding damages owed to class based on sample size in class action for violation of Fair Labor Standards Act and Connecticut Minimum Wage Act. The district court explained that "'[i]t is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions. Disputes as to the strength of [a proposed expert witness's] credentials, faults in his ... methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.'"[56]

The court also opined that "[a] trial court should 'exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith.' Otherwise, '[o]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.' Allegations that the factual basis for an expert's testimony are flawed or imperfect 'may diminish the probative value' of the expert testimony, but do not demand preclusion."[57]

This is an incorrect application of Rule 702 because such a liberal standard of admissibility is inconsistent with Rule 702. This case is also an incorrect application of Rule 702 because faults in the use of methodology go to admissibility; the court has a gatekeeper role to perform. This case is also an improper application of Rule 702

[54] *Id.* at 589 (internal citations and quotations omitted).

[55] No. 13-CV-1529 (VAB), 2016 WL 7165716 (D. Conn. Dec. 8, 2016).

[56] *Id.* at *7 (internal citations omitted).

[57] *Id.* at *8 (internal citations omitted).

because it creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

Lavalette v. Ion Media Networks, Inc.[58]

Employee brought action alleging retaliation against employer under New York City Human Rights Law, New York False Claims Act, and breach of contract. The court was presented with a challenge to plaintiff's expert regarding stock appreciation rights. In permitting certain testimony, the court stated: "'[A] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith.' '[O]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'"[59]

This is also an improper application of Rule 702 because it once again creates an incorrect standard of "unrealistic" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not bad faith but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence to be determined by the judge.

National Coalition on Black Civic Participation v. Wohl[60]

A voting rights organization brought a Voting Rights Act action against a lobbyist and political operative alleging they sent robocalls containing false information. In assessing the admissibility of testimony from a licensed investigator, court found that, in the Second Circuit, there is "a presumption of admissibility of evidence."[61]

A presumption of admissibility is inconsistent with Rule 702.

Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.[62]

A residential-mortgage-backed securities trustee brought actions against a loan servicer. Plaintiff's proffered expert, a former executive at Freddie Mac, sought to testify concerning uncured

[58] No. 16 CIV. 7286 (KPF), 2019 WL 3409899 (S.D.N.Y. July 29, 2019).
[59] *Id.* at *17 (internal citations omitted).
[60] 661 F. Supp.3d 78 (S.D.N.Y. 2023).
[61] *Id.* at 97.
[62] 574 F. Supp.3d 197 (S.D.N.Y. 2021).

document defects. In permitting the testimony, the court held that the moving party's "arguments that there are other, more appropriate comparators, or challenges to [expert's] selection of the GSE servicing standards as a 'prudent' baseline, are better addressed through competing expert testimony and cross-examination for the jury to weigh."[63]

The court misapplied Rule 702 in deferring to the jury the question of whether an expert applied reliable methodology to the facts of the case.

Pike Co., Inc. v. Universal Concrete Products, Inc.[64]

In a contractor and subcontractor construction dispute with claims of breach of contract and improper encumbrance with mechanic's lien and counterclaims of breach of contract, misappropriation of trade secrets, and tortious interference, the court addressed defendant's motion to strike plaintiff's proffered damages expert. In denying the motion, the court held: "[d]isputes as to the strength of an expert's credentials, faults in the use of a methodology, or lack of textual authority for an opinion go to 'the weight, and not the admissibility' of an expert's testimony."[65] Further, "[a]rguments about the assumptions and data underlying an expert's testimony go to the weight, rather than the admissibility, of that testimony.'"[66]

The court misapplied Rule 702 because faults in the use of methodology go to admissibility, not to weight; the court has a gatekeeper role to perform.

POM Wonderful LLC v. Organic Juice USA, Inc.[67]

In an action for selling adulterated pomegranate juice and counterclaims for false advertising, the reports of a proffered expert on consumer surveys were permitted. In so holding, the court stated that any "methodological flaws alleged in [the expert's] report go to the weight to be given to the surveys, not their admissibility."[68]

The court misapplied Rule 702. It was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the

[63] *Id.* at 205.
[64] 524 F. Supp.3d 164 (W.D.N.Y. 2021).
[65] *Id.* at 176 (citing United States v. American Exp. Co., No. 10-CV-4496(NGG)(RER), 2014 WL 2879811, at *2 (E.D.N.Y. June 24, 2014)).
[66] *Id.* at 176 (internal citations omitted).
[67] 769 F. Supp.2d 188 (S.D.N.Y. 2011).
[68] *Id.* at 200.

underlying factual analysis for purposes of admissibility.

Romero v. Irving Consumer Prod., Inc.[69]

In a personal injury action, the district court denied a motion to preclude defense trucking and transportation expert, finding that "[e]xpert testimony should be excluded where it is 'speculative or conjectural,' but arguments that the expert's assumptions 'are unfounded go to the weight, not the admissibility, of expert testimony'" and concluded that "[u]ltimately, the factfinders will have to weigh the credibility of both the lay and expert witnesses and come to their own conclusions as to whether [defendant] acted negligently."[70]

Although the court assessed the question of the expert's reliance on facts in dispute, and determined the credibility of the witnesses should be weighed by the jury, it misapplied Rule 702 in deferring the question of admissibility to the jury when it failed to determine whether the expert's opinion was based on sufficient facts by a preponderance of the evidence.

[69] 664 F. Supp.3d 255 (N.D. N.Y. 2023).
[70] *Id.* at 265, 266.

Rutherford v. City of Mount Vernon[71]

Rutherford involved alleged Fourth Amendment rights violations, false arrest, malicious prosecution, among other claims, arising from the execution of a search warrant. Plaintiffs' law enforcement expert's opinions were permitted even though not based on comparative data.

The court reasoned that "'[d]isputes as to the strength of [an expert's] credentials, faults in his use of different etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.'"[72]

The court misapplied Rule 702. Whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

Scott v. Chipotle Mexican Grill, Inc.[73]

Plaintiffs, employees of the restaurant chain, brought a collective and class action against an employer alleging violations of the Fair Labors Standards Act and

[71] No. 18 CIV. 10706 (AEK), 2023 WL 6395375 (S.D.N.Y. Sept. 29, 2023).
[72] *Id.* at 24 (quoting *McCullock,* 61 F.3d at 1044).
[73] 315 F.R.D. 33 (S.D.N.Y. 2016).

state laws. The court evaluated a labor studies expert, economist and "restaurant analyst." In addressing the standard for expert testimony, the court held that "[i]n light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the district court finds 'serious flaws in reasoning or methodology.'"[74] The court further explained that "[o]therwise, if an expert's testimony falls within 'the range where experts might reasonably differ,' the duty of determining the weight and sufficiency of the evidence on which the expert relied lies with the jury, rather than the trial court."[75]

This case is an incorrect application of Rule 702. Whether an expert applied reliable methodology to the facts of the case is for the court, not the jury, to decide. In addition, a liberal standard of admissibility is inconsistent with Rule 702.

S.E.C. v. Badian[76]

In a civil enforcement action brought by the SEC against two defendants, alleging they conspired to violate securities laws, experts in banking and securities were proffered. The court explained that "Badian challenges Glosten and Jones' report as unreliable because [each] admitted to having concerns about 'discrepancies' in the raw data that they were asked to analyze. . . . Defendants are free at trial to challenge the strength of Glosten and Jones' analysis as a result of these modifications by, for example, conducting vigorous cross-examination . . . ."[77]

The court misapplied Rule 702 since it was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

S.E.C v. Lek Securities Corp.[78]

In a securities fraud action against broker-dealer, the SEC sought to exclude defendant's proffered expert witness, an institutional trading expert with 37

[74] *Id.* at 43 (citing *In re Fosamax,* 645 F. Supp.2d at 173).
[75] *Id.*
[76] 822 F. Supp.2d 352 (S.D.N.Y. 2011).
[77] *Id.* at 364.
[78] 370 F. Supp.3d 384 (S.D.N.Y. 2019).

years' experience. Although the court excluded some of the testimony because it was "just flat out wrong," it then, despite describing the expert's analysis as "misleading and unreliable," permitted portions of the report as "shaky but admissible evidence best addressed by cross examination."[79]

Here, too, the court misapplied Rule 702 since it was responsible for deciding if the underlying factual assumptions made by the expert and his methodology were sufficient based on a preponderance of the evidence. Credibility may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Sitts v. Dairy Farmers of America, Inc.[80]

This action, involving alleged antitrust claims under the Sherman Act in the dairy industry, addressed admissibility of a proffered economist. The court held that "[t]his type of challenge goes to the weight of [the expert]'s opinion rather than its admissibility as it pertains only to whether [the expert]'s regression analysis is sufficiently detailed and illustrative to yield persuasive conclusions."[81]

This is another example of improper application of Rule 702. The court was responsible for deciding if the underlying factual assumptions made by the expert were sufficient based on a preponderance of the evidence. The credibility of the information relied upon may be attacked on cross-examination, but the court must assess the underlying factual analysis for purposes of admissibility.

Tedone v. H.J. Heinz Co.[82]

Plaintiff, allegedly injured when opening a glass bottle of ketchup, brought a personal injury action against manufacturer and hotel. Defendant moved to exclude plaintiff's expert on the source of the bottle's fracturing on the grounds that the witness did not rely on sufficient facts, use reliable methods, or apply principals to the facts of the case. In permitting the testimony, the court held: "Ultimately, the Defendant's challenge to [expert's] qualifications and methods go to the weight of his testimony, not its admissibility."[83]

The court failed to properly apply Rule 702. Whether an expert applied reliable methodology to the

[79] *Id.* at 414.

[80] 2:16-cv-00287, 2020 WL 3467993 (D. Vt. June 24, 2020).

[81] *Id.* at *10.

[82] 686 F. Supp.2d 300 (S.D.N.Y. 2009).

[83] *Id.* at 310.

facts of the case is for the court, not the jury, to decide.

51 Webster St., Inc. v. Atlantic Richfield Co.[84]

Plaintiff sued a former gas station operator for remediation costs. Motions by both parties to exclude the other side's experts (in environmental forensic chemistry and geology) were denied. In reaching its determination, the court reasoned that "[i]n light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the court finds 'serious flaws in reasoning or methodology.'"[85]

This case is an incorrect application of Rule 702 because such a liberal standard of admissibility in which exclusion is the exception is inconsistent with Rule 702. This case is also an improper application of Rule 702 because it creates an incorrect standard of "serious flaws" as the benchmark for exclusion, giving the impression that anything short of that should be admissible. The standard is not "serious flaws" but rather that the sufficiency of the basis for and the reliable application of principles and methodology of the expert's opinion is demonstrated by a preponderance of the evidence.

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[84] No. 16-CV-468-MJR, 2019 WL 76573 (W.D.N.Y. Jan. 2, 2019).

[85] *Id.* at *2 (internal citation omitted).

The Third Circuit

By: Peter J. Pizzi and Christine P. Clark

Peter J. Pizzi is a founding member of, and Christine P. Clark is an associate with, Walsh Pizzi O'Reilly Falanga LLP, a 33-lawyer majority women-owned firm with offices in Newark, New York City, and Philadelphia.

Peter is a trial lawyer with decades of experience in commercial litigation, business valuation and close corporation disputes, the defense of class actions, and healthcare and information law. He holds the New Jersey Supreme Court's Certified Civil Trial Lawyer designation and the CIPP/US certification. Currently the Defense Counsel Journal's Editor-Elect, Peter has served in various leadership positions within the IADC and the New York State Bar Association, and regularly participates in CLE programs and writes on information privacy, data security, and eDiscovery topics. Awarded the Best Lawyer® recognition, Peter was the recipient of the IADC's 2022 Yancey Award for excellence in the Defense Counsel Journal writing for his article "Social Media Immunity in 2021 and Beyond: Will Platforms Continue to Avoid Litigation Exposure Faced by Offline Counterparts." He is a graduate of Bowdoin College and Fordham Law School.

Christine focuses her practice on business and commercial litigation. Christine earned her undergraduate business degree from the University of Notre Dame and her law degree from Seton Hall University School of Law. In 2023, Christine completed a one-year judicial clerkship with the Honorable Stuart A. Minkowitz, Assignment Judge, Superior Court of New Jersey, Law Division, Morris County.

Cote v. U.S. Silica Co.[1]

A WORKER at a rail transfer yard who suffered the partial amputation of his hand brought this product liability action against the manufacturer of the machine that injured the worker, the manufacturer's distributor, the owner of the quarry where the sand that was transferred originated, and the company that transported the sand from the quarry to the worksite. Plaintiff proffered an engineering expert, Thomas Eagar, to establish that the practices by which sand was loaded into railcars increased the risk of harm to a worker in plaintiff's position. Eagar opined that the facts established that the sand loading process caused or substantially contributed to plaintiff's injury.

Defendants challenged the reliability of Eagar's opinions, arguing that the opinions were inadmissible because based on erroneous factual assumptions. Upon analyzing this argument, the court held that underlying factual assumptions affected the weight, not the admissibility, of Eagar's opinions.[2]

The court's finding is inconsistent with the current version of Rule 702 because the 2023 amendments clarified that the analysis of Eagar's factual opinions is a question of admissibility. Although the credibility of facts cited by the expert may be attacked on cross-examination, a judge must first determine, as gatekeeper, the admissibility of an expert's factual assumptions by a preponderance of the evidence.

Feit v. Great-West Life & Annuity Insurance Co.[3]

The beneficiary of a life insurance policy sued the insurer challenging the denial of accidental death benefits. The plaintiff proffered a cardiologist, Dr. Arthur P. Fisch, M.D., to opine that plaintiff's cardiac condition did not contribute to his death following a car accident. Defendant argued that Dr. Fisch's testimony should be excluded because, although it criticized the finding that plaintiff's cardiac condition caused his death, it did not supply an alternative cause of death. Therefore, defendant claimed that Dr. Fisch's testimony was inadmissible because it failed to resolve the ultimate issue in this action.

The court found that Dr. Fisch's testimony was admissible, noting that expert opinions are not

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[1] 572 F. Supp.3d 84, 117 (M.D. Pa. 2021).
[2] *Id.* at 117.
[3] 460 F. Supp.2d 632 (D. N.J. 2006).

inadmissible because they may contain flaws, nor are they excludable because they provide testimony regarding only one aspect of an action but do not prove the whole case. Instead, the court found that these vulnerabilities affect the weight of expert testimony, not its admissibility.[4]

The court's finding conflicts with Rule 702 because the court's gatekeeper role requires an admissibility determination where flaws in the expert's testimony are identified by opposing parties.

Ford v. Ford Motor Co.[5]

A vehicle caught fire in a garage. The plaintiff sued the manufacturer alleging a design defect, a manufacturing defect, and a failure to warn. The plaintiff offered fire investigator Michael Zazula as an expert to testify to the cause of the fire. Defendants asked the court to exclude Zazula's testimony, arguing that Zazula was unqualified and that his opinions were speculative and unreliable.

In analyzing defendants' arguments, the court found that any concerns arising from the alleged deficits in Zazula's methodology could be raised on cross-examination, as they went to the weight of his testimony, not its admissibility.[6]

The court's holding represents an incorrect application of Rule 702, because the reliability of an expert's opinion is a question of admissibility which the court must establish by a preponderance of the evidence.

In re *Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Litig.*[7]

The plaintiffs in this talcum powder product liability action against the manufacturer claimed that prolonged perineal use of the product caused ovarian cancer. Both parties proffered many expert witnesses on various scientific issues related to, *inter alia*, causation and testing of talcum powder for asbestos. In its analysis of whether to exclude each expert witness, the court cited to *Feit*, finding that "an expert opinion is not inadmissible because it may contain flaws, nor is it excludable because it provides testimony regarding only one facet or aspect of an action but does not prove the whole case; such vulnerabilities affect the weight of the testimony, not its admissibility."[8] The court even found that the flaws of experts may be tested on cross-examination and do not warrant the exclusion of an expert.

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[4] *Id.* at 641-642.
[5] 311 F. Supp.3d 667 (D. N.J. 2017).
[6] *Id.* at 679.
[7] 509 F. Supp.3d 116 (D. N.J. 2020).
[8] *Id.* at 131.

As noted in the analysis of *Feit*, the court's finding is inconsistent with Rule 702 because courts have a role as gatekeeper to make an admissibility determination regarding the flaws of an expert's testimony and cannot leave analysis of an expert's reliability as a question of weight for cross-examination and, ultimately, for jury resolution.

In re *Wellbutrin XL Antitrust Litig.*[9]

In this Sherman Act and state antitrust and consumer protection action against producers and distributors of a branded antidepressant, the defendants proffered Dr. Martin J. Adelman as an expert in patent litigation. The plaintiffs challenged the reliability of Dr. Adelman's opinions, arguing that he should be excluded. The court, in a footnote, found that plaintiffs' challenges went to the weight of Dr. Adelman's testimony, not its admissibility.[10]

This court's holding appears to be an incorrect application of Rule 702, because the reliability of an expert's opinion is a question of admissibility, which a judge must establish by a preponderance of the evidence.

In re *Zoloft (Sertraline Hydrochloride) Products Liability Litig.*[11]

The mothers of children born with birth defects brought this product liability action against the manufacturer of a prescription antidepressant. The plaintiffs proffered a statistician, Dr. Nicholas Jewell, as an expert witness on general causation. Before this matter reached the Third Circuit, the district court criticized Dr. Jewell's opinions, finding that in using a study he had drawn a different conclusion from the study than had its authors. The Third Circuit stated that this conclusion by the district court was not necessarily justified and was an inquiry more appropriately left to the jury.

In this respect, the Third Circuit incorrectly applied Rule 702(d) which requires judges to analyze whether an expert's methodology supports their conclusions and cannot leave such determinations to the jury.

Krys v. Aaron[12]

In this multi-district securities litigation, the defendants moved to strike the opinion of plaintiff's

[9] 133 F. Supp.3d 734, 766 (E.D. Pa. 2015), *aff'd sub nom. In re* Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132 (3d Cir. 2017), *judgment entered sub nom. In re* Wellbutrin XL Antitrust Litig., No. 15-2875, 2017 WL 3529114 (3d Cir. Aug. 9, 2017).

[10] *Id.* at 766 n. 47.

[11] 858 F.3d 787, 800 (3d Cir. 2017).

[12] 112 F. Supp.3d 181, 201 (D. N.J. 2015).

expert, Dr. Joan A. Lipton, who offered testimony on valuation issues. The defendants challenged the factual narrative underpinning Dr. Lipton's conclusions. In reviewing this argument, the court held that the defendants' "challenges to the underlying bases for Dr. Lipton's Report go to weight, not admissibility, and therefore constitute challenges properly presented through cross-examination, and not through exclusion of her otherwise reliable and relevant valuation work."[13]

The case presents an incorrect application of Rule 702 because the basis for an expert's opinion is a question of admissibility and is not relegated to the weight to be given the testimony by the jury. The court is tasked with determining whether an expert's opinion rests upon sufficient facts or data to be admissible based on a preponderance of the evidence standard, per Rule 702(d).

McGarrigle v. Mercury Marine[14]

In this product liability action against an outboard manufacturer by the operator of a boat who fell overboard, the plaintiffs proffered a naval architect as a liability expert. The defendants argued that the expert's opinion was unreliable because it relied solely on the 2007 American Society of Testing and Materials ("ASTM") F 1166–07, the reliance on which was misplaced because this standard did not apply to recreational boats and outboard engines.[15]

In analyzing defendants' arguments, the court found that "[i]f there is a gap between the ASTM F 1166–07 standards as written and as applied by [the expert], any inconsistencies go to the weight of the evidence, not to its admissibility."[16]

The court's finding here is an incorrect application of Rule 702 because Rule 702(d) requires judges to analyze whether an expert's methodology supports their conclusions.

Perez v. Townsend Engineering Co.[17]

In this product liability and personal injury action brought by a worker against a manufacturer of a meat skinning machine, the defendant moved to preclude the testimony of plaintiff's expert engineer, testifying about the hazards of the device, by arguing that the expert's opinion did not rest upon a sufficiently reliable basis, was based on speculation, and did not "fit" the facts of this case.

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[13] *Id.* at 199.
[14] 838 F. Supp.2d 282, 292 (D. N.J. 2011).
[15] *Id.* at 291.
[16] *Id.* at 292.
[17] 545 F. Supp.2d 461, 466 (M.D. Pa. 2008).

In analyzing defendant's arguments, the court stated that, "[an] expert is ... permitted to base his opinion on a particular version of disputed facts and the weight to be accorded to that opinion is for the jury. It is also ... a proper subject for cross-examination."[18]

The court's finding is an incorrect application of Rule 702 because the basis for an expert's opinion is a question of admissibility and is not limited to a question of weight for the jury. The court is tasked with determining whether an expert's opinion is based on sufficient facts or data to be admissible based on a preponderance of the evidence standard, as shown by Rule 702(d).

Rossano v. Maxon[19]

In this product liability and negligence action related to the operation of a trailer lift-gate, the defendant moved to exclude the plaintiff's biomechanical engineer and alternative design experts, arguing that their respective opinions were not the product of reliable principles and methods and could not serve as expert testimony.

In analyzing the defendant's arguments, the court found that when a party "object[s] to the application rather than the legitimacy of [an expert's] methodology, such objections [are] more appropriately addressed on cross-examination...."[20]

This case is an incorrect application of Rule 702 because an analysis of the application of the principles and methods to the facts of the case is an admissibility requirement to be determined by the court by a preponderance of the evidence.

Stecyk v. Bell Helicopter Textron, Inc.[21]

This matter involved a wrongful death and product liability action against the manufacturer of an Osprey military aircraft after a crash. Plaintiffs argued that the testimony of the defendant's expert, a metallurgist, regarding a leak of hydraulic fluid lacked an adequate factual foundation. The court found that the burden was on the plaintiffs to "explor[e] the facts and assumptions underlying the testimony of [defendant's] expert witness . . . during cross-examination."[22] Moreover, the court noted that, "[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those

[18] *Id.* at 466 (citation omitted).
[19] 659 F. Supp.3d 559, 567 (E.D. Pa. 2023).
[20] *Id.* at 567 (citations omitted).
[21] 295 F.3d 408, 414 (3d Cir. 2002).
[22] *Id.* at 414.

weaknesses through effective cross-examination."[23]

This passage reflects an incorrect application of Rule 702, because the issue of whether an expert's opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

United States v. Otero[24]

The defendant was indicted for using and discharging firearms during a robbery. The government proffered a firearm and toolmark identification specialist as an expert witness and the defendants objected. The court recognized that there was a potential for error in the expert's methodology, with recent national studies challenging the validity and accuracy of the expert's methodology. Despite these issues, the court denied the defendants' motion and admitted the expert. The Third Circuit affirmed the lower court's ruling, stating that it "see[s] no error in [the district court's] conclusion."[25]

This case represents an incorrect application of Rule 702 because it is an example of a judge declining to disturb an expert's conclusions even where unsupported. A judge is required to explore an expert's conclusions in determining whether, under Rule 702(d), an expert's conclusions rest upon reliable methodology.

Walker v. Gordon[26]

In this civil rights action asserting a violation of Fourth Amendment rights, the plaintiff moved to preclude defendants' expert psychiatrist, who was seeking to testify about plaintiff's mental state. Plaintiff argued that the expert's opinion should be excluded, disputing the evidence relied upon by the expert, and arguing that the expert's conclusions derived from such evidence were unreliable.

The court found that "because [plaintiff] objected to the application rather than the legitimacy of [the expert's] methodology, such objections were more appropriately addressed on cross-examination and no *Daubert* hearing was required."[27]

This passage reflects an incorrect application of Rule 702 because the application of the expert's methodology is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

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[23] *Id.*
[24] 849 F. Supp.2d 425 (D. N.J. 2012).
[25] United States v. Otero, 557 F. App'x 146, 150 (3d. Cir. 2014).
[26] 46 F. App'x 691, 696 (3rd Cir. 2002).
[27] *Id.* at 31.

Wolfe v. McNeil-PPC, Inc.[28]

This matter involved a product liability action alleging that a children's anti-inflammatory drug caused plaintiff to develop Stevens–Johnson Syndrome and Vanishing Bile Duct Syndrome.

The defendants moved to exclude or limit the testimony of four proposed expert witnesses, a pharmacologist, toxicologist, epidemiologist, and clinical pharmacist. The defendants argued that the opinions of these experts were not based on reliable methodology because they were reliant upon case reports. The court found the following in response to these arguments:

> The court rejected an analogous case-report argument in its May 4, 2011, *Daubert* opinion in this litigation. Like the experts addressed in that opinion, Drs. Nelson, Salisbury, and Tackett "did not solely rely on case reports in forming their opinions on causation but used them to supplement their extensive review of plaintiff's medical records" and other evidence, including epidemiological studies and other peer-reviewed literature. "[T]he three doctors' use of case studies in reaching their conclusion affects only the weight to be given their testimony, not its admissibility."[29]

The court's conclusion that the doctors' use of case studies was a question of weight is an incorrect application of Rule 702 which requires a determination whether the proposed expert opinions were "reliable application[s] of the principles and methods to the facts *of* the case," and, therefore, presented a question of admissibility for the court.

[28] 881 F. Supp.2d 650, 660 (E.D. Pa. 2012).

[29] *Id.* at 660 (internal citations omitted).

The Fourth Circuit

By: Amy E. Askew and Louis P. Malick

Amy E. Askew, a Principal for Kramon & Graham, PA is an accomplished trial and appellate lawyer with extensive experience in rail transportation and healthcare industry sectors. In addition to matters involving railroad employers, she has an impressive record of favorable results in defending employers generally. In the legal community, she navigates professional liability matters involving legal malpractice and attorney grievance allegations. Her practice includes complex commercial disputes, as well as defending companies in class-action litigation, particularly consumer class actions. Clients describe Amy as "an excellent trial lawyer . . . incredibly thorough, organized and focused on detail."

Louis P. Malick, a Principal for Kramon & Graham, PA handles a range of complex commercial litigation matters at the trial level and on appeal, including shareholder and other business disputes, state licensing disputes, estate and trust disputes, real estate disputes, class-action defense, employment disputes and defense of attorneys and other professionals facing malpractice claims or grievances. Clients value his strong advocacy and creative problem solving.

A. Fourth Circuit Court of Appeals

Baxter v. Commissioner of IRS[1]

THIS is an appeal of a tax court decision. The taxpayers had claimed a taxable capital loss deduction based on a Custom Adjustable Rate Debt Structure ("CARDS") transaction. The Internal Revenue Commissioner determined the CARDS transaction lacked economic substance and, accordingly, the deduction was invalid, and assessed penalties. At trial in the tax court, the Commissioner offered the report and opinions of Dr. A. Lawrence Kolbe, an economics and management consultant. Dr. Kolbe opined, on particular, that the CARDS transaction had a lower net present value than the taxpayers claimed.

The Fourth Circuit affirmed the admissibility of Dr. Kolbe's opinion. The taxpayers argued that the expert failed to use appropriate data regarding interest rates and costs in his analysis. The court determined that "such challenges … affect the weight and credibility of [the expert's] assessment, not its admissibility."[2]

This holding runs afoul of the 2023 amendments to Rule 702, which makes clear that the sufficiency of data is a question for the court to determine, not the jury.

Bresler v. Wilmington Trust Co.[3]

Plaintiffs, personal representatives of an estate, sued defendants, a trustee and its subsidiary, for a breach of contract relating to insurance policies of the decedent. The jury awarded $23 million in damages to the plaintiffs. The plaintiffs offered damages calculations prepared by their accounting expert, Robert E. Pugh, concerning present and future shortfalls of the net-in-trust resulting from the trustee's breach.

On appeal, the defendants argued that the plaintiffs' accounting expert 1) erroneously incorporated certain data into his calculations; 2) used an invalid interest spread; and 3) improperly discounted an amount to present value. The Fourth Circuit affirmed and held that "courts may not evaluate the expert witness's conclusion itself, but only the underlying methodology. Moreover, 'questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, 'not its admissibility.'"[4] The court further held that any challenges to the accuracy of the expert's calculations also went to weight and credibility.

[1] 910 F.3d 150, 158 (4th Cir. 2018).
[2] *Id.* at 158.
[3] 855 F.3d 178, 195-196 (4th Cir. 2017).
[4] *Id.* at 195.

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness's opinion are for the court to decide as part of its admissibility determination.

Burns v. Anderson[5]

Plaintiff sued to collect the remaining balance due on a note after a sale of collateral yielded less than the total amount due. The lender offered Russell Bregman as an expert in stock valuation. He opined as to the commercial reasonableness of the value obtained for the collateral (shares of stock) that was sold in a private sale.

The Fourth Circuit affirmed the trial court's admission of the lender's expert's testimony. The court rejected the borrowers' arguments that the potential error rate of the methodology was large; that the expert failed to review pertinent documents; and that some of the data used by the expert was unreliable. It instead affirmed the trial court's determination that the challenge related to the error rate associated with the methodology was a "weight" issue. The Fourth Circuit further noted that the borrowers' argument did "not mount a true *Daubert* argument challenge" and that the arguments relating to the facts and data supporting the expert's opinion went to weight, not admissibility.[6]

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness' opinion do not go to weight and are, rather, for the court to decide as part of its admissibility determination.

Price v. MOS Shipping Co.[7]**;** ***Price v. Atlantic Ro-Ro Carriers, Inc.***[8]

The plaintiff brought an action under the Longshore & Harbor Worker's Compensation Act alleging he was injured while unloading freight in the hold of a ship when a forklift being operated by another longshore worker fell through an unprotected hatch and struck him. The plaintiff challenged the admissibility of testimony by the defendant's expert witness, Walter Curran, an expert in stevedoring. Mr. Curran testified regarding the respective duties of a longshore worker, stevedore employers, and vessel owners.

The Fourth Circuit affirmed. It rejected the plaintiff longshore worker's argument that the expert's opinion was based on a misinterpretation of certain, disputed testimony. The Fourth Circuit noted that "questions

[5] 123 F. App'x 543, 549 (4th Cir. 2004).

[6] *Id.* at 549.

[7] 740 F. App'x. 781, 785 (4th Cir. 2018).

[8] 2017 WL 2876473 (D. Md., July 6, 2017).

regarding the factual underpinnings of the expert witness's opinion affect the weight and credibility assessment, not its admissibility."[9] It further noted that the district court had "properly allowed these disputes to be tested through '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof,'" and that the expert's testimony was "not misleading or unduly confusing to the jury."[10]

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness' opinion are for the court to decide as part of its admissibility determination.

TFWS, Inc. v. Schaefer[11]

The plaintiff, a liquor retailer, sued the Maryland State Comptroller claiming that Maryland regulations regarding wholesale pricing of wine and liquor violated the Sherman Act. In a first appeal, the Fourth Circuit affirmed the finding of violation, but remanded for consideration of the State's Twenty-First Amendment defense —that is, that the regulations furthered Maryland's interest in promoting temperance, which outweighed the federal interest in promoting competition under the Sherman Act. The district court granted summary judgment to the Comptroller and the liquor retailer appealed again. Among other experts, the State offered an economist, Dr. David T. Levy, who gave opinions as to liquor price comparisons between Maryland and other states.

The Fourth Circuit affirmed. The court rejected the retailer's argument that the expert's calculations did not support the conclusions he reached. The Fourth Circuit held that the retailer did not "mount a true *Daubert* challenge," noting that the focus of *Daubert* is on the methodology or reasoning used by an expert, not the conclusion itself. In noting that the retailer did *not* argue that the expert's "methods have not been tested, have not withstood peer review and publication, have excessive rates of error or have not been accepted in the field," the court found that the challenge was "to the proper weight to be given to [the expert's] evidence, not to admissibility."[12]

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[9] *Id.* at 785 (citation omitted).
[10] *Id.*
[11] 325 F.3d 234, 240 (4th Cir. 2003).
[12] *Id.* at 240. *See also* Heckman v. Ryder Truck Rental, Inc., Civ. No. 12-664-CCB, 2014 WL 3405003 at * (D. Md. July 9, 2014) (citing to the reasoning of Synergetics Inc. v. Hurst, 477 F.3d 949, 956 (8th Cir. 2007) ("so long as the methods employed are scientifically valid, … mere disagreement with the

This case is inconsistent with the 2023 amendment because the court found that the question of whether an expert's calculations support his conclusion went to weight, not admissibility, and because the court restricted its review to the expert's methodology and declined to evaluate the reliability in its application to the expert's conclusion.

B. District of Maryland

Dugger v. Union Carbide Corp.[13]

In this asbestos case, a defendant moved to exclude testimony of plaintiff's causation experts, including Dr. Arthur L. Frank and Dr. John C. Maddox. Defendant argued, among other things, that Dr. Frank had not employed a reliable methodology because he relied on regulatory statements, mixed fiber studies and an amicus brief in reaching his conclusions. The district court found the evidence to be scientific and reliable, but also said that the asbestos defendant can challenge the reliability of the evidence during cross examination. The court further found the defendant's argument that the studies relied on by the expert do not support the expert's conclusions are challenges "more appropriately brought before a jury."[14] The court ruled that Dr. Maddox's opinions were admissible for the same reasons, and also said that the defendant's argument that Dr. Maddox considered studies regarding asbestos generally as opposed to brake pad manufacturing in particular went to the weight of his conclusion, not its admissibility.

The court's decision is inconsistent with the 2023 amendment because it leaves reliability challenges to cross-examination and the jury's consideration.

Glass v. Anne Arundel County[15]

A driver brought civil rights claims against a county and a police officer under 42 U.S.C. § 1983 after a traffic stop. The plaintiff driver moved to strike the opinions of the defendants' expert in accident reconstruction, Cpl. Gregory Russell, arguing, among other things, that the report was not based on reliable data.

In rejecting the driver's argument, the district court noted that the driver's objections were to the conclusions the expert reached from the calculations made and the expert's failure to consider other data. The court held that those

assumptions and methodology used does not warrant exclusion of expert testimony")).

[13] Civ. No. 16-3912, 2019 WL 4750568 at *5 (D. Md. Sept. 30, 2019).

[14] *Id.* at *5.

[15] 38 F. Supp.3d 705, 716 (D. Md. 2014).

challenges "go to the weight of the report, not its admissibility, and may be challenged on cross-examination."[16]

This case is inconsistent with the 2023 amendment because it holds that the sufficiency of an expert's factual basis for an opinion is an issue affecting weight, not admissibility. The plaintiff only challenged the relevance of the data on which the expert's conclusion was based, not the methodology used, so the court also did not address the expert's application of methodology.

Jordan v. Town of Fairmount Heights[17]

The plaintiff brought various state and federal civil rights claims against the defendant police officers and a municipality arising out of an alleged use of excessive force in the course of a traffic stop and arrest. The plaintiff designated Gregory G. Gilbertson as an expert on police procedure and to offer opinions on whether a defendant breached the standard of care by hiring one of the defendant officers despite a history of excessive use of force and whether a defendant breached the standard of care in supervising and retaining the two officers who effected the arrest.

The defendants claimed that the expert's opinion lacked a sufficient factual basis. Specifically, the defendants argued that the expert relied on press releases and news articles that he found performing internet searches and that as a result his "opinions are not grounded in reliable, admissible facts as evidenced by the fact that his reports do not include citation to any record evidence."[18] The district court rejected the defendants' challenge, finding that "'questions relating to the bases and sources of an expert's opinion affect the weight to be assigned [to] that opinion, rather than admissibility.'"[19] But the court also found that, contrary to the defendants' argument, an expert may rely on inadmissible evidence, consistent with Federal Rule of Evidence 703.

The court's decision is inconsistent with the 2023 amendment because, instead of resolving this as part of its admissibility determination, it says that the jury could evaluate as a question of weight whether the expert's opinion had a sufficient factual basis.

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[16] *Id.* at 716.

[17] Civ. No. 22-CV-02680-AAQ, 2024 WL 732011 at *5 (D. Md. Feb. 21, 2024). The court improperly relied on *Bresler*, *supra* note 3, in reaching its decision.

[18] 2024 WL 732011 at *5.

[19] *Id.*

National Fair Housing Alliance v. Bank of America[20]

The defendants were sued by fair housing advocates and individuals for "allegedly discriminatory maintenance and marketing of real estate owned properties."[21] The plaintiffs retained multiple experts to testify regarding racial disparities in housing based on statistical and economic analyses: Dr. Michael D. Fetters, Pamela A. Kisch, Dr. Jacob S. Rugh, Deavay Tyler, and Lindsay Augustine. Defendants moved to exclude all of the experts and their opinions.

As to two of the experts, Dr. Fetters and Dr. Rugh, the defendants argued, among other things, that they relied upon flawed data and incomplete variables in reaching their conclusions. The district court rejected this argument, noting that "'under *Daubert*, a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses' – 'it does not evaluate the conclusion itself.'"[22] The court further held that the defendants' argument that the expert's calculations did not support his conclusion went to weight, not admissibility.

This case is inconsistent with the 2023 amendment because the court found that the question of whether an expert's calculations support his conclusion went to weight, not admissibility, and because the court restricted its review to the expert's methodology and declined to evaluate the reliability of its application to the expert's conclusion.

St. Michael's Media, Inc. v. Mayor & City Council of Baltimore[23]

This is a First Amendment case where the plaintiffs asked the court to enjoin a local government from banning a prayer rally and conference at a city-owned venue based on alleged public safety concerns arising from the expected content of speeches to be given. The court granted a temporary restraining order and the plaintiff then moved for a preliminary injunction. The court granted the injunction in part and denied it in part.

Plaintiff offered Dr. James P. Derrane as an expert in special event security planning who would give a safety risk assessment regarding the proposed rally.

The district court considered whether the proffered expert's report had indicia of reliability without making a final determination as to admissibility under Rule 702 and *Daubert*. The court ultimately did not consider the

[20] Civ. No. 18-1919, 2023 WL 1816902 at *5, *8 (D. Md. Feb. 8, 2023).
[21] *Id.* at *1.
[22] *Id.* at *5.
[23] 566 F. Supp.3d 327, 355 (D. Md. 2021).

report, finding issues with the expert's qualifications and methodologies. But before reaching its conclusion, the district court stated because the court's focus is on the methodology used by an expert and not the conclusions reached, any question regarding the factual bases for the expert's opinions go to the weight, not the admissibility of the opinion.[24]

The court's discussion is inconsistent with the 2023 amendment because it suggests the question whether an expert's calculations support his conclusion goes to weight, not admissibility, and because it suggests the court should focus on an expert's methodology and not his conclusions.

C. District of North Carolina

Fredeking v. Triad Aviation, Inc.[25]

An airplane owner sued an airplane repair company for negligence, breach of contract and breach of warranty arising out of an alleged "overspeed" event. The plaintiff airplane owner designated two experts, including, in particular, Douglas Sleeman, to testify as to whether an "overspeed event" occurred and what caused it.

The defendant repair company moved to strike the expert, arguing that his opinion 1) was not supported by sufficient facts and data; 2) was the result of an unreliable methodology; and 3) was not relevant and would not help the jury. Specifically, the repair company argued that the expert's opinion was not based on any data, measurements, or scientific analysis.

After determining that the "process of elimination" was a valid and reliable scientific approach, the court addressed the repair company's argument that the expert failed to conduct tests or cite to any peer reviewed literature that supported his conclusion. The court held that, to the extent the expert's "data, or factual assumptions, have flaws, these flaws go to the weight of the evidence, not to its admissibility."[26]

This decision is inconsistent with the 2023 amendment because it held that flaws in the factual basis supporting the expert's opinion were issues for the jury to consider as a question of weight, not issues for the court to consider as part of its admissibility determination.

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[24] *See also* Maryland Shall Issue, Inc. v. Hogan, Civ. No. 16-3311, 2021 WL 3172273 at *4 (D. Md. July 7, 2021); Rozinsky v. Assurance Co. of America, Civ. No. 15-2408, 2017 WL 3116682 at *4 (D. Md. July 21, 2017).

[25] 647 F. Supp.3d 419, 433 (M.D. N.C. 2022).

[26] *Id.* at 433.

Rhyne v. United States Steel Corp.[27]

In a toxic tort action, plaintiff sued defendant manufacturers claiming that he was exposed to benzene while using the product as a pipefitter, which caused him to develop acute myloid leukemia. The plaintiff's expert in industrial hygiene made certain calculations relating to plaintiff's exposure. The defendants moved to strike the industrial hygienist's opinions claiming, among other things, that the data used in reaching his opinions was unreliable.

The district court found that the expert's opinions were reliable and the "challenges to the accuracy of the factual underpinnings go to the weight that the jury should give [the expert's] opinion" not the admissibility.[28]

This decision is inconsistent with the 2023 amendment because it leaves challenges to the accuracy of an opinion's factual underpinnings to the jury as part of its determination of weight instead of deciding them as part of the court's admissibility determination.

Soho Wilmington LLC v. Barnhill Contracting Co.[29]

The plaintiff sued the defendant for nuisance related to the construction and placement of sewer pipes near the plaintiff's building. The plaintiff offered Erik Hector as an expert to opine on the economic impact of the sewer pipe project on the plaintiff.

The defendant moved to exclude the plaintiff's economic expert, arguing that the expert's opinions were speculative and unreliable because he failed to consider critical data points or perform certain analyses. In rejecting the defendant's challenge, the district court noted that the defendant's challenge was to perceived factual inadequacies in the expert's analysis. The court held that such attacks go to the weight of the testimony, not the admissibility, and should be explored during cross-examination.

This decision is inconsistent with the 2023 amendment because it ruled that a perceived factual inadequacy in an expert's analysis was an attack for the jury to consider as part of weight, not an issue for the court to resolve in determining admissibility.

[27] 474 F. Supp.3d 733, 760 (W.D. N.C. 2020).
[28] *Id.* at 760.
[29] Civ. No. 7:18-CV-79-D, 2020 WL 6889207 at *7 (E.D. N.C. Nov. 23, 2020).

United States v. Johnson[30]

The federal government sued a county sheriff alleging a pattern and practice of discriminatory law enforcement activities. The defendant sheriff offered the opinions of an expert in statistics, who performed various statistical analyses relating to the county's law enforcement practices.

The government moved to exclude the expert, arguing that the expert's opinion lacked a sufficient factual basis in the record. The district court held that the "[g]overnment's argument, … is directed toward the weight and persuasiveness of [the expert's] explanations rather than their admissibility."[31]

This decision is inconsistent with the 2023 amendment because it leaves challenges to the accuracy of an opinion's factual underpinnings to the jury as part of its determination of weight instead of deciding them as part of the court's admissibility determination.

D. District of South Carolina

Funderburk v. South Carolina Electric & Gas Co.[32]

Following a massive rainstorm, the plaintiffs sued various defendants for failing to take certain actions to prevent floods, thereby causing damage to the homes and personal property. Plaintiffs offered two experts, including in particular an engineer, Rick Van Bruggen, who opined that the construction of certain railroad property caused or contributed to the damage. The defendant railroad moved to limit the expert's testimony.

The court denied the defendant's motion as to Mr. Van Bruggen. In analyzing the expert's opinion under *Daubert,* the district court noted that it "may not evaluate the expert witness' conclusion itself, but only the opinion's underlying methodology"[33] and that "questions regarding the factual underpinnings of the [expert witness's] opinion affect the weight and credibility of the witness' assessment, not its admissibility."[34]

The decision is inconsistent with the 2023 amendment because the court stated that it could not evaluate the expert's conclusion as part of its admissibility determination, and reserved questions regarding the factual basis for the expert's opinion for the jury as part of a weight determination instead of resolving them as part of the court's admissibility determination.

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[30] 122 F. Supp.3d 272, 340 (M.D. N.C. 2015).
[31] *Id.* at 340.
[32] 395 F. Supp.3d 695 (D. S.C. 2019).
[33] *Id.* at 707.
[34] *Id.* at 713.

In re *Levesque*[35]

A bankruptcy trustee sued a debtor's former business partners for breach of fiduciary duty and fraudulent transfer. Both sides offered expert witnesses as to the value of the debtor's equity ownership interest in another company. The trustee moved to exclude the defendants' valuation expert.

Although the court granted the trustee's motion as to those issues where the valuation expert had no factual support for certain opinions, the court rejected the trustee's challenges to the reliability of the data the expert used to support other opinions. The court held that "[q]uestions regarding the factual underpinnings of the [expert witness's] opinion affect the weight and credibility of the witness' assessment, not its admissibility."[36]

Similarly, the defendants moved to exclude the trustee's valuation expert, arguing that the expert either failed to consider critical facts or that his data was flawed.

Again, the court noted that "challenges to the facts and data underlying an expert report, however go to the 'weight and credibility of the witness's assessment, not admissibility.'"[37] The decision is inconsistent with the 2023 amendment insofar as it views challenges to the facts and data underlying an opinion to be related to weight, not admissibility. This decision is in a different posture than most, however, because it is in the context of an expected bench trial, not a jury trial.

Moore v. BPS Direct, LLC[38]

In a product liability case arising from an allegedly defective tree stand, the plaintiff sued the manufacturer and seller for injuries relating to a fall. Among other experts, the plaintiff offered Jo Anna Vander Kolk as a vocational expert. The defendants moved to exclude the plaintiff's vocational expert, raising challenges to the bases of her opinions.

The district court determined that the expert had sufficient facts to form an opinion and that the defendants' challenge as to her factual bases and weight were more appropriate for cross examination. This decision is inconsistent with the 2023 amendment because it determined that the sufficiency of the factual basis for the expert's opinion went to weight, not admissibility.

[35] 653 B.R. 127, 141, 150 (Bankr. D. S.C. 2023).
[36] *Id.* at 150.
[37] *Id.*
[38] Civ. No. 17-3228, 2019 WL 2913306 at *5 (D. S.C. July 8, 2019).

Patenaude v. Dick's Sporting Goods, Inc.[39]

In a products liability case, the plaintiff sued a manufacturer of athletic cups for strict liability, negligence, and breach of warranty. The plaintiff retained an expert to opine as to the performance of the athletic cup and whether the manufacturer's cup provided adequate protection from injury. The manufacturer moved to strike the expert's opinion, arguing that the testing the expert performed failed to account for certain facts.

The court rejected the manufacturer's argument, holding that "it is well settled that the factual basis of an expert opinion generally goes to weight, not admissibility."[40] The decision is inconsistent with the 2023 amendments because it views a challenge to the factual basis for an expert's opinion as raising an issue of weight, not admissibility.

E. District of Virginia

Coleman v. Tyson Farms, Inc.[41]

An employee sued his employer for gender discrimination under Title VII of the Civil Rights Act of 1964, retaliation under the Family and Medical Leave Act, and breach of implied contract under Virginia law. The employee designated Dustin Chambers, Ph.D. as his economic expert to opine regarding his "front pay" damages. The employer moved to exclude Dr. Chambers's opinions asserting, in part, that his opinions on wage loss were based on two assumptions that were speculative, and therefore not reliable. First, the employer argued that Dr. Chambers's opinion that the employee would have worked continuously in his current position for the defendant employer for thirty years was not grounded in fact, nor were his assumptions regarding attendant wages and benefits. Second, in calculating wage loss, Dr. Chambers assumed replacement employment for the employee in a field unrelated to his prior occupation and made assumptions about the future pay and benefits the employee would receive.

The district court denied the employer's motion, holding that "the asserted fallibility of an expert's assumptions affect the weight of his testimony, not its admissibility."[42]

In so doing, the district court failed to determine whether the expert's assumptions (and as a result, his conclusions) were based on sufficient facts, and instead left that decision to the jury. Under current Rule 702 (and likely prior to the amendments), the district court

[39] Civ. No. 18-3151, 2019 WL 5288077 at *2 (D. S.C. Oct. 18, 2019).
[40] *Id.* at *2.
[41] Civ. No. 2:10cv403, 2011 WL 1833301 at *3 (E.D. Va. Apr. 13, 2011).
[42] *Id.* at *3.

would have abused its discretion in abdicating its gatekeeping role.

In re *Zetia (Ezetimibe) Antitrust Litigation*[43]

This is a multidistrict antitrust litigation regarding the manufacture of patented and generic medications. Plaintiffs offered two economists as experts. Defendants moved to exclude the testimony of Plaintiffs' economic experts, arguing that certain data entered into the economic model was based on unsupported assumptions and, as a result, the opinions were unreliable.

The court rejected defendants' argument and declined to exclude the experts. The court noted that the experts could rely on disputed facts so long as there was evidence in the record to support them. As to the sufficiency or accuracy of those facts, "the court should allow the opposing party to 'test the accuracy of the expert's conclusions through cross-examination and presentation of contrary evidence to the jury.'"[44] The court held that it was for the jury to determine whether an expert's inputs into an economic model were reliable inputs.

This opinion is inconsistent with the 2023 amendment because the court decided that the jury would be permitted to determine the accuracy of the expert's conclusions, including whether data the expert relied on was reliable.

Nationwide Mutual Fire Ins. Co. v. Bryant Thomas Heating & Cooling, Inc.[45]

In this subrogation claim, an insurance company sued an HVAC company, alleging that the HVAC company's negligence in installing a gas-fired water heater resulted in an explosion and fire, damaging the insured's property. The plaintiff insurer's expert, an engineer, opined that the HVAC company negligently installed a water heater which caused a leak, based on the assumption that a certain connection on the water heater had not been manipulated in the ensuing months after installation. The defendant HVAC company moved to exclude the expert, arguing that his opinion was based on conjecture and that he failed to consider other factors that could have led to the leak and, ultimately, the explosion and fire.

The district court denied the motion to exclude. It reasoned that "shaky but admissible" testimony is properly dealt with through cross examination and that the factual underpinnings of an expert's testimony went to weight and not admissibility. The court further noted that in assessing the

[43] MDL No. 2:18-md-2836, 2022 WL 3337796 at *7, *11 (E.D. Va. Aug. 3, 2022).
[44] *Id.* at *7.

[45] Civ. No. 3:19-CV-780, 2020 WL 5415659 at *2, *3 (E.D. Va. June 26, 2020).

reliability of an expert's opinion, a court is only concerned with the methodology, not the conclusions the methodology generates.

This decision is inconsistent with the 2023 amendment because the court decided that concerns regarding the factual underpinnings of an expert's testimony go to weight, not admissibility, and it declined to evaluate the conclusion resulting from the expert's methodology.

Smith v. Wellpath, LLC[46]

An estate filed a claim against a jail and certain officers alleging negligence in connection with the death of its decedent while in custody. The plaintiff estate offered Anthony Callisto, Jr. as an expert. Although the opinion does not discuss his opinions in detail, it seems he was offered as an expert on the standard of care required of correctional officers. One of the defendant officers moved to exclude the estate's expert, arguing, in part, that the expert relied on disputed facts.

The district court rejected the officer's argument, finding that "any asserted fallibility of [the expert's] assumptions affects the weight of his testimony, not its admissibility."[47]

This decision is inconsistent with the 2023 amendment because it determined that the sufficiency of the factual basis for the expert's opinion went to weight, not admissibility.

F. District of West Virginia

Degarmo v. C.R. Bard, Inc.[48]

In a multidistrict product liability action regarding the use of transvaginal surgical mesh to treat pelvic organ prolapse and stress urinary incontinence, plaintiffs identified William Porter, M.D. to offer opinions regarding specific causation. Dr. Porter arrived at his opinions after employing a differential diagnosis, which the district court concluded was a reliable methodology. In moving to preclude Dr. Porter's testimony, the defendant argued, *inter alia,* that Dr. Porter did not have a sufficient factual basis to opine that the pubovaginal sling at issue actually contracted.

In denying the defendant's motion, and in reliance on decisions holding that the reliability of an expert's data affects the weight and not the admissibility of an opinion, the district court held that "[i]t is not the role of the court to evaluate the veracity of the facts underlying an expert's opinion."[49]

[46] Civ. No. 2:20cv77, 2023 WL 9317261 at *16 (E.D. Va. Mar. 30, 2023).
[47] *Id.* at *16.
[48] Civ. No. 2:12-cv-07578, 2018 WL 700795 at *3 (S.D. W. Va. Feb. 2, 2018).
[49] *Id.* at *3.

The district court's failure to undertake any type of reliability analysis of the facts and data and how, if at all, they were applied to Dr. Porter's methodology is contrary to the amendments to Rule 702.

Morrison v. C&K Industrial Services, Inc.[50]

Plaintiff filed a wrongful discharge claim against his former employer, claiming that he was terminated from employment after making two requests for a respirator to protect himself and others against exposure to chemical fumes. The employer argued that the equipment was not necessary and that the employee was terminated due to performance issues.

Plaintiff designated Russell Pfifer to testify that the employer was negligent in not providing a respirator to plaintiff; that plaintiff was justified in insisting he be provided with one; and that discharging plaintiff for raising a safety complaint violated the Occupational Safety and Health Act. In reaching his opinion, the expert determined that plaintiff was exposed to harmful chemicals. The employer moved to exclude Mr. Pfifer's opinion that plaintiff should have been provided with a respirator, arguing that the conclusion that the employee was exposed to hazardous chemical was based on speculation, as the expert had no information as to whether plaintiff was actually exposed to the pertinent harmful chemical and, even if so, at what level. Specifically, the employer argued that Mr. Pfifer only had a list of chemicals found in the wastewater but did *not* have the levels of the chemicals in the water, nor any other analytical data.

The district court rejected the employer's argument. The district court determined that the employer's challenge to the facts underlying Mr. Pfifer's opinion was appropriate for cross examination, as it affected the weight of the testimony, not the admissibility.

Under the current iteration of Rule 702 (and likely its prior version), the district court's ruling would be wrong, as the sufficiency of the facts used by the expert, as well as whether such facts are applied in a reliable way, are all questions to be answered by the trial court, not the jury.

[50] 2010 WL 11636104 (N.D. W. Va. Aug. 17, 2010).

The Fifth Circuit

By: Jim Shelson, Nash Gilmore, and Garrett Anderson

Jim Shelson is a partner with Phelps Dunbar, LLP in Jackson, Mississippi. His practice includes a broad array of challenging subject matter, often involving technical expert evidence in the areas of toxicology, epidemiology, medical science and causation. He also handles commercial disputes and first-party coverage litigation. Jim is licensed in Mississippi, Florida, and Alabama. He has substantial jury trial and appellate experience in both state and federal courts. He is also the author of a book about Mississippi chancery court practice.

Nash Gilmore is an associate with Phelps, Dunbar LLP in Jackson, Mississippi. His practice is devoted to a broad array of litigation, including the representation of insurers and their policy holders, general commercial litigation, and products liability. His practice is also dedicated to representing domestic and international insurers in first-party coverage litigation/arbitration, with a focus on weather-related property damage claims. He earned his J.D. from the University of Mississippi School of Law and clerked for the Honorable Jim M. Greenlee on the Mississippi Court of Appeals after graduating.

Garrett A. Anderson is an associate in Fletcher & Sippel LLC's Jackson, Mississippi office and primarily practices in the areas of railroad litigation, commercial litigation, and corporate bankruptcy. After earning his law degree from Mississippi College School of Law in 2019, Garrett joined Stewart Robbins Brown & Altazan LLC's Baton Rouge, Louisiana office, focusing on corporate bankruptcy matters. He later clerked for Mississippi Supreme Court Justice Robert P. Chamberlin before joining Phelps Dunbar LLP's Jackson, Mississippi office, where he handled a variety of commercial litigation and corporate bankruptcy matters. Garrett is licensed to practice in Mississippi and Louisiana.

A. Fifth Circuit Court of Appeals

Bear Ranch, LLC v. Heartbrand Beef, Inc.[1]

PLAINTIFF Bear Ranch, a cattle ranch, sued a beef production company and related entities, alleging breach of contract and fraudulent inducement claims. Defendants called a valuation expert to testify regarding the value of plaintiff's unjust enrichment claims.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "Bear Ranch's objection to this expert opinion evidence is more of a disagreement about the reasonableness of [the expert's] valuation than the rigor of the district court's preliminary assessment."[2] In support of this finding, the Fifth Circuit quoted *Daubert* as follows: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[3]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

GlobeRanger Corp. v. Software AG United States of America[4]

Plaintiff GlobeRanger sued defendant Software AG for trade secret misappropriation. GlobeRanger offered expert testimony regarding its damages. "GlobeRanger's expert based his $19.7 million damages opinion on an unjust enrichment theory rooted in research and development costs that Software AG avoided."[5] Software AG claimed that the damages model was "unreliable and flawed" because it did not account for the value of costs saved and for other reasons.

The Fifth Circuit found that the district court's decision to allow the expert's testimony was not an abuse of discretion. The Fifth Circuit reasoned that "Software AG's arguments go to the weight a factfinder should give the

[1] 885 F.3d 794 (5th Cir. 2018).
[2] *Id.* at 803.
[3] *Id.* at 802.
[4] 836 F.3d 477 (5th Cir. 2016).
[5] *Id.* at 499.

testimony. Indeed, Software AG raised these potential weaknesses both in cross examination and through its own expert testimony. Software AG thus had the opportunity to try to convince the jury not to give full weight to GlobeRanger's expert's calculations, and to instead listen to its expert's opinion about the value of costs saved."[6]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Mathis v. Exxon Corp.[7]

Plaintiffs, fifty-four gas station franchisees, filed suit against Exxon for violating the Texas analogue of the Uniform Commercial Code's open price provision. Plaintiff sought to introduce testimony of economist Barry Pulliam regarding whether Exxon had set a commercially reasonable price in the economic context, as well as his definition of the relevant geographic market for each gas station.

The court provided that "[t]he *Daubert* analysis should not supplant trial on the merits. '[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' We find no abuse of discretion in the decision to admit Pulliam's testimony."[8]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

MM Steel, L.P. v. JSW Steel (USA) Inc.[9]

Steel distributor brought action against steel manufacturers and distributors, alleging an antitrust conspiracy. Plaintiff's damages expert testified using the "yardstick test" – *i.e.*, a study of the profits of business operations that are closely comparable to the plaintiff's business.

[6] *Id.* at 500 (internal citations omitted).
[7] 302 F.3d 448 (5th Cir. 2002).
[8] *Id.* at 461 (internal citations omitted).
[9] 806 F.3d 835 (5th Cir. 2015).

The Fifth Circuit stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct.

More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Nova Consulting Group, Inc. v. Engineering Consulting Services, Ltd.[10]

Nova Consulting Group, an environmental consulting firm, filed suit against a competitor, alleging claims for misappropriation of trade secrets and tortious interference with contractual relations. Nova Consulting called an expert to testify to the economic harm and computation of economic damages caused by defendant.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "[w]hen, as here, the parties' experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony."[11] The Fifth Circuit relied on *Daubert* as follows: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[12] After "vigorous cross-examination" of the expert, the court instructed the jury that "ultimately, then you all as the judges of the facts still make the determination of whether you want to believe any, all[,] or none of [their] testimony."[13]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Pipitone v. Biomatrix, Inc.[14]

Plaintiffs Thomas and Bonnie Pipitone filed suit against Biomatrix alleging that its product, Synvisc, caused Thomas Pipitone to develop a salmonella infection in his knee following a Synvisc injection. Plaintiffs sought to introduce medical testimony regarding the cause of the salmonella infection in Pipitone's knee.

The court provided that "as *Daubert* makes clear, 'vigorous cross-examination, presentation of contrary evidence, and careful

[10] 290 F. App'x. 727 (5th Cir. 2008).
[11] *Id.* at 733.
[12] *Id.*
[13] *Id.*
[14] 288 F.3d 239 (5th Cir. 2002).

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[15]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Primrose Operating Co. v. National American Insurance Co.[16]

Plaintiff sued its insurer for alleged breach of the duty to defend. Plaintiff called an expert to testify about the reasonableness of attorney's fees charged to plaintiff by two law firms retained independently of the insurer.

In finding that the district court did not abuse its discretion in allowing plaintiff's expert to testify, the Fifth Circuit explained that although the expert's testimony may have been weakened by generic billing entries, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[17]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Puga v. RCX Solutions, Inc.[18]

RCX is a licensed motor carrier. It contracted with Ronald Brown to transport a load across Texas. During his drive, Brown crossed the median and crashed into plaintiff's vehicle. Plaintiff sued RCX for negligence. The district court permitted plaintiff to offer the testimony of State Trooper Andrew Smith as an expert in accident investigation. RCX challenged the relevance of Smith's opinion.

The Fifth Circuit found that "[t]he district court did not abuse its discretion in allowing Smith to offer an expert opinion on the cause of the accident – Smith considered an appropriate amount of physical evidence at the scene of the crime to offer his opinion, and RCX had ample opportunity to show the jury any flaws in his opinion."[19] The

[15] *Id.* at 250.
[16] 382 F.3d 546 (5th Cir. 2004).
[17] *Id.* at 562.
[18] 922 F.3d 285 (5th Cir. 2019).
[19] *Id.* at 294.

Fifth Circuit's analysis included the following generalized statements:

- "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[20]
- "the court's role is limited to ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue so that it is appropriate for the jury's consideration."[21]
- "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,"[22] and
- "[a]t no point should the trial court replace the adversary system."[23]

Under the Rule 702 amendments, these generalized statements are accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Roman v. Western Manufacturing, Inc.[24]

Monique Roman, as administratrix of Dorel Roman, an owner of a stucco business, filed a products liability suit against a stucco application pump manufacturer. Roman sought damages as the result of a stucco pump detaching and striking plaintiff. Plaintiff offered two experts, a mechanical engineer and a failure analyst, to testify regarding the construction or composition of the pump at issue.

After assessing the credentials of each of plaintiff's experts, the Fifth Circuit explained that while the defendant's "cross-examination was quite effective," ultimately such doubts affected "the weight of the evidence, as opposed to the admissibility of his testimony."[25] The Fifth Circuit recognized that there was evidence contrary to plaintiff's expert, but found "that was for the jurors to weigh. [Plaintiff's] liability and causation evidence was admissible under Rule 702."[26]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] 691 F.3d 686, 694 (5th Cir. 2012).
[25] *Id.* at 694.
[26] *Id.*

satisfies the requirements of Rule 702(a)-(d).

Tyler v. Union Oil Co.[27]

Plaintiffs, former employees of Union Oil Company of California ("Unocal"), filed suit against Unocal alleging violations of the ADEA and FLSA. Plaintiffs sought to introduce statistical evidence and testimony of Dr. Blake Frank to support an inference of motive for disparate treatment.

The court opined that "[u]nder the evidence here, Unocal's objection that Dr. Frank created his own database, which was unreliable, goes to probative weight rather than to admissibility. Dr. Frank compiled his database from documents provided by Unocal during discovery. Unocal did not show that Dr. Frank's compilation of the data provided him was itself unreliable. Unocal instead attempts to show that the underlying data – provided *by Unocal* – was itself unreliable. This is an issue that Unocal could – and did – raise in cross-examination."[28]

This language fails to account for the expert witness testimony-proponent's burden to prove by a preponderance of the evidence that the expert witness's testimony is based on sufficient facts or data and the product of reliable principles and methods pursuant to Rule 702(b)-(c).

United States v. 14.38 Acres of Land[29]

Plaintiff United States filed a complaint and declaration of taking to condemn 14.38 acres of land belonging to James C. Coker, III to provide flood control in the Yazoo River Basin in Mississippi. Coker sought to introduce testimony of Rogers Varner and Rip Walker, Coker's engineering and real estate appraisal experts, respectively, regarding the likelihood of Coker's property flooding if his property were to be located on the unprotected side of a new levee and Coker's property's diminished market value as a result of the government's taking.

The court provided that "in determining the admissibility of expert testimony, the district court should approach its task 'with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.'"[30]

This language does not comport with new Rule 702's requirement

[27] 304 F.3d 379 (5th Cir. 2002).
[28] *Id.* at 392-393 (internal citations omitted).
[29] 80 F.3d 1074 (5th Cir. 1996).
[30] *Id.* at 1077 (citations omitted).

that the court, rather than the jury, determine whether the expert witness testimony-proponent has established the requirements of Rule 702(a)-(d) by a preponderance of the evidence. Additionally, relying on *Daubert*, the court provided that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[31] Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

United States v. Ebron[32]

The United States filed this criminal action against defendant, Joseph Ebron, for the murder of a fellow inmate. Ebron was found guilty and sentenced to death. Ebron appealed his conviction and sentence. The United States called a forensic pathologist to testify regarding the cause and manner of the inmate's death.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "[c]ontrary to what Ebron argues, the fact that Brown's testimony may be assailable does not mean it is inadmissible under Rule 702. The trial court's role as gatekeeper under *Daubert* is not intended to serve as a replacement for the adversary system."[33] In support of this finding, the Fifth Circuit quoted *Daubert* as follows: "[A]s *Daubert* makes clear, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[34]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

United States v. Hicks[35]

Defendant was found guilty of unlawfully possessing firearms and ammunition while subject to a domestic restraining order. Defendant appealed his conviction. The government offered testimony of a ballistics expert that the bullet

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[31] *Id.* at 1078 (internal citations omitted).
[32] 683 F.3d 105, 139 (5th Cir. 2012).
[33] *Id.* at 139.
[34] *Id.*
[35] 389 F.3d 514 (5th Cir. 2004).

casings found in a field were fired from a weapon found in defendant's son's bedroom. Defendant challenged the reliability of the expert's methodology.

In assessing the expert's methodology, the Fifth Circuit explained that "the proponent of expert testimony … has the burden of showing that the testimony is reliable."[36] Reaffirming the latitude given to trial judges to determine reliability, the Supreme Court further stated in *Kumho Tire* that "whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[37] The Fifth Circuit, applying these principles, ultimately found that the expert's methodology reliable.

More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

United States v. Perry[38]

Defendants were convicted of crimes related to their gang involvement in selling drugs. Meredith Acosta testified for the government as a ballistics expert. The government did not produce some documents considered by Acosta until the eve of trial or the day before Acosta testified. Defendants claimed that the late production evinced a lack of standards and reliability in her methodology.

The Fifth Circuit found the district court did not abuse its discretion in admitting Acosta's testimony because expert testimony "need not satisfy each *Daubert* factor."[39] In doing so, the Fifth Circuit quoted *Daubert's* statement regarding the traditional and appropriate means of attacking shaky evidence, stated that the *Daubert* inquiry should not supplant a trial on the merits, and stated the following: "Particularly in a jury trial setting, the court's role under Rule 702 is not to weigh the expert's testimony to the point of supplanting the jury's fact-finding role – the court's role is limited to ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue so that it is appropriate for the jury's consideration."[40]

Under the Rule 702 amendments, these generalized statements regarding the court's role in determining the admissibility of expert testimony are accurate only if the proponent of the expert evidence first

[36] *Id.* at 525.
[37] *Id.*
[38] 35 F.4th 293 (5th Cir. 2022).
[39] *Id.* at 329.
[40] *Id.* at 330.

demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Williams v. Manitowac Cranes, LLC[41]

Plaintiff John Williams Jr. was operating a crane manufactured by defendant Manitowac Cranes. The crane Williams was operating tipped, and Williams was thrown from the crane and injured. Williams sued, asserting failure to warn, design defect, and negligence claims against Manitowac. Williams offered Dr. William Singhose as a warnings expert. Manitowac challenged whether Dr. Singhose was qualified to testify as a warnings expert.

The Fifth Circuit found as follows: "Manitowac's quibbles about qualifications are better characterized as arguments about the *weight* of Dr. Singhose's testimony – not about its admissibility. But this battle should be fought with the conventional weapons of cross-examination and competing testimony – not the nuclear option of exclusion. Thus, the district court did not manifestly err by qualifying Dr. Singhose as a warnings expert."[42] In so finding, the Fifth Circuit noted that the district court "does *not* judge the expert conclusions themselves."[43]

Under the Rule 702 amendments, this dicta is accurate only to the extent the trial court first finds that it is more likely than not that the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. The expert's conclusion must be supported by reliable principles and methods.

Similar Fifth Circuit Cases

The following opinions permitted expert testimony in part on the rationale that questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and/or that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence:

- *United States v. Hodge*,[44]
- *United States v. Seale*,[45]
- *Wellogix, Inc. v. Accenture, LLP*,[46] and
- *Whitehouse Hotel Ltd. Partnership v. C.I.R.*[47]

[41] 898 F.3d 607 (5th Cir. 2018).
[42] *Id.* at 625.
[43] *Id.* at 623.
[44] 933 F.3d 268 (5th Cir. 2019).
[45] 600 F.3d 473 (5th Cir. 2010).
[46] 716 F.3d 867 (5th Cir. 2013).
[47] 615 F.3d 321 (5th Cir. 2010).

B. District Court Cases

Arlington Southern Hills, LLC v. American Insurance Co.[48]

Plaintiff sued defendant/ insurer for not providing coverage for property damage allegedly incurred during a wind and hail storm. Plaintiff offered several experts, including a meteorologist to testify regarding whether hail impacted the property, and an engineer and building inspector to testify regarding causation issues and scope of loss issues.

This opinion states that the trial court is charged with making a preliminary determination under Rule 104(a) regarding whether the expert's testimony is admissible. This is the incorrect burden of proof under the amendments to Rule 702.

Atlas Global Technologies LLC v. TP-Link Technologies, Ltd.[49]

Plaintiff sued defendants for patent infringement. Plaintiff's expert testified regarding whether defendants infringed on plaintiff's patents.

In finding that the expert's infringement opinions were sufficiently reliable and relevant to avoid exclusion, the district court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[50]

Under the Rule 702 amendments, this generalized statement is accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d). The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Bargher v. White[51]

Plaintiff Dennis Bargher sued Craig White, a correctional officer, after Bargher was attacked by another inmate. Plaintiff sought to introduce the testimony of Dr. George E. Smith, an expert in the field of correctional medicine.

The court provided that "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than

[48] 51 F. Supp.3d 681 (N.D. Tex. 2014).
[49] 684 F. Supp.3d 570, 576 (E.D. Tex. 2023).
[50] *Id.* at 576.
[51] 541 F. Supp.3d 682 (M.D. La. 2021).

its admissibility and should be left for the [trier of fact's] consideration. 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' This is the case here. Defendants have highlighted a technical, rather than scientific, deficiency in Dr. Smith's testimony which may go to the weight of his testimony. As such, the court declines to render Dr. Smith's testimony under Rule 702 inadmissible on this basis."[52]

The court did not assess how the expert applied the methodology but, rather, opted to let the defendants test the reliability and bases for Dr. Smith's opinions through cross-examination. Additionally, this language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

[52] *Id.* at 687 (internal citations omitted).

Collins v. Benton[53]

Plaintiffs sued defendants seeking recovery for injuries and property damages that plaintiffs allegedly sustained during a car accident. Defendants sought to introduce the testimony of Nancy Michalski regarding the reasonable value of plaintiffs' medical services.

The court provided that "a court's role as a gatekeeper does not replace the traditional adversary system. A 'review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.' 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' 'As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.'"[54]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court

[53] 470 F. Supp.3d 596 (E.D. La. 2020).
[54] *Id.* at 602-603.

that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d). Further, the court provided that "to the extent that Plaintiffs argue that the Physicians Fee Reference is not a reliable source, 'questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.' It is 'the role of the adversarial system, not the court, to highlight weak evidence.'"[55]

This language does not comport with new Rule 702's requirement that the court, rather than the jury, determine whether the expert witness testimony-proponent has established the requirements of Rule 702(a)-(d) by a preponderance of the evidence.

Cooley v. State Farm Fire & Casualty Co.[56]

Plaintiff, the homeowner-insured, filed suit against its insurer regarding windstorm damage that blew a tree down in plaintiff's yard. Defendant filed a motion to strike plaintiff's expert. Plaintiff retained a public adjuster to offer expert testimony regarding the scope, value, and cause of damages to the property from the windstorm.

The district court, in finding that plaintiff's expert was qualified to provide expert testimony, explained that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system" and that "[e]ven if there is some merit to State Farm's contention that Irwin is not qualified to testify as an engineer, the precise delineations of what opinions [he] can offer are more appropriately the subject of a motion in limine and/or an objection at trial."[57]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

DM Arbor Court, Ltd. v. City of Houston, Texas[58]

Plaintiff sued defendant (City of Houston, Texas) for refusing to grant permits to repair hurricane damage to an affordable housing apartment complex. Plaintiff alleged that defendant's refusal to grant the permits constituted a regulatory taking. Plaintiff offered a valuation expert to testify regarding the "before" value of the apartment complex to quantify the compensation due for the alleged regulatory taking.

[55] *Id.* at 604.
[56] 661 F. Supp.3d 618 (S.D. Miss. 2023).
[57] *Id.* at 622, 624.
[58] 622 F. Supp.3d 426 (S.D. Tex. 2022).

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Garcia v. Columbia Medical Center of Sherman[59]

Plaintiffs sued defendants for medical malpractice. Plaintiffs offered an economist regarding past and future lost earnings and services, as well as several medical experts.

This opinion states that the trial court is charged with making a preliminary determination under Rule 104(a) regarding whether the expert's testimony is admissible. This is the incorrect burden of proof under the amendments to Rule 702.

Lofton v. McNeil Consumer Specialty Pharmaceuticals[60]

Plaintiffs brought a wrongful death action alleging that the decedent suffered a rare adverse drug reaction after taking Motrin. Defendants challenged the admissibility of the causation opinion of plaintiffs' experts.

The district court found that the causation opinions of plaintiffs' experts were admissible because defendants' objection went to the weight or the sufficiency of the evidence and not its relevance or reliability. In particular, the district court found that the failure to consider the most recent epidemiological study, the reliance on case reports, and that plaintiffs' experts did not support their opinions with published studies all went to weight and sufficiency and not relevance and reliability.

Under the Rule 702 amendments, "weight and sufficiency" cannot be used to evade the requirement that the proponent of the expert evidence must first demonstrate to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Manning v. Walgreen Co.[61]

This is a trip-and-fall premises liability action. Plaintiff designated an expert to testify regarding the factors contributing to plaintiff's fall, defendants' actual or constructive knowledge of the dangerous condition, steps that

[59] 996 F. Supp. 617 (E.D. Tex. 1998).
[60] No. 05-cv-1531, 2008 WL 4878066 (N.D. Tex. July 25, 2008).
[61] 638 F. Supp.3d 730 (S.D. Tex. 2022).

could have been taken to prevent the fall, and safer alternatives.

The district court excluded the expert's testimony regarding defendant's knowledge of the dangerous condition, but otherwise found the expert's testimony relevant and reliable. The district court stated the following:

- questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility; and
- vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[62]

Under the Rule 702 amendments, these generalized statements are accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Neutrino Development Corp. v. Sonosite[63]

Plaintiff sued defendant for patent infringement. Plaintiff objected to the testimony of seven experts offered by defendant to testify regarding various patent infringement issues.

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Nucor Corp. v. Requenez[64]

Plaintiff sued defendant for breach of contract. Plaintiff and defendant offered several experts to discuss welding standards.

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Other District Court Cases

Numerous other district court opinions in the Fifth Circuit have likewise permitted expert

[62] *Id.* at 734.

[63] 410 F. Supp.2d 529 (S.D. Tex. 2006).

[64] 578 F. Supp.3d 878 (S.D. Tex. 2022).

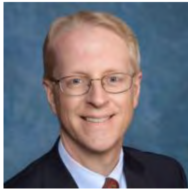
testimony in part on the rationale that questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and/or that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[65]

[65] Alpizar v. John Christner Trucking, LLC, 568 F. Supp.3d 714 (W.D. Tex. 2021); America Can! v. Arch Ins. Co., 597 F. Supp.3d 1038 (N.D. Tex. 2022); Anders v. Hercules Offshore Servs., LLC, 311 F.R.D. 161 (E.D. La. 2015); Andrews v. Rosewood Hotels & Resorts, LLC, 575 F. Supp.3d 728 (N.D. Tex. 2021); Arlington Southern Hills, LLC v. American Ins. Co., 51 F. Supp.3d 681 (N.D. Tex. 2014); Austin Firefighters Relief & Ret. Fund v. Brown, 760 F. Supp.2d 662 (S.D. Miss. 2010); BNJ Leasing, Inc. v. Portabull Fuel Serv., LLC, 591 F. Supp.3d 125 (S.D. Miss. 2022) (also finding expert testimony should be admitted unless it is "wholly unreliable"); Burton v. Wyeth, 513 F. Supp.2d 719 (N.D. Tex. 2007); CliniComp Int'l, Inc. v. Athenahealth, Inc., 507 F. Supp.3d 774 (W.D. Tex. 2020); Coleman v. BP Expl. & Prod., 609 F. Supp.3d 485 (E.D. La. 2022); Complete Logistical Servs., LLC v. Rulh, 394 F. Supp.3d 625 (E.D. La. 2019); Dockery v. Fischer, 253 F. Supp.3d 832 (S.D. Miss. Sept. 29, 2015); Enniss Fam. Realty I, LLC v. Schneider Nat. Carriers, Inc., 916 F. Supp.2d 702 (S.D. Miss. 2013); Gaddy v. Blitz U.S.A., Inc., No. 2:09-CV-52, 2011 WL 13193319 (E.D. Tex. Jan. 18, 2011); Gaddy v. Taylor Seidenbach, Inc., 446 F. Supp.3d 140 (E.D. La. 2020); Galvez v. KLLM Transp. Servs., LLC, 575 F. Supp.3d 748 (N.D. Tex. 2021); Graham v. Hamilton, 872 F. Supp.2d 529 (W.D. La. 2012); Haimur v. Allstate Prop. & Cas. Ins. Co., 605 F. Supp.3d 887 (S.D. Miss. 2022); Holcombe v. United States, 516 F. Supp.3d 660 (W.D. Tex. 2021); Holt v. St. Luke Health System, No. H-16-2898, 2018 WL 706469 (S.D. Tex. Feb. 5, 2018); *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 166 F. Supp.3d 654 (E.D. La. 2016); Jackson v. Parker-Hannifin Corp., 645 F. Supp.3d 577 (S.D. Miss. 2022); Jagneaux v. United Rentals (N. Am.), Inc., 453 F. Supp.3d 897 (S.D. Miss. 2020); Johnson v. Samsung Elecs. Am., Inc., 277 F.R.D. 161 (E.D. La. 2011); Jones v. Cannizzaro, 514 F. Supp.3d 853 (E.D. La. 2021); Jones v. L.F. Group, Inc., 559 F. Supp.3d 550, 553 (N.D. Miss. 2021); Joseph v. Doe, 542 F. Supp.3d 433 (E.D. La. 2021); Julius v. Luxury Inn & Suites, LLC, 535 F. Supp.3d 600 (S.D. Miss. 2021); Kim v. Nationwide Mut. Ins. Co., 614 F. Supp.3d 475 (N.D. Tex. 2022); Lamar Advert. Co. v. Zurich Am. Ins. Co., 533 F. Supp.3d 332 (M.D. La. 2021); Lewis v. Chet Morrison Contractors, LLC, 959 F. Supp.2d 962 (E.D. La. 2013); Maiden Biosciences, Inc. v. Document Sec. Systems, Inc., 2022 WL 16964752 (N.D. Tex. Nov. 16, 2022); Martinez v. Porta, 598 F. Supp.2d 807 (N.D. Tex. 2009); Matthews v. Allstate Ins. Co., 731 F. Supp.2d 552 (E.D. La. 2010); MCI Communs. Serv. Inc. v. KC Trucking & Equip. LLC, 403 F. Supp.3d 549 (W.D. La. 2019); MedARC, LLC v. Scott & White Health Plan, 618 F. Supp.3d 365 (N.D. Tex. 2022); Nestle v. BP Expl. & Prod., 627 F. Supp.3d 577 (E.D. La. 2022); New Orleans City v.

BellSouth Telecomms., Inc., 728 F. Supp.2d 834 (E.D. La. 2010); Nixon v. Krause, Inc., No. 3:00-CV-0915, 2003 WL 26098644 (N.D. Tex. Aug. 29, 2003); Perez v. Bruister, 54 F. Supp.3d 629, 640 (S.D. Miss. 2014), aff'd as modified, 823 F.3d 250 (5th Cir. 2016); Page v. State Farm Life Ins. Co., 584 F. Supp.3d 200 (W.D. Tex. 2022); Poole-Ward v. Affiliates for Women's Health, P.A., 329 F.R.D. 157 (S.D. Tex. 2018); Prejean v. Satellite Cty., Inc., 474 F. Supp.3d 829 (W.D. La. 2020); Smith v. DG Louisiana, LLC, 499 F. Supp.3d 280 (M.D. La. 2020); Stafford v. Lyft, Inc., 2022 WL 2106019 (W.D. Tex. April 25, 2022); Sexton v. Exxon Mobil Corp., 484 F. Supp.3d 321 (M.D. La. 2020); Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241 (M.D. La. 1996); Taylor v. B&J Martin, Inc., 611 F. Supp.3d 278 (E.D. La. 2020); Ureteknologia De Mexico S.A. De C.V. v. Uretek (USA), Inc., 434 F. Supp.3d 517 (S.D. Tex. 2020); United States v. E.R.R., LLC, 657 F. Supp.3d 851 (E.D. La. 2023); United States v. La. Generating, LLC, 929 F. Supp.2d 591 (M.D. La. 2012); United States v. Harvey, 405 F. Supp.3d 667 (S.D. Miss. 2019); Vallecillo v. McDermott, Inc., 576 F. Supp.3d 420 (W.D. La. 2021); Van Winkle v. Rogers, 2022 WL 4231013 (W.D. La., Sept. 13, 2022); Vedros v. Northrop Grumman Shipbuilding, Inc., 119 F. Supp.3d 556 (E.D. La. 2015); Wade v. BP Exp. & Prod., 630 F. Supp.3d 776 (E.D. La. 2022); Wagoner v. Exxon Mobil Corp., 813 F. Supp.2d 771 (E.D. La. 2011); Worldwide Holdings, LLC v. Ariix, LLC, 2019 WL 6037989 (E.D. Tex. July 31, 2019).

The Sixth Circuit

By: David T. Schaefer, M. Trent Spurlock, and Jasamine R. Chenault-Diehlmann



David Schaefer is a partner in the Louisville office of Dinsmore & Shohl. In his 38-year career, he has defended hundreds of product liability and personal injury cases in Kentucky, Indiana and surrounding states. His trial and appellate product liability practice includes complex motor vehicle, pharmaceutical and medical device cases, and multidistrict litigation.

Trent Spurlock is a partner in the Louisville office of Dinsmore & Shohl. Trent has maintained a civil trial practice throughout his career, defending and advising clients in the manufacturing, retail, pharmaceutical, and insurance industries regarding commercial disputes and liabilities arising from product defects, toxic exposures, insurance coverage, premises liability, and catastrophic injuries.

Jasmine Chenault-Diehlmann is a litigation associate in the Louisville office of Dinsmore & Shohl. Her practice focuses on tort litigation, including personal injury, insurance defense, premises liability, and motor vehicle collisions. Jasmine received trial experience in her first few years of practice, where she successfully tried a bench trial in state court.

Best v. Lowe's Home Centers, Inc.[1]

IN a personal action arising from permanent anosmia (loss of sense of smell) sustained by a customer after pool chemicals spilled onto his face and clothes in defendant's store, the plaintiff offered an otolaryngologist, Dr. Francisco Moreno, to establish medical causation between the chemical spill and plaintiff's injuries by use of a "differential diagnosis" methodology. The district court found the doctor's opinion to be inadmissible, which resulted in summary judgment for defendant. On appeal, the plaintiff argued that the doctor's opinions should not have been excluded. The Court of Appeals reversed the decision of the district court and the resulting summary judgment.

On appeal, the Sixth Circuit analyzed and dismissed all of the district court's criticisms of Dr. Moreno's opinions. Most of the analysis did not implicate any concerns about the application of Rule 702. However, the court relied upon Eighth Circuit and Third Circuit authorities and stated that any weaknesses in Dr. Moreno's methodology would affect the weight to be given his testimony, not its admissibility.[2]

This statement is facially inconsistent with the current version of Rule 702 in describing how an expert's methodology should be evaluated. Under Rule 702(c), courts should determine whether the proponent of the testimony has demonstrated that the expert's testimony is, more likely than not, the product of reliable principles and methods. Weaknesses in methodology affect the admissibility of testimony and do not just go to the weight that the expert's opinion.

Brown v. Wal-Mart Stores, Inc.[3]

Brown is a premises liability case arising from an injury to a customer's eye after she was struck by an aerosol can that allegedly fell from an overhead shelf. The proffered expert witness was a retail store safety expert. The primary issue was whether the retail store safety expert had sufficient facts to render his opinion against Wal-Mart. The trial court denied Wal-Mart's motion to exclude the expert.

[1] 563 F.3d 171 (6th Cir. 2009).

[2] *Id.* at 182.

[3] No. 98-5965, 1999 U.S. App. LEXIS 32031 (6th Cir. Nov. 24, 1999).

The Sixth Circuit affirmed, holding that (1) where an expert's opinion has a reasonable factual basis, it should not be excluded, and (2) whether an expert opinion should be accepted as having a reasonable factual basis is for the jury to decide.

Under Rule 702, the test of whether an expert's testimony is based on sufficient facts is not satisfied by simply determining that the testimony "has a reasonable factual basis," then leaving it for the jury to decide whether the factual basis is "adequate" to support the expert's opinions. Rather, the decision on whether an expert's testimony is based on sufficient facts is a matter to be determined by the court, applying a preponderance of the evidence standard.

In re *Scrap Metal Antitrust Litig.*[4]

In an antitrust action, industrial scrap-generating companies alleged that defendant scrap metal brokers and dealers violated the Sherman Act by conspiring to restrain and eliminate competition in the purchase of unprocessed industrial scrap metal. The proffered expert witness was an economist, Dr. Jeffrey Leitzinger.

Following a jury verdict against one of the defendants, Columbia Iron and Metal Company ("Columbia"), Columbia appealed. Among the issues on appeal was whether the district court erred in denying Columbia's motion to exclude the testimony of Leitzinger due to errors in his damages calculations, which were based in part on inaccurate information from *Iron Age* magazine's Scrap Price Bulletin ("SPB"). The Court of Appeals affirmed the decision of the district court, observing that rejection of expert testimony is the exception rather than the rule, and finding no abuse of discretion because the record contained at least "*some* factual basis" for Leitzinger's opinions.[5]

Following earlier Sixth Circuit decisions (*L.E. Cooke Co.* and *McLean*[6]) and contrary to the current version of Rule 702, this opinion does not apply a preponderance of the evidence standard to test the sufficiency of the facts and data upon which the expert's opinions were based and was instead satisfied if the opinions had at least "some factual basis," leaving any further deficiencies in the expert's data for consideration by the jury. In addition, this opinion suggests, contrary to the current version of Rule 702, that a court should not analyze an expert's ultimate opinions for reliability, but should stop its admissibility inquiry at determining whether the expert applied a reliable methodology.

[4] 527 F.3d 517 (6th Cir. 2008).

[5] *Id.* at 532 (emphasis in original).

[6] Each described *infra*.

This opinion is frequently cited[7] by Sixth Circuit courts for propositions such as:

- "[A] determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion."[8]
- "The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation."[9]
- A court "will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record."[10]
- "[W]eaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility."[11]

McLean v. 988011 Ontario, Ltd.[12]

A personal injury lawsuit arose from a plane crash allegedly caused by negligent servicing of the aircraft by the defendant. The district court granted the defendant's motion for summary judgment, concluding that plaintiffs had failed to sufficiently establish causation. In reaching its conclusion, the district court refused to consider the opinions of plaintiffs' two expert witnesses regarding causation for several reasons, including that the experts contradicted each other as to the cause of the crash, and they relied on circumstantial evidence whose factual basis was undermined by defendants' evidence.

On appeal, the Sixth Circuit reversed the summary judgment, concluding that the district court had improperly discounted the opinions of the plaintiff's experts. In doing so, the court reasoned that the experts' opinions were at least grounded in some record evidence: "An expert's opinion, where based

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[7] *See* United States v. Stafford, 721 F.3d 380, 393-94 (6th Cir. 2013); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 45 F. Supp.3d 724, 754 (N.D. Ohio 2014); Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C., 520 F. Supp.3d 872, 877, 879-880, 885, 887-878 (E.D. Michigan 2021); *See also* Stephenson v. Family Sols. of Ohio, Inc., 645 F. Supp.3d 755, 766, 771-772 (N.D. Ohio 2022); *In re* Ascent Res.-Utica, LLC, No. 21-0307, 2022 U.S. App. LEXIS 17437 at *7-9 (6th Cir. June 23, 2022).

[8] 527 F.3d at 529.

[9] *Id.* at 529-530.

[10] *Id.* at 530.

[11] *Id.*

[12] 224 F.3d 797 (6th Cir. 2000).

on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.'"[13]

This opinion is an example of a court, in evaluating the admissibility of an expert's testimony, only requiring that the testimony be based on some evidence in the record, with any contrary facts or weaknesses to be analyzed by the jury in determining how much weight to give the testimony. This is inconsistent with the current version of Rule 702.

United States v. Bonds[14]

In an appeal of a criminal conviction based on the admissibility of expert testimony about DNA evidence obtained from a blood sample of the defendant, the court affirmed the admissibility of the testimony, holding in relevant part:

> Accordingly, we hold that general acceptance is required as to the principles and methodology employed. The assessment of the validity and reliability of the conclusions drawn by the expert is a jury question; the judge may only examine whether the principles and methodology are scientifically valid and generally accepted.
>
> Thus in this case, the criticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.[15]

Under Rule 702, the *Bonds* court's inquiry should not have stopped at assessing the principles and methodology. Rather, pursuant to Rule 702(d), a court should also assess whether it is more likely than not that an expert's resulting opinions (conclusions) reflect a reliable application of the principles and methods, and this determination should not be left to the jury.

[13] *Id.* at 801-802 (internal citations omitted).

[14] 12 F.3d 540 (6th Cir. 1993).

[15] *Id.* at 563.

United States v. L.E. Cooke Co.[16]

The United States government sought to condemn and acquire land and award just compensation to the owners. Defendant corporation had interests in coal leases on the land, and a trial was held to determine their value. One of the government's experts was mining engineer Samuel Fish, who had performed a coal study and appraisal of the coal leases. The district court denied a motion to strike Fish's testimony, and this ruling was one of the issues on appeal.

The court affirmed the trial court's decision not to strike Fish's testimony. The court held:

> The Federal Rules of Evidence allow an expert great liberty in determining the basis of his opinions and whether an expert opinion should be accepted as having an adequate basis is a matter for the trier of fact to decide. Because [the expert's] testimony was clearly relevant to the issue at trial and did have some factual basis, it was admissible.[17]

Contrary to the language of this opinion, whether an expert's testimony is based on sufficient facts is a matter to be evaluated first by the court, applying a preponderance of the evidence standard to determine whether the testimony is reliable and admissible. The decision of whether the expert had a sufficient basis for his opinions should not have simply been left to the jury to decide after the court concluded that the expert's testimony met a threshold of "some factual basis."

This case is frequently cited[18] for the following propositions that are now inconsistent with Rule 702:

- "Where the opinion has a reasonable factual basis, it should not be excluded."[19]
- "Any weaknesses in the factual basis of an expert witness' opinion, including unfamiliarity with standards, bear on the weight of the evidence rather than on its admissibility."[20]
- "Whether an expert opinion should be accepted as having an adequate basis is a

[16] 991 F.2d 336 (6th Cir. 1993).
[17] *Id.* at 342 (internal citations omitted).
[18] *See Brown, supra* note 3; *McLean*, *supra* note 12; *In re Scrap Metal*, *supra* note 4; *In re Whirlpool*, *supra* note 7.
[19] 991 F.2d at 342.
[20] *Id.*

matter for the trier of fact to decide."[21]

United States v. Stafford[22]

Stafford was an appeal of a criminal case following the conviction and sentencing of defendant for being a felon in possession of a firearm and ammunition. Defendant Stafford appealed the district court's denial of his motion to exclude the results of gunshot-residue analysis and related expert testimony by gunshot residue expert Robert Lewis.

The court, citing the Sixth Circuit's decision in *In re Scrap Metal Antitrust Litigation*, failed to analyze the reliability of the expert's ultimate opinions, instead focusing only on the methodology in determining admissibility, and stating that any questions about the conclusions were for the jury to analyze. This is inconsistent with the current version of Rule 702's requirements that courts determine whether the proponent of the testimony has demonstrated that the expert's opinions, more likely than not, reflect a reliable application of the principles and methods to the facts of the case.

Benton v. Ford Motor Co.[23]

In a product liability action in which the plaintiff alleged that the defective design of the vehicle caused it to roll over and injure the plaintiff during a motor vehicle accident, the plaintiff offered Andrew Lawyer, an electrical engineer specializing in accident reconstruction and safety analysis, to testify that the vehicle had a low stability index and high propensity to roll over, which caused the accident. The defendant auto manufacturer filed a motion to exclude Lawyer's opinions. The court denied the motion to exclude, holding in pertinent part that the reliability of Lawyer's conclusions "must be weighed by the trier of fact."[24]

Contrary to this opinion, a court's inquiry into the reliability and admissibility of an expert's opinion does not stop at whether the expert is utilizing reliable methods. Pursuant to Rule 702(d), a court should also analyze the expert's conclusions and whether they, more likely than not, reflect a reliable application of the methodology.

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[21] *Id.*

[22] 721 F.3d 380 (6th Cir. 2013).

[23] 492 F. Supp.2d 874 (S.D. Ohio 2004).

[24] *Id.* at 879.

In re *Whirlpool Corp. Front-Loading Washer Products Liability Litig*.[25]

This product liability litigation related to alleged defects in front-loading washing machines which caused them to accumulate residue, mold and mildew. This opinion contains rulings on numerous motions by the plaintiffs and defendant to exclude testimony of multiple experts for each side. The court denied the defendant's motion to exclude the testimony of the plaintiff's design expert, Gary Wilson; the plaintiffs' motion to exclude the testimony of mechanical engineer, Paul Taylor; and the defendant's motion to exclude the testimony of survey and market researcher, Sarah Butler.

The court's opinion is based on prior Sixth Circuit authorities supporting admissibility of an expert's opinion as long as the opinion has support in the record, and that weaknesses in the expert's factual support go to weight, not admissibility.

Contrary to the current version of Rule 702, this opinion places in the hands of the jury most of the analysis of an expert's methodology and the sufficiency of facts and data considered by the expert.

Innovation Ventures, L.L.C. v. Custom Nutrition Laboratories, L.L.C.[26]

In a breach of contract case, the plaintiff and defendant each filed motions to exclude each other's damages experts, Rodney Crawford for the plaintiff and Dr. Christopher Pflaum for the defendant. The court denied both motions.

In admitting the opinions of both parties' experts, the court observed that rejection of expert testimony is the exception, rather than the rule. The court relied on prior authorities permitting expert testimony based in part on erroneous facts, as long as there is some factual support for the opinion. This opinion, like many opinions before it, does not cite to any burden of proof for the admissibility of expert testimony. Rather, it repeats the idea that the bar for admitting expert testimony is very low, that excluding such testimony is the exception not the rule, and that most of the analysis of expert testimony should be performed by a jury in deciding how much weight to afford the testimony. This opinion also puts on display the inconsistencies between the current version of Rule 702 and the Sixth Circuit's holding in *In re Scrap Metal*.[27]

[25] 45 F. Supp.3d 724 (N.D. Ohio 2014).

[26] 520 F. Supp.3d 872 (E.D. Michigan 2021).

[27] 527 F.3d 517, 529 (6th Cir. 2008).

The Seventh Circuit

By: William B. Larson, Jr. and Wade A. Bredin

Bill Larson is a partner with MG+M The Law Firm, based in the Wilmington, Delaware, office. He is a well-rounded litigator, counselor, problem solver, and trial attorney with extensive experience in Delaware general and commercial litigation, real estate litigation, trusts and estates litigation, local government matters, and national product liability litigation. Bill is a council member and former chair of the Delaware State Bar Association's Litigation section. He also previously served as the senior assistant city solicitor and special deputy attorney general for the City of Wilmington.

Wade Bredin is an associate with MG+M The Law Firm, based in the Wilmington, Delaware, office. He works across a wide spectrum of civil litigation matters, including national product liability litigation, real property litigation, trusts and estates matters, and commercial litigation. He also works on local government matters. Wade has experience in all phases of litigation, from advising on pre-litigation disputes to working on appellate matters.

Manpower, Inc. v. Insurance Company of the State of Pennsylvania[1]

THE partial collapse of a Paris office building resulted in insurance litigation over the cost of business interruption. The insurance agreement set out the method for determining these costs, though the numbers chosen to calculate this amount was the subject of dispute. Each party offered forensic accounting experts to determine the costs of the business interruption. The competing experts had used different numbers—but the same calculation—in reaching their final estimates.

The lower court excluded plaintiff's expert on the grounds that his testimony was based on incorrect assumptions of future profits. Specifically, the lower court found that plaintiff's expert had relied on too short a base period of profit margins in determining future profits. The Seventh Circuit reversed and instructed the admission of both experts, stating that "the reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology."[2]

Under the amendment to Rule 702(d), the court must find that each expert's opinion reflects a reliable application of sound principles and methods to the facts of the case. If the methodology or principles used by one expert is in dispute, it must hear evidence to determine whether it is more likely than not that the expert has applied sound principles and methods. Here, the court failed to determine whether Plaintiff's expert's methodology was based on sound principles, instead leaving it to the fact-finder to weigh the two experts' methods.

Smith v. Ford Motor Co.[3]

A battle of automobile experts led to an appeal when both experts were excluded on the basis that they could not be qualified as automotive design or engineering experts. The lower court reasoned that neither expert could be qualified because neither was peer-reviewed in the field of automotive engineering and because they were both proclaimed experts in something other than automotive engineering specifically. The Seventh Circuit overturned the district court's exclusion, finding that the experts could testify to conclusions of automotive

[1] 732 F.3d 796 (7th Cir. 2013).

[2] *Id.* at 808.

[3] 215 F.3d 713, 719 (7th Cir. 2000).

engineering despite being experts in related, but not exactly analogous, fields.

In so doing, the Seventh Circuit held that "the court's gatekeeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the reliability of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact…."[4]

Under the amendment to Rule 702(b), this conclusion would be incorrect. Courts are responsible for determining that it is more likely than not that the expert's final opinion is based on sufficient facts and data which reliably support the conclusion; a court may no longer allow a jury to determine whether the "factual underpinnings" are reliable enough to support the expert's conclusion.

Although the decision of the Seventh Circuit in *Smith* was in accordance with the new Rule, its dicta has been misused in various ways since its publication in 2000. Under the amended Rule, Rule 702(b) clearly requires a finding that the factual underpinnings of an expert's opinion are, in fact, reliable.

Walker v. Soo Line Railroad Co.[5]

Lightning struck plaintiff as he worked on defendant's railroad tower. Plaintiff sued on a theory that the tower was negligently grounded. Plaintiff sought to exclude defendant's expert, who inspected the railroad tower before the incident. The lower court allowed defendant's expert to testify despite allegations that his investigation had not been completed properly. The lower court did not discuss the expert's personal knowledge of the site or the reliability of his inspection. Defendant's expert testified that he had personally inspected the tower and that it was properly grounded.

The Court of Appeals affirmed the lower court's decision to admit defendant's expert. In so doing, it held that cross-examination—not a motion before the court—was the proper venue for questioning the reliability and completeness of the expert's investigation. The Court of Appeals wrote that "[i]f there was evidence that Tower A was unsafe that [the expert] should have considered but did not, or if there was reason to believe that [expert's] investigation was shoddy, [plaintiff] could have uncovered those flaws through cross-examination and through the presentation of contrary evidence."[6]

Pursuant to the Rule 702 amendments, courts must find by a preponderance of the evidence that an expert relied on sound principles and methods and that these

[4] *Id.* at 718.
[5] 208 F.3d 581 (7th Cir. 2000).
[6] *Id.* at 591.

principles and methods were reliably applied to the facts of the case. Here, the lower court should have heard evidence concerning the expert's investigation to determine whether it was based on reliable principles and methods and that those principles and methods were reliably applied, rather than leaving the issue in the first instance to cross-examination and the jury.

Livingston v. City of Chicago[7]

Female paramedic applicants challenged Chicago's physical testing regime alleging gender discrimination based on the disparate impact caused by the physical requirements. Chicago presented a career emergency responder as an expert in the necessary physical training to ensure paramedics were physically able to perform their duties. Plaintiffs challenged the reliability and relevance of the expert's testimony.

The judge's *Daubert* analysis referenced his gatekeeping function and mostly applied the *Daubert* standard correctly. However, in his analysis of the experts' reliable principles and methods, the judge found that the opinion was based on the expert's "expertise, the case-specific information listed in the report, and his inspection and site visit."[8] Further, the judge found that "because [the expert] connects his expertise to the facts and data in this case, his opinion is the product of reliable principles and methods, not *ipse dixit*."[9] Finally, the judge found that the "quality or remoteness" of the expert's experience as applied to the facts and data went to the "weight of his testimony, not its admissibility."[10] Further, "[d]eterminations on admissibility should not supplant the adversarial process; 'shaky' expert testimony may be admissible, assailable by its opponents through cross-examination."[11] "Thus, to the extent Plaintiffs argue that their cross-examination of Dr. Davis revealed weaknesses in his methodology, these arguments do not go to the admissibility of his testimony but rather to its weight."[12]

Under Rule 702's amendment, the court must find that the proffered expert reliably applied sound principles and methods before the expert can testify. Here, the court allowed the expert's testimony despite a lack of reliable principles and methods applied by the expert in reaching his conclusion.

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[7] 597 F. Supp.3d 1215, 1224 (N.D. Ill. 2022).
[8] *Id.* at 1224.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1221.
[12] *Id.* at 1225.

Cage v. City of Chicago[13]

Defendant in a rape case challenged the admission of the City's expert, because the expert had based his opinion as to whether seminal evidence indicated rape on disputed facts. Defendant's expert based his opinion on defendant's narrative of events and presented a conflicting opinion.

When a laboratory's results came down firmly on one set of facts, the district court did not change its ruling and still allowed both sets of experts to testify, stating that this factual contradiction was: "[A]n issue the trier of fact may consider when determining how much weight to give to [the expert's] conclusion; it does not bear on admissibility for the purposes of *Daubert*."[14]

The district court held that "the emphasis in [Rule 702] on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other," allowing experts to testify to their opinions based on two conflicting narrative of events.[15]

Under the amendment to Rule 702(d), the court likely would exclude the expert who based his opinion on the disproven facts because the court's gatekeeping function includes ensuring that the opinion reflects a reliable application of principles and methods to the facts of the case.

U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co.[16]

Plaintiff was forced to replace a costly sprinkler system and sued based on a theory of defective manufacturing and design. Defendant introduced an expert who opined that the sprinkler design was not defective.

Defendant manufacturer challenged that opinion on the grounds that the expert's methodology failed to account for numerous metallurgical properties of the sprinklers, failed to take alternative explanations into account, failed to quantify numerous data collected, and made questionable assumptions. The court found that the potential flaws in methodology went to the weight of his opinion, not its admissibility. The court held that the arguments against the expert's methods "go to the weight of the evidence [the expert] offers, rather than the admissibility of that evidence."[17]

Under the amendments to Rule 702(c), the court is responsible for determining that it is more likely than not that the expert used reliable principles and methods in

[13] 979 F. Supp.2d 787, 810 (N.D. Ill. 2013).
[14] *Id.* at 811.
[15] *Id.* at 810.
[16] 2010 WL 1266659 (S.D. Ind. March 25, 2010).
[17] *Id.*

reaching his conclusion. The question is not one of weight, but admissibility.

Huntington Chase Condominium Assc. v. Mid-Century Ins. Co.[18]

A condominium association and an insurer moved to exclude each other's meteorology experts in a dispute over hail damage coverage. The trial court held that both experts could testify despite one of them admittedly not being qualified in the computer modelling and data program he used to reach his conclusions. The court held that this lack of specific training went to the weight of his testimony, not its admissibility:

> As a general matter, however, while experts' lack of specialization in a specific subfield or technology may affect the **weight** of the opinions they express, it does not preclude the **admissibility** of those opinions. A court "should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.[19]

Under the amendment to Rule 702(d), the court must find that the expert's opinion reflects a reliable application of the principles and methods used. If the expert admits that he is unqualified in the use of the principles and methods used, it stands to reason that his conclusion cannot reflect a reliable application of those methods. Accordingly, the court would likely bar the testimony under the amended Rule.

[18] 379 F. Supp.3d 687 (N.D. Ill. 2019).

[19] *Id.* at 700 (emphasis in the original, internal citations omitted).

The Eighth Circuit

By: Thomas Gaillard, III and Alex Gressett

Tom Gaillard is managing partner at Helmsing Leach Herlong Newman & Rouse, in Mobile, Alabama. He maintains an active civil trial and appellate practice in both federal and state courts. A lawyer in private practice for more than 25 years, Tom has worked on a diverse array of cases with a focus on civil defense litigation and trial work, including product liability, medical and professional liability, personal injury, wrongful death and toxic tort litigation. Tom also represents individuals and governmental entities in a variety of matters, including constitutional claims brought under 42 U.S.C. § 1983.

Alex Gressett is an associate attorney with Helmsing, Leach, Herlong, Newman & Rouse, in Mobile, Alabama. As an associate at Helmsing Leach, Alex maintains a diverse litigation practice. After graduating with honors from the University of Alabama, Alex earned her J.D. from Cumberland School of Law at Samford University, where she served on the editorial board of the Cumberland Law Review.

Arcoren v. United States[1]

IN this pre-*Daubert* case, the defendant had been convicted in the district court for several counts of sexual abuse. At the trial, the government called an expert witness to testify regarding "battered woman syndrome." After hearing the proffered testimony in chambers, the court admitted the evidence.

On appeal, the Eighth Circuit considered the admissibility of this testimony and ultimately held that the testimony met the requirements of Rule 702. In doing so, the court cited to a prior line of Eighth Circuit

[1] 929 F.2d 1235 (8th Cir. 1991).

cases for the proposition that "Rule 702 is one of admissibility rather than exclusion" and "Rule 702 was intended to function as a broad rule of admissibility."[2] Further, a "trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the fact-finder."[3]

Clearly, this case has been overruled by *Daubert* and the amendments to Rule 702. This case is important because the following line of post-*Daubert* Eight Circuit decisions have continued to cite to the *Arcoren* case and the "so fundamentally unsupported" standard for decades to follow.

Arkwright Mutual Insurance Co. v. Gwinner Oil, Inc.[4]

The plaintiffs in this case were property insurers who brought a subrogation action against oil and propane companies. The plaintiffs alleged that the companies were negligent in delivering liquid propane to their insured, a manufacturing plant. There was an explosion and fire at the insured's manufacturing plant, and the plaintiff sought to place blame on the defendants. The defendants called a mechanical engineer and a metallurgist to provide opinion testimony regarding propane storage and the proposed cause of the explosion and resulting fire.

The plaintiffs argued on appeal that the district court erroneously admitted the opinions of two of the defendants' expert witnesses. The court ultimately found that the district court did not abuse its discretion in admitting the expert testimony. However, the court followed the flawed analysis employed by the Eighth Circuit in the *Hose* and *Loudermill* decisions, discussed further in this section.

Citing to *Hose*, the court in *Arkwright* again applied the "so fundamentally unsupported as to be unhelpful" standard,[5] which is a highly permissive admissibility test that completely disregards the Rule 702 requirements. The "so fundamentally unsupported" standard allows admission unless an extreme deficiency exists in which it can offer "no assistance to the jury." This standard contradicts all of the requirements set forth in Rule 702 that the testimony must be (1) based on sufficient facts or data; (2) the product of reliable principles and methods; and (3) reflects a reliable application of the principles and methods to the facts of the case. This case is yet another example of the Eighth Circuit taking their gatekeeping guidance from prior cases that pre-date *Daubert*, rather

[2] *Id.* at 1239-1240.
[3] *Id.*
[4] 125 F.3d 1176 (8th Cir. 1997).
[5] *Id.* at 1183.

than simply applying the standards that Rule 702 commands.

Bonner v. ISP Technologies, Inc.[6]

In this case, a worker sued an organic solvent manufacturer for injuries allegedly caused by his exposure to the solvent. In the United States District Court for the Eastern District of Missouri, the jury awarded the worker over $2 million for his injuries. The manufacturer appealed, arguing among other things, that the court erred in admitting the testimony of Dr. Terry Martinez, a pharmacologist and toxicologist, and Dr. Raymond Singer, a neuropsychologist and neurotoxicologist.

The court again erroneously asserted that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion on cross-examination."[7] The Eighth Circuit further cited to its *Hose* analysis which provides that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[8] Ultimately, the Court of Appeals found that the district court conducted "a thoughtful and thorough inquiry" and found "nothing in the record to suggest that [the expert's testimony] was the result of methodology so unreliable as to render its admission an abuse of discretion."[9]

It is unclear whether this case would still be good law under the amendments to Rule 702. The Eighth Circuit again erroneously cited to the "so fundamentally unsupported" standard originating in *Hose.* Despite this, the court appeared to still give strong deference to the district court's decision and even properly noted the trial court's gatekeeping role.[10]

Children's Broadcasting Corporation v. Walt Disney Company[11]

This case involved claims by the Children's Broadcasting Corporation against Walt Disney for breach of contractual duties to sell advertising and to maintain confidentiality as well as claims for misappropriation of a trade secret. Children's Broadcasting presented evidence at trial that Disney had

[6] 259 F.3d 924 (8th Cir. 2001).
[7] *Id*. at 929.
[8] *Id.* at 929-930.
[9] *Id.* at 932.
[10] *See id.* at 932 ("Nor is it our task to duplicate the district court's analysis of the scientific validity of expert testimony, for the gatekeeping function is reserved to the district court.").
[11] 357 F.3d 860 (8th Cir. 2004).

"accelerated" their entry into the children's radio market by using information about advertising and marketing they obtained from Children's. The plaintiff presented evidence on damages from a proposed expert witness on these issues that was questioned by the defendants.

The Eighth Circuit upheld the District Court's admission of the expert's testimony indicating that the District Court was satisfied with the expert's credentials for valuing trade secrets and that he used an accepted academic methodology. The Eighth Circuit stated that the objections to the expert's opinions were better directed to the weight of the testimony, rather than admissibility, and that the defendants had a full opportunity to cross examine the expert.

The Eighth Circuit improperly relied on prior Eighth Circuit decisions stating that the factual basis of an expert opinion goes to the credibility of the testimony and not the admissibility. The Eighth Circuit again improperly stated its standard for admissibility at variance to Rule 702 and stated "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[12]

This decision is yet another Eighth Circuit opinion that applies a flawed analysis as to the admissibility of expert opinion testimony and fails to properly apply the requirements of Rule 702. It is difficult to know from the factual discussion in this case whether a proper application of the current language of Rule 702 would lead to the exclusion of this expert's proposed testimony, but the analysis of the Eighth Circuit regarding this admissibility question is likely to no longer be good law under the current language of Rule 702.

Hartley v. Dillards, Inc.[13]

Plaintiff, a former employee, sued Dillard's, Inc. alleging age discrimination following his termination. A jury found for the plaintiff. Dillard's appealed arguing that the testimony of plaintiff's economist expert should have been excluded because it was not based on sufficient facts, data, scientific principles, and reliable methods. The economist testified on the computation of damages and the economics of employability and external factors affecting mall and retail store sales. Plaintiff presented the testimony to support his position that the defendant used declining profits to justify plaintiff's termination. The economist testified that the financial problems of the store were consistent with what was happening to department stores around the country. Defendant argued that the testimony was not

[12] *Id.* at 865.

[13] 310 F.3d 1054 (8th Cir. 2002).

based on sufficient facts or data because the materials he relied on did not support his testimony, and he failed to consider the economic realities specifically applicable to the store at issue.

The *Hartley* court cited to Rule 702 and the *Kumho Tire* decision in its analysis, noting that "a trial judge, in admitting expert testimony, has a gatekeeping responsibility to ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[14] The court went on to quote *Hose* stating that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination . . . only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[15]

However, it is unclear whether the court actually used the "so fundamentally unsupported" standard or the Rule 702 standard when analyzing the district court's decision. The court simply reasoned that while the expert's testimony may not have addressed the specific financial conditions it needed to, the jury could consider this evidence on the profit questions relating to discharge. Thus, the court found "the district court did not abuse its discretion under *Kumho Tire* in admitting [the expert] testimony."

It is unclear whether this case would still be good law because the court's analysis of the testimony was very short and ambiguous. The court never directly discussed the Rule 702 standards, but it did discuss the district court's gatekeeping responsibility when citing to *Kumho Tire*. The court then went on to quote its framework employed in *Bonner* and *Hose* before affirming the district court's decision in just a few short sentences. Because *Bonner* and *Hose* reflect incorrect application of Rule 702, and this case cites to that framework, it is likely this case should not be relied on for analysis of expert testimony under Rule 702.

Hose v. Chicago Northwestern Transportation Co.[16]

This appeal arose out of a jury verdict for personal injuries in favor of the plaintiff-employee against the plaintiff's employer under the Federal Employers' Liability Act (FELA). Plaintiff was a welder who claimed that he was exposed to substantial fumes and dust containing manganese and subsequently developed manganese encephalopathy.

Plaintiff called three different physicians to provide proposed expert testimony to support his

[14] *Id.* at 1061.
[15] *Id.*
[16] 70 F.3d 968, 974 (8th Cir. 1995).

claims. One doctor offered testimony based on a PET scan to rule out other causes of plaintiff's brain injury and testified that the scan was consistent with manganese encephalopathy. The court provided very little analysis of the reliability of the opinion testimony based on the PET scan.

Next, plaintiff offered testimony from another physician regarding a polysomnogram to support that doctor's testimony that the plaintiff had a sleep disorder consistent with exposure to a toxic substance. Again, the court did not do much analysis regarding the reliability of this opinion testimony or whether the physician applied any methodology in a reliable manner. The court simply admitted the testimony and indicated that the defendant was free to argue to the jury that this testimony should carry little weight.

Finally, the plaintiff also offered testimony from another physician regarding her opinion that the diagnosis of the plaintiff at the time of trial was manganese encephalopathy caused by inhalation of manganese fumes. The defendant also challenged this opinion testimony, but the district court allowed it at trial and the Eighth Circuit upheld the decision without much analysis about the actual reliability of the testimony under Rule 702.

Citing to the pre-*Daubert* opinion in *Loudermill*, the court stated: "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[17]

The court held that the opinion testimony of the physicians had sufficient factual basis and the district court properly left it to the jury to evaluate the credibility of the witness. This case fatally misconstrued the holding in *Daubert* and is at odds with the current language of Rule 702.

In re *Bair Hugger Forced Air Warming Devices Products Liability Litig.*[18]

In this case, plaintiffs were a group of patients who had undergone orthopedic implant surgeries utilizing defendant's manufactured surgical device. Plaintiffs argued the device caused them to contract joint infections, and asserted claims for negligence,

[17] *Id.* at 974.
[18] 9 F.4th 768 (8th Cir. 2021), cert. denied, 3M Company v. Amador, 142 S. Ct. 2731 (May 16, 2022).

strict products liability, and other related claims. Following a full cross-examination at trial of the plaintiffs' experts, the district court subsequently excluded the expert opinions on general causation theories finding that they did not meet Rule 702 mainly because they included large analytical gaps and were not generally accepted.

On appeal, the Eighth Circuit reversed the lower court's witness exclusions, concluding that the witnesses' opinions had certain weaknesses, but were not "so fundamentally unsupported" so as to merit exclusion. Citing again to the "liberal thrust" of Rule 702 regarding the admissibility of expert testimony, the court re-examined the reasons provided by the MDL court for excluding plaintiffs' experts. Regarding plaintiffs' medical causation experts, the Eighth Circuit disagreed with the MDL court that there was too great an analytical gap between the literature and the experts' opinions. The Eighth Circuit focused instead on the "totality of the evidence" and found that their theories were not unreliable. The court stated that "deficiencies in an expert's factual basis go to weight and not admissibility," and "redress for such weaknesses lies in cross-examination and contrary evidence rather than exclusion."[19]

This analysis is directly criticized in the 2023 amendments to Rule 702: "[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)."[20]

The Eighth Circuit in *In re Bair Hugger* reanalyzed the issues and substituted its own discretion for the district court's. The district court's opinion more closely adhered to the standard found in Rule 702, which should have been upheld by the Court of Appeals absent a finding of an abuse of discretion.

Jenson v. Eveleth Taconite Co.[21]

The plaintiff-employees brought a class action lawsuit against their former employer for sexual harassment and discrimination in violation of Title VII and the Minnesota Human Rights Act. After finding the employer liable, the United States District Court for the District of Minnesota affirmed the

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[19] *Id.* at 786, 787.
[20] Advisory Comm. on Evidence Rules, Proposed Amendments to the Federal Rules of Evidence, Rule 702, advisory comm. note 1.
[21] 130 F.3d 1287 (8th Cir. 1997).

Special Master's report and recommendation awarding damages. The employees appealed on several grounds including the Special Master's exclusion of the testimony of their causation experts. The Court of Appeals held that the Special Master erred in rejecting the testimony of the three psychiatrists and three psychologists' plaintiffs proffered as their causation experts.

The *Jenson* court expressed some confusion as to whether the *Daubert* analysis should be applied to "soft" sciences such as psychology. However, the court reasoned that "under either *Daubert* or under the more general parameters of Rule 702, the proffered testimony was both reliable and relevant and should have been admitted into evidence."[22] The court went on to discuss the *Daubert* factors but completely failed to apply them. The court stated:

> The record indicates the opinion evidence offered by the plaintiffs' expert witnesses was thorough and meticulously presented. The methodology for arriving at their opinions was laid out clearly by each witness. The key question in this damages phase of the trial was the causal link between the actions of the defendants and the claimed emotional injuries of the plaintiffs. The expert testimony was therefore without a doubt relevant to the issue before the court.
>
> For these reasons, we find that the overall testimony was erroneously excluded under Rule 702 and established precedents of this court.[23]

The court went on to quote such "established precedents" which happened to be, again, all of the pre-*Daubert* authority discussed above. The court discussed not only the "so fundamentally unsupported" standard but also pointed to the authority stating that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony," and "the rule clearly is one of admissibility rather than exclusion."[24]

After reversing the district court's decision and taking away its gatekeeping role, the court concluded by stating that "the weight and credibility of this evidence is left to the trier of fact, which in this case is the district court. However, there is little doubt that exclusion of such evidentiary proof could appreciably affect the

[22] *Id.* at 1297-1298.

[23] *Id.* at 1298.

[24] *Id.*

damages awarded to the plaintiff class."[25] This case appears to be inconsistent with the requirements outlined in the current version of Rule 702.

Johnson v. Mead Johnson & Co., LLC[26]

The plaintiff, in his capacity as guardian *ad litem* for an infant, brought a products liability action against the manufacturer of infant formula after the infant ingested the formula and sustained significant brain injuries due to a bacterial infection. Plaintiff retained three physicians among numerous other experts to testify regarding causation. The district court held a Rule 702 hearing and excluded the testimony of the three physicians because they did not do an adequate differential diagnosis. The Eight Circuit reversed.

The Eighth Circuit gave little to no deference to the district court's decision to exclude the expert testimony. "Interestingly, the liberalization of the standard for admission of expert testimony creates an intriguing juxtaposition with our oft-repeated abuse-of-discretion standard of review. While we adhere to this discretionary standard for review of the district court's Rule 702 gatekeeping decision, cases are legion that, correctly, under *Daubert*, call for the liberal admission of expert testimony."[27] The court examined the experts' methods, finding that a differential expert can be reliable even "with less than full information" and such considerations should go to the weight to be given by the jury, not its admissibility.[28]

This case completely disregards the standards in Rule 702. Not only did it suggest that opinions that exclude plaintiffs' experts get less deference because they conflict with *Daubert's* "liberal thrust," the court took away the district court's gatekeeping role, re-examined the issues, and held that the district court abused its discretion in excluding the experts based on their unreliable methodology.

Kuhn v. Wyeth, Inc.[29]

In this case, the plaintiffs were consumers who were prescribed a hormone therapy drug and developed breast cancer after taking the drug. The plaintiffs sued the manufacturer of the drug alleging, among other things, that the drug increased the risk of breast cancer and the manufacturer failed to adequately warn of this risk. Plaintiffs retained an epidemiologist to testify as their causation expert to support their contention that short-

[25] *Id.* at 1299.
[26] 754 F.3d 557 (8th Cir. 2014).
[27] *Id.* at 562.
[28] *Id.* at 564.
[29] 686 F.3d 618 (8th Cir. 2012).

term use of the drug increases the risk of breast cancer.

The proffered expert cited to five studies to support his conclusions, however he conceded that two of the studies should not have been included in the report, two of the studies involved other drug combinations, and one of the studies did not reliably track duration of use. The magistrate judge found that with no studies to reliably support his position, along with a failed effort to discredit other studies' results, the expert's opinion was not sufficiently reliable and must be excluded.

The Eighth Circuit re-analyzed each of the studies cited by plaintiffs' epidemiologist. The court ultimately reversed and found that the expert's explanation as to why the study did not undermine his opinion was sufficient to raise a jury question and the trial court should have allowed the expert to testify in front of the jury. Based on the amendment to Rule 702, the court must find that the proffered expert opinion is based on the application of sound principles and methodology and on sufficient facts and data. The decision of the Eighth Circuit in this case appears to violate those principles and the current language of Rule 702.

Lauzon v. Senco Products, Inc.[30]

The plaintiff was a carpenter who sued the manufacturer of a pneumatic nail gun resulting from an injury to his hand when a nail went through his hand while using the pneumatic nail gun at work.

Plaintiff retained a mechanical engineer as an expert witness to provide opinion testimony about a design defect theory. The district court excluded that opinion testimony. However, the Court of Appeals reversed the decision of the district court to exclude that expert opinion testimony.

Despite citing the then-applicable prerequisites for admissibility of expert opinion testimony under Rule 702, the Eighth Circuit expressed the idea that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony."[31]

It does not appear that this case would continue to be good law under the more recent amendments to Rule 702, since the appellate court appears to have applied the incorrect burden of proof (not the current 104(a) standard) and failed to properly analyze the methodology of the expert and the other prerequisites to admissibility.

[30] 270 F.3d 681 (8th Cir. 2001).
[31] *Id.* at 686.

Loudermill v. Dow Chemical Co.[32]

In this case, the plaintiff was a worker who had been exposed to chemicals at a plant and died due to cirrhosis of the liver. Plaintiff's estate brought an action against the plant for wrongful death alleging that his death by cirrhosis of the liver was a direct result of his exposure to the chemicals.

At the trial of this case, the expert testimony of a toxicologist with doctoral degrees in toxicology and chemistry, but not in medicine, was used to establish causation between the chemical exposure and the plaintiff's injuries. Defendant objected to the admission of this testimony because the toxicologist admitted that he had never done research in this area. Further, because he lacked a medical degree, defendant argued he should not have been permitted to testify as to the high medical probability of the cause of plaintiff's cirrhosis of the liver.

On appeal, the Eighth Circuit held that the district court did not abuse its discretion in admitting the testimony because the toxicologist's testimony "sufficiently assisted the jury to justify the magistrate's decision to allow admission."[33] The court reasoned that the jury was well aware that the expert was not a medical doctor and that the weight and value of the testimony was for the jury to evaluate. "The testimony was, however, sufficient to cross the threshold of admissibility."[34]

This was the first case within the Eighth Circuit to declare that that "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."[35] For many years following this decision, courts within this circuit have continued to apply the *Loudermill* court's analysis and reasoning even though this was a pre-*Daubert* case. This case is relied on by other decisions in the Eighth Circuit to support the admissibility of expert testimony, but it should no longer be considered good law under the current version of Rule 702.

Polski v. Quigley Corp.[36]

The Polskis filed suit against Quigley asserting claims for fraud, negligence, and strict products liability among others, alleging that the use of the Cold-Eeze product caused them sensory loss. The Polskis offered the expert opinion of a physician to prove causation. The district court struck the physician's testimony concluding that his causation opinion rested on an unproven premise about Cold-Eeze. The court determined that his opinions were not sufficiently

[32] 863 F.2d 566 (8th Cir. 1988).
[33] *Id.* at 569.
[34] *Id.* at 570.
[35] *Id.*
[36] 538 F.3d 836 (8th Cir. 2008).

reliable to be admitted under Rule 702.

On appeal, the Polskis argued the district court erred in precluding the physician's opinion. The Eighth Circuit ultimately found no abuse of discretion in the district court's decision to exclude the physician's testimony. However, the court still discussed the faulty application of the Rule 702 standard applied in previous cases such as *Lauzon*, and it is unclear whether this case would still be good law. The Eighth Circuit cited to *Lauzon* for its proposition that Rule 702 is "clearly one of admissibility rather than exclusion."[37] The court also discussed the "so fundamentally unsupported" standard in its analysis. However, the court still found no issue with the district court's decision to exclude the testimony despite citing to these earlier cases which discuss the wrong standard.

Smith v. BMW North America, Inc.[38]

The plaintiff, a motorist who was rendered a quadriplegic after a motor vehicle accident, brought a product liability action against the vehicle manufacturer, alleging the air bag was faulty. The district court excluded testimony of plaintiff's experts.

On appeal, the Eighth Circuit held: (1) forensic pathologist's expert testimony as to how motorist sustained neck injury, and that, to a reasonable degree of medical certainty, a properly deploying air bag would have reduced her injuries, was admissible; and (2) certified accident reconstructionist's expert testimony as to principal direction of force during accident was admissible, but his testimony regarding magnitude of barrier equivalent velocity was inadmissible because it was unreliable.

The Court of Appeals claimed to review the district court's decision under the abuse of discretion standard, but re-examined the issues instead and reversed the district court's decision in excluding the testimony. The district court found that the forensic pathologist was not scientifically or medically reliable for seven reasons. The Court of Appeals found that all the court's cited reasons were insufficient to disqualify him "from offering testimony that would be helpful to the jury."[39] As to the second expert, the district court determined the methods used by the accident reconstructionist were fundamentally flawed and his opinions based upon those methods were therefore inherently unreliable. The Court of Appeals found that the district court's

[37] *Id.* at 839.
[38] 308 F.3d 913 (8th Cir. 2002).
[39] *Id.* at 919.

perception of the expert's demonstration did not provide a valid basis for concluding that his testimony was unreliable.

This case represents an incorrect application of Rule 702 because the Court of Appeals supplemented its discretion for the trial court's and completely disregarded the trial court's reasoning for excluding the testimony. Rule 702 specifically provides that the gatekeeping role rests exclusively with the trial court. Here, the trial court found that the testimony was not to be admitted because the proponent did not demonstrate to the court it met the admissibility requirements set forth in the rule. The Eighth Circuit decided to ignore the analysis of the trial court, re-examined the issues, and admitted the testimony because it would "be helpful to the jury."

Structural Polymer Group, Ltd. v. Zoltek Corp.[40]

In this breach of contract case, the plaintiff and defendant had a contract for the sale of carbon fiber. After an entry of a jury award in the plaintiff's favor, the defendant-seller appealed the jury's damages award arguing that it was based on impermissible speculation and other improper grounds. On appeal, the Eighth Circuit considered whether the jury's damage award was adequately supported by the record. In doing so, the court applied a Rule 702 analysis to the defendant's challenges.

According to the court, "[a]s a rule, questions regarding the factual underpinnings of the expert's opinion affect the weight and credibility of [the witness'] testimony, not its admissibility."[41] Additionally, the court applied the "so fundamentally unsupported" standard in its analysis. Ultimately, the court concluded the jury's award was adequately supported by the record. The Eighth Circuit in this case continues to track the language used in its pre-*Daubert* decisions and completely disregards the true Rule 702 standards.

United States v. Beasley[42]

In this criminal case, the defendant challenged on appeal the district court's denial of his motion to exclude DNA evidence. The Eighth Circuit, in analyzing the admissibility of certain testimony regarding alleged deficiencies in the laboratory testing, stated that "these alleged deficiencies . . . go to the weight of the DNA evidence, not to its admissibility."[43]

The problem with the Eighth Circuit's analysis here is that it ignores Rule 702(d) requiring the

[40] 543 F.3d 987 (8th Cir. 2008).

[41] *Id.* at 997.

[42] 102 F.3d 1440 (8th Cir. 1996).

[43] *Id.* at 1448.

trial court find by a preponderance of the evidence that the expert has reliably applied the methodology to the facts. Although this case predates the 2000 revisions, it is important because the Eighth Circuit uses this case to support its later decision in *United States v. Gipson*, and thus, it falls into the long line of poor decisions by the Eighth Circuit which misinterpret Rule 702.

United States v. Finch[44]

In this criminal case involving the charge of possession of crack cocaine, there was a question about the quantity of crack cocaine consumed during laboratory testing. The government presented the testimony of a forensic chemist for the state crime lab to provide opinion testimony about the amount of crack cocaine consumed during testing to support its position that the total amount of crack cocaine possessed by the defendant at the time of arrest was in excess of a certain level required to support the charge for possession. The forensic chemist testified that her experience in analyzing and weighing small quantities of powdery substances gave her "a better judgment about the quantities involved . . . than a lay person."[45] The defendant argued that her testimony was simply based on conjecture and not supported by any reliable principles or methodology.

In this case, the plaintiff's expert testimony was admitted by the district court. This case cites to several earlier decisions standing for the proposition that "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[46]

The court misstates the law here and follows the erroneous analysis of the previous decisions within this circuit. The analysis certainly does not follow Rule 702 and is so engrained in the case law in the Eighth Circuit that it has trickled down to second and third generation decisions. The *Finch* holding is a direct descendant of pre-2000 amendment standards. *Finch* quoted the statement from *United States v. Rodriguez*.[47] *Rodriguez* took the quotation from *Arkwright*. *Arkwright* drew the sentence from *Hose* and *Hose* found the words in the pre-*Daubert* ruling in *Loudermill.*

This case is yet another example of an Eighth Circuit opinion that continued to follow the flawed analysis of earlier Eighth Circuit decisions on the admissibility of expert testimony. A proper analysis of proposed expert testimony under

[44] 630 F.3d 1057 (8th Cir. 2011).
[45] *Id.* at 1063.
[46] *Id.* at 1062.
[47] 581 F.3d 775, 795 (8th Cir.2009) (quoting *Arkwright*, *supra* note 4, at 1183).

the current language of Rule 702 requiring sufficient facts and data as well as a reliable application of the principles and methodology of the expert would likely lead to a different conclusion than the opinion reached in this case.

United States v. Gipson[48]

In this case, Gipson appealed from a final judgment entered in the United States District Court for the District of Minnesota upon a jury verdict finding him guilty of two counts of bank robbery. Gipson argued on appeal that under *Daubert* the district court improperly admitted DNA evidence at trial.

When analyzing the question of the admissibility of DNA evidence in this case, the Eighth Circuit stated "[i]n applying the reliability requirement of *Daubert*, this court has drawn a distinction between, on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the *application* of that scientific methodology."[49] Further, the Eighth Circuit stated that "when the *application* of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable," the court said, "outright exclusion of the evidence in question is warranted only if the methodology 'was so altered [by a deficient application] as to skew the methodology itself.'"[50] The Eighth Circuit went on to agree with the decision of the district court that the method for DNA testing was reliable and then analyzed the contention of the defendant that the application of that method was not performed in a reliable manner. However, the court simply upheld the district court's decision to admit the DNA evidence and stated that any "faulty application" of the method of analysis of the DNA in that case would only go to the weight of the evidence and not to its admissibility.

The current version of Rule 702 should require the court to analyze the scientific methodology in question as well as the application of that methodology to the facts of the particular case. In either instance, the expert should be required to show, by a preponderance of the evidence, that his or her opinion testimony is based on sufficient facts and data and a reliable application of the scientific methodology to those facts. The court cannot simply overlook these issues and state that any deficiencies would go to the weight, and not the admissibility, of the proffered evidence.

[48] 383 F.3d 689 (8th Cir. 2004).
[49] *Id.* at 696.
[50] *Id.* at 697.

United States v. Martinez[51]

In this criminal case, the defendant was convicted of sexual abuse following a jury trial. The defendant appealed. Among other things, the Eighth Circuit considered the effect *Daubert* had on the admissibility of DNA evidence. The court discussed the requirements of Rule 702 and the application of Rule 104(a), however, the court erroneously stated that "an alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself."[52] While this case pre-dates the 2000 amendments to the Rules, it is important to note in this article because it continues to be cited by the Eighth Circuit and other circuits for this proposition.

Weisgram v. Marley Co.[53]

In the Eighth Circuit's opinion in *Weisgram v. Marley Co*., the plaintiff brought a wrongful death action on behalf of the decedent's estate, against the manufacturer of an allegedly defective home baseboard heater. The district court admitted testimony of three experts: (1) a metallurgist who had examined the subject heater and its components; (2) a city fire captain who arrived with the first fire truck on the scene, and also conducted the investigation for the fire department; and (3) a fire investigator and technical forensic expert. On appeal, the Eighth Circuit concluded that the testimony of all three expert witnesses was unreliable and "the District Court abused its admittedly broad discretion in allowing the suspect testimony."[54]

The Eight Circuit analyzed each of the expert's testimonies and concluded that the opinions amounted to "no more than subjective belief or unsupported speculation."[55] The court re-examined the issues and concluded that there was too great an analytical gap between the data and the opinion proffered and thus the "testimony was unreliable and it was an abuse of discretion to allow it."[56]

While it appears the court applied the correct Rule 702 standard in its opinion, in Judge Bright's dissent, he cited to the earlier decisions in *Jensen* and *Arcoren* for the proposition that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony" and "[t]he rule is one of admissibility rather than exclusion."[57] *Arcoren*, decided in 1991, was not only before

[51] 3 F.3d 1191 (8th Cir. 1993).
[52] *Id.* at 1198.
[53] 169 F.3d 514 (8th Cir. 1999), aff'd 528 U.S. 440 (2000).
[54] *Id.* at 518.
[55] *Id.* at 521.
[56] *Id.* at 523.
[57] *Id.*

Rule 702 was amended but also before the Supreme Court established the reliability test in *Daubert*. Judge Bright went on to state that even if the testimony of the plaintiffs' experts was unreliable, the matter goes to the weight and not the admissibility of the testimony. While this dissent is not binding law, several later decisions have cited to the *Weisgram* dissent for this proposition, including *Lauzon*.

The Ninth Circuit

By: Mark Behrens and Andrew Trask

Mark Behrens co-chairs the Washington, D.C.-based Public Policy Group of Shook, Hardy & Bacon L.L.P. Mark has over thirty years of experience working on civil justice issues and defense litigation. A substantial part of his practice is working to improve the civil litigation environment through legislation; in the courts through amicus curiae briefs on behalf of business, civil justice, and defense lawyer organizations; through legal scholarship and judicial education; and in the court of public opinion. Mark chairs the IADC's Civil Justice Response Committee and serves on the Board of Lawyers for Civil Justice. He is a recipient of the IADC's Joan Fullam Irick Award for his work as Civil Justice Response Committee chair.

Andrew Trask is Senior Counsel in Shook Hardy & Bacon, LLP's Los Angeles office. He received his JD from the University of Chicago Law School and has worked extensively on class actions in his legal practice. He has also been widely published on the topic. His books on class actions include The Class Action Playbook.

Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.[1]

PLAINTIFF Alaska Rent-a-Car alleged that rental car company Avis violated an antitrust class action settlement prohibiting Avis from using personnel to steer potential customers towards other brands it owned. After granting partial summary judgment on liability, the trial court held a jury trial on damages that resulted in a $16 million award. Avis appealed, arguing in part that the trial court had improperly allowed Alaska's

[1] 738 F.3d 960 (9th Cir. 2013).

expert because he had relied on faulty assumptions and used inappropriate comparison markets.

The Ninth Circuit affirmed the admission of the expert's testimony, holding that "[a]ll of Avis's challenges to Alaska Rent–A–Car's expert are colorable, but none go to admissibility. They amount to impeachment."[2] The court reasoned that Avis lodged only specific criticisms, but did not challenge the expert's "general methodology, comparing the unknown to an analogous known experience. Instead, Avis challenges three aspects of the witnesses' testimony: using Alamo as the comparator, using the national rather than the Alaska market as a baseline, and extrapolating from the Juneau market to the entire Alaska market."[3]

This case provides an example of the Ninth Circuit deferring the Rule 702 analysis—particularly Rule 702(d)—to the jury. Rather than examine whether "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case" by determining whether Alamo was an appropriate comparator, or whether the national market was the appropriate baseline, the court left the resolution of those questions to the jury.

The Ninth Circuit did not mention the preponderance standard. Instead, the court stated a standard that required the trial court "to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable."[4]

City of Pomona v. SQM North America. Corp.[5]

The City of Pomona sued defendant SQM for importing sodium nitrate fertilizer that contaminated city water. The court excluded the City's expert witness. On appeal, the Ninth Circuit reversed holding "the district court abused its discretion by not allowing a jury to resolve contested but otherwise admissible expert testimony."[6]

The Ninth Circuit did not mention the preponderance standard. Instead, it stated that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. The judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions

[2] *Id.* at 969.
[3] *Id.* at 970.
[4] *Id.* at 969.
[5] 750 F.3d 1036 (9th Cir. 2014).
[6] *Id.* at 1041.

merely because they are impeachable."[7]

This case provides an example of the Ninth Circuit deferring the Rule 702 analysis—particularly Rule 702(d)—to the jury. Rather than examine whether "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case," the circuit court held that the "district court did not apply the correct rule of law: only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."[8] The circuit court's holding is contrary to the text of Rule 702(d), which specifically targets "application" of methods to specific facts. The opinion states that "adherence to protocol … typically is an issue for the jury," and that a "more measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the role of the fact finder in assessing and weighing the evidence."[9]

Corcoran v. CVS Health Corp.[10]

Plaintiffs brought a class action accusing CVS of misrepresenting the prices of certain generic drugs. After partially granting certification, the district court excluded the testimony of plaintiffs' pharmaceutical economist because it found his methodology unreliable and then granted summary judgment to CVS. The Ninth Circuit reversed.

The court did not mention the preponderance of the evidence standard. Despite the fact that the trial court found the expert's methodology not to be reliable, the Ninth Circuit did not discuss the methodology in its memorandum opinion.[11]

Elosu v. Middlefork Ranch Inc.[12]

Plaintiffs sued defendant homeowners' association for negligence, alleging that its employee accidentally set their deck on fire after repainting, burning down their cabin. The district court excluded plaintiffs' expert testimony as "too speculative" and then entered summary judgment for the defendant. The Ninth Circuit reversed.[13]

[7] *Id.* at 1044 (internal citations and quotations omitted).
[8] *Id.* at 1048.
[9] *Id.* at 1047-1048.
[10] 779 F. App'x 431 (9th Cir. 2019).
[11] *Id.* at 435.
[12] 26 F.4th 1017 (9th Cir. 2022).
[13] *Id.* at 1023.

The Ninth Circuit held that the district court's exclusion of the expert "was an abuse of discretion, as the district court assumed a factfinding role in its analysis. [Its] concerns speak to corroboration, not foundation, and are properly addressed through impeachment before a jury at trial—not exclusion by a district judge at the admissibility stage."[14] The Ninth Circuit did not mention the preponderance of the evidence standard.

Hangarter v. Provident Life & Accident Insurance Co.[15]

A chiropractor sued an insurance company alleging it had wrongfully discontinued disability benefits. After a verdict for the plaintiff, defendant appealed, challenging—among other things—the admission of plaintiff's expert testimony.

The Ninth Circuit held that the determination of what underlying facts the expert relied on "went more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination."[16] The Ninth Circuit did not mention the preponderance of the evidence standard.

Hardeman v. Monsanto Co.[17]

Plaintiff filed a product liability action against Monsanto alleging that the main ingredient (glyphosate) in its Round-Up weed killer had given him cancer. The trial court denied Monsanto's motion to exclude plaintiff's expert as unreliable. After a verdict for the plaintiff, Monsanto appealed.

The Ninth Circuit did not mention the preponderance of the evidence standard. Instead, it said that the Rule 702 "inquiry is flexible and should be applied with a liberal thrust favoring admission."[18] The court ignored the 2000 amendments to Rule 702, stating that the "interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system . . . to attack shaky but admissible evidence. The Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost 28 years ago."[19]

The Ninth Circuit held that application of the methodology to facts was not a question of admissibility, but of weight. "We have explained that expert

[14] *Id.* at 1023-1024.
[15] 373 F.3d 998 (9th Cir. 2004).
[16] *Id.* at 1017 n.14.
[17] 997 F.3d 941 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2834 (2022).
[18] *Id.* at 960 (internal citations and quotations omitted).
[19] *Id.* at 962 (internal citations and quotations omitted).

evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*. Imperfect application of methodology may not render expert testimony unreliable because a minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method does not render expert testimony inadmissible."[20]

Messick v. Novartis Pharmaceuticals Corp.[21]

Plaintiff sued defendant for complications arising from breast cancer treatment. The trial court granted defendant's motion to exclude plaintiff's expert testimony as unreliable. The Ninth Circuit reversed, holding that the expert's differential diagnosis was sufficiently reliable even though expert could not explain how the treatment caused cancer.[22]

The Ninth Circuit did not mention the preponderance of the evidence standard. Instead, the court said that Rule 702 "should be applied with a liberal thrust favoring admission."[23]

The Ninth Circuit did not examine the doctor's methodology. Instead, it trusted his testimony that he could tell causation from years of clinical experience: "Medicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis."[24]

Mighty Enterprises, Inc. v. She Hong Indstrial Co. Ltd.[25]

A distributor sued a manufacturer for breach of contract. The manufacturer moved to exclude plaintiff's damages expert as merely parroting figures from the plaintiff. The trial court denied the motion. The Ninth Circuit affirmed the trial court.

Contrary to Rule 702(d), the Ninth Circuit held that "[defendant's] challenge to [plaintiff's] expert, namely that he parroted certain costs from amounts provided to him by [plaintiff], does not render the testimony inadmissible. It is relevant to the persuasiveness of his testimony, not its admissibility."[26] The court also held that the trial court did not need to

[20] *Id.* (internal citations and quotations omitted).
[21] 747 F.3d 1193 (9th Cir. 2014).
[22] *Id.* at 1198.
[23] *Id.* at 1196 (internal citations and quotations omitted).
[24] *Id.* at 1198.
[25] 745 F. App'x 706 (9th Cir. 2018).
[26] *Id.* at 709.

examine whether the date the expert used was appropriate to the point the party was trying to prove: ""[defendant's] second argument, that the expert's use of a ten-year period for lost future profits rendered his testimony inadmissible, also fails. An expert can use assumptions, inferences, and comparisons. Such assumptions are admissible; their reliability is impeachable."[27] "Experts can rely on data provided to them without independent verification because the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[28] The Ninth Circuit also did not mention the preponderance of the evidence standard.

Murray v. Southern Route Maritime SA[29]

Plaintiff sued ship owner for negligently turning over a ship with a faulty floodlight that shocked him. As part of proving injury, plaintiff submitted testimony from a scientific expert. The ship owner moved to exclude, but the trial court admitted the testimony. The Ninth Circuit affirmed the trial court.

The Ninth Circuit held that, despite the expert's lack of testing, "the appropriate way to discredit [plaintiff expert's] theory was through competing evidence and incisive cross-examination."[30]

The Ninth Circuit did not mention Rule 702 or the preponderance standard. Although the trial court did not examine the expert's methodology, the Ninth Circuit held that was not error: "It is true that the order does not scrutinize the testability and error rate factors. Although *Daubert* does not require a methodical walkthrough of each factor, the best practice may be for district courts to at least reference the four *Daubert* factors so as to avoid an appeal issue like the one here."[31]

Primiano v. Cook[32]

Plaintiff sued defendants for manufacturing and installing an allegedly defective prosthetic elbow. As part of her case, the plaintiff submitted expert testimony about the elbow. The trial court excluded the expert evidence because the expert did not talk to the plaintiff, and there was no publication supporting plaintiff's theory. The Ninth Circuit reversed.

The Ninth Circuit did not mention the preponderance of the

[27] *Id.*
[28] *Id.* (citations and quotations omitted).
[29] 870 F.3d 915 (9th Cir. 2017).
[30] *Id.* at 925.
[31] *Id.* at 924.
[32] 598 F.3d 558 (9th Cir. 2010).

evidence standard. Instead, the court held that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion."[33]

Pyramid Technologies, Inc. v. Hartford Casualty Insurance Co.[34]

Plaintiff sued an insurance company for bad faith denial of its flood damage claim. The trial court excluded plaintiff's proposed experts without a hearing and then granted summary judgment to the insurer. The Ninth Circuit held that the trial court had abused its discretion in excluding the testimony and reversed and remanded for a new ruling.

The Ninth Circuit did not mention the preponderance standard. Instead, it held that the "'reliability' test is flexible and should be applied based on the circumstances of the case."[35]

Wendell v. GlaxoSmithKline LLC[36]

Plaintiffs sued pharmaceutical manufacturers alleging bowel inflammatory medicines had caused their son's fatal cancer. As part of their case, they relied on expert testimony to establish causation. The trial court excluded that evidence, but the Ninth Circuit reversed.

The Ninth Circuit held that the trial court did not have a gatekeeping responsibility. "Where, as here, the experts' opinions are not the 'junk science' Rule 702 was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof—to attack shaky but admissible evidence."[37]

The Ninth Circuit did not mention the preponderance of the evidence standard. The Ninth Circuit also did not require a rigorous analysis of the experts' methodology. Instead, it ruled that "the district court was wrong to put so much weight on the fact that the experts' opinions were not developed independently of litigation and had not been published," that it "wrongly conflated the standards for publication in a peer-reviewed journal with the standards for admitting expert testimony in a courtroom," and that "[w]e do not require experts to eliminate all other possible causes of a condition

[33] *Id.* at 564.
[34] 752 F.3d 807 (9th Cir. 2014).
[35] *Id.* at 817.
[36] 858 F.3d 1227 (9th Cir. 2017).
[37] *Id.* at 1237 (internal citations and quotations omitted).

for the expert's testimony to be reliable."[38]

Wendt v. Host International, Inc.[39]

Cheers actors George Wendt and John Ratzenberger sued the defendant under the Lanham Act for violating their trademark rights by putting robots based on their characters in its "Cheers" airport bars. As part of their case, they sought to submit survey evidence. The trial court excluded the evidence and granted summary judgment to the defendant. The Ninth Circuit reversed.

The Ninth Circuit did not mention the preponderance of the evidence standard. The Ninth Circuit also did not require a rigorous analysis of the experts' methodology. Instead, it held that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility."[40] In so holding, the court relied on a case that predated the *Daubert* ruling.

[38] *Id.* at 1235-1237 (internal citations and quotations omitted).

[39] 125 F.3d 806 (9th Cir. 1997).

[40] *Id.* at 814.

The Tenth Circuit

By: Matthew Cairns and Katherine Kazarian

Matt Cairns is a Senior Associate General Counsel at Textron Inc. where he manages non-aviation product liability claims. He practiced law for 32 years in New Hampshire before joining Textron. He is a graduate of Brown University and Case Western Reserve School of law.

Katherine Kazarian is a 2024 graduate of Roger Williams Law School in Rhode Island and 2012 graduate of Barnard College, Columbia University in New York. She currently lives in East Providence, Rhode Island and serves in the Rhode Island General Assembly as the House Majority Whip.

Courts in the Tenth Circuit have generally done well in recent years in properly applying Rule 702 to exclude unreliable expert opinions. There are, however, a few exceptions listed below.

In re *Urethane Antitrust Litig.*[1]

In re Urenthane was a class antitrust action for price fixing related to polyurethane chemical products. Before trial, Dow moved to exclude the testimony of Dr. James McClave, the plaintiffs' statistical expert, because he used "a multiple-regression analysis" to develop models predicting prices that would have existed in a competitive market, compared the modeled prices to the actual prices during the conspiracy period, and opined as to damages. Dow argued that McClave picked variables and time periods that would reach the result he wanted ("variable" and "benchmarking" shopping). The trial court disagreed, and the Tenth Circuit affirmed, writing:

> Dr. McClave's [selection of variables and time periods] is open to debate. But the district court had the discretion to accept Dr. McClave's explanation for omitting variables addressing domestic demand. Thus, the district court did not abuse its discretion in concluding that Dow's complaints bore on the weight of Dr. McClave's testimony rather than its admissibility.[2]

This case is an incorrect application of Rule 702 because an analysis of the methods and reliability of the expert's proffered testimony to the facts of the case is an admissibility requirement. The courts should have determined if the "variable and benchmark shopping" that plaintiff's expert engaged in was a proper and reliable method for an expert to employ. Instead, the courts punted the issue as one for cross examination.

Goebel v. Denver and Rio Grande Western Railway Co.[3]

Goebel was an action involving a locomotive engineer and his employer, where the engineer alleged that he sustained brain damage when exposed to diesel exhaust at high altitude in train tunnels. Plaintiff proffered a medical expert that offered an expert general causation opinion and an expert opinion on the diagnosis of acute high altitude cerebral edema (HACE). The trial court allowed the expert to testify, and the railroad appealed. The Tenth Circuit affirmed noting:

> The Railroad's core argument is that the district court incorrectly concluded that "this is not [a] case" where "too great

[1] 768 F.3d 1245 (10th Cir. 2014).
[2] *Id.* at 1262.
[3] 346 F.3d 987 (10th Cir. 2003).

> an analytical gap" existed between the data and the opinion. When faced with such a claim, we must, as did the Supreme Court in *Joiner*, review the literature to determine whether the district court was within its discretion in finding an adequate link between the existing data and the conclusions. Given the lack of scientific literature directly addressing the confluence of all of the factors at issue in the tunnel, such a review is all the more important here. As we stated above, our review is deferential—only if we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances" will we disturb its ruling.[4]

This case is an incorrect application of Rule 702 because the court allowed an expert to testify even though his testimony was not based on specific facts or data. The expert was allowed to use general information in order to develop his expert testimony, which is not in accordance with the preponderance of the evidence standard.

[4] *Id.* at 993 (internal citations omitted).

Macsenti v. Becker[5]

Mascenti was an intentional infliction of emotional distress and negligence action involving a dentist, his dental assistant, and one of their patients. Plaintiff proffered a professor of oral surgery at the University of Oklahoma and practicing dentist as his liability expert. Over defendants' objections, the trial court allowed the expert to testify, and the Court of Appeals affirmed. The opinion contains the following flawed analysis:

> Dr. Sullivan's credentials are not challenged. Defendant focuses his attack on the absence of professional literature to support his opinion and asserted conflicts between portions of Dr. Sullivan's reasoning and principles which do find support in the professional literature. Defendant's positions disputing Dr. Sullivan's opinions were energetically developed at trial through cross-examination of Dr. Sullivan and through the testimony of defendant's own experts, *inter alia*.
>
> On careful review of this record, we find no plain error such as to excuse a

[5] 237 F.3d 1223 (10th Cir. 2001).

> timely *Daubert* objection to plaintiff Macsenti's expert testimony. We are convinced that Defendant forfeited the opportunity to subject the expert testimony of Dr. Sullivan and plaintiff's other experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted.[6]

This case is an in correct application of Rule 702 because an analysis of the methods and reliability of the expert's proferred testimony to the facts of the case is an admissibility requirement that should be determined by the court using a preponderance of the evidence standard. The court is charged with making this determination for every expert before allowing them to testify, and the Court of Appeals should not have reviewed this under a "plain effort" standard.

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[6] *Id.* at 1231.

The Eleventh Circuit

By: Susan J. Cole and Loren Y. Yudovich

Susan Cole is a partner with MG+M The Law Firm, based in the Miami office, and is Florida Board Certified in Civil Trial Practice. She has been an active trial lawyer in both state and federal courts for over 40 years. She is an active member of IADC, NBTA, and DRI and often presents on issues of toxic tort, evidence, and ethics.

Loren Yudovich is a senior associate with MG+M The Law Firm in the Miami office. She practices in both state and federal court, with an emphasis on complex commercial litigation in many jurisdictions throughout the United States and its territories.

Adams v. Laboratory Corporation of America[1]

PLAINTIFFS brought this suit against defendant laboratory alleging that its cyto-technologists were negligent in missing signs of abnormalities and pre-cancerous cells in plaintiff's pap smears that ultimately led to a delay in plaintiff's cancer diagnosis. Defendant moved to exclude testimony of plaintiffs' expert, Dr. Dorothy Rosenthal, contending that her review of the pap smear slides was tainted by unreliable methodology. The district court granted defendant's motion and excluded plaintiffs' expert, finding Dr. Rosenthal's methodology to be an *ipse dixit* assessment that could not be proven or meaningfully reviewed by other experts, that it did not follow approved litigation guidelines, and that it was biased.

[1] 760 F.3d 1322 (11th Cir. 2017).

On appeal, the Eleventh Circuit reversed the district court's exclusion of Dr. Rosenthal's expert testimony, holding the district court abused its discretion by finding Dr. Rosenthal's methodology unreliable and biased, and thus, improperly supplanting the jury's fact-finding role.[2] The Eleventh Circuit found common-sense concepts of bias to be especially appropriate for consideration by a jury, and that whether and, if so, the extent to which an expert's philosophical bent biases her review is a credibility determination that has always been within the province of the jury.[3] The Eleventh Circuit found that, at most, defendant established that there is an unspecified level of risk that Dr. Rosenthal's assessment might have been biased, and that she had not sought to exclude the possibility of bias by conducting a blinded review. That meant, at most, the risk of bias would suggest that Dr. Rosenthal's testimony is to some extent "shaky," but shakiness goes to the weight of her testimony, not its admissibility.[4] The Eleventh Circuit held the asserted problems with Dr. Rosenthal's methodology could be addressed, and should have been addressed, through the conventional adversarial means and assessed by the jury. Thus, the district court erred in excluding her testimony.

The Eleventh Circuit's ruling is contrary to the requirements of Rule 702, and ironically, reverses a district court's holding that properly applied Rule 702 and the court's gate-keeping role thereunder. Specifically, the Eleventh Circuit failed to analyze whether the expert's opinion was the product of reliable principles and methods, instead, held the expert's methodology should have been assessed by the jury through cross-examination. In repudiating its Rule 702 obligations, the Eleventh Circuit rejected and reprimanded district court findings that did just that. The district court's reliance on the proffered expert's failure to adhere to the professional society guidelines, which were established specifically for such an expert's review of slides in these situations (and which noncompliance was admitted by the expert herself), in excluding the expert testimony was properly within its role under Rule 702 and should not have been left to the determination of a jury.

Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.[5]

Quiet Technology was a fraud case in which plaintiff alleged that defendant's aerospace product was defective. Plaintiff sought to introduce the expert testimony of Joel Frank, an aerodynamics

[2] *Id.* at 1334.
[3] *Id.* at 1335.
[4] *Id.* at 1334.
[5] 326 F.3d 1333 (11th Cir. 2003).

specialist. Defendant sought to exclude Frank on several bases, including his qualifications, but predominantly on the reliability of Frank's methodology. The district court disagreed with defendant and denied the expert challenge of Frank. The Eleventh Circuit affirmed Frank's admissibility.

The Eleventh Circuit found that because the defendant had not challenged the impropriety of conducting such a study using the sorts of aerodynamic data Frank employed, but had instead challenged the accuracy of the specific data used and Frank's misuse of the methodology, the alleged flaws in Frank's analysis were of a character such that challenge was to the accuracy of his results and not the general scientific validity of his methods. In affirming Frank's admissibility, the Eleventh Circuit found that the identification of "such flaws in a generally reliable scientific study [are] precisely the role of cross-examination" and are "more appropriately considered an objection going to the weight of the evidence rather than its admissibility."[6] Thus, the Eleventh Circuit held that defendant's arguments that Frank's study was methodologically flawed, and that his testimony consequently was unreliable, only go to the weight, not the admissibility, of the evidence he offered. As such, these arguments were subject to effective cross examination and, accordingly, were not a case where the jury was likely to be swayed by facially authoritative, but substantively unsound, unassailable expert evidence.

This holding is contrary to the current version of Rule 702. The Eleventh Circuit failed to apply a preponderance of the evidence standard to test the sufficiency of the data upon which the expert's opinions were based. The court also failed in its Rule 702 role to determine that the methodology used by the expert was applied reliably. Instead, the court left that issue for the jury to decide. In doing so, the Eleventh Circuit's opinion suggested, contrary to the 2023 amendments to Rule 702, a court should not analyze an expert's ultimate opinions for reliability.

Tampa Bay Water v. HDR Engineering Inc.[7]

Plaintiff, a regional water authority, sued the defendant engineering firm for defectively designing a large water reservoir that ultimately led to large cracks in the cement of the reservoir. Plaintiff moved to exclude defendant's engineering expert, Dr. Bromwell, on grounds that his testimony was unreliable based on the methodology used in concluding the cause of the reservoir damage was due to its collapse upon wetting. The

[6] *Id.* at 1345.

[7] 731 F.3d 1171, 1184-1185 (11th Cir. 2013).

district court disagreed and denied plaintiff's *Daubert* motion as to Bromwell. The Eleventh Circuit affirmed.

On appeal, plaintiff argued that Bromwell failed to use the only accepted testing method, and thus, any conclusions as to the cause of the collapse was not the product of a reliable methodology. The Eleventh Circuit disagreed and instead found that even though Bromwell did not use the methodology advocated by plaintiff and plaintiff's expert as the accepted method, because plaintiff's expert testified to that and as to the unreliability of Bromwell's methodology, the disagreement between experts should be an issue for the jury to decide. The Eleventh Circuit held that the failure to include certain variables in testing affects the extent to which the testimony was probative, and not the admissibility of the testimony.[8] The Eleventh Circuit held that these types of disagreements between experts ordinarily go to the credibility of expert testimony, and not its admissibility, "and is the province of the jury."[9] The Eleventh Circuit went even further, and found no error in the district court's sole reliance on Bromwell's "impressive credentials" to support the reliability of his proposed expert testimony.[10] The Eleventh Circuit found that although an expert's qualifications go primarily to the first prong of the *Daubert* inquiry, Bromwell's overwhelming qualifications could bear on the reliability of his proffered testimony even if "they are by no means a guarantor of reliability."[11]

In so finding, the Eleventh Circuit held that Bromwell's impressive qualifications bolstered a showing of reliability of his expert testimony, and thus, that the district court committed no manifest error by allowing the jury to hear Bromwell's testimony. This latter finding was contrary to Rule 702 as it stood at the time of this opinion (and as currently amended), by confusing and conflating the separate inquires mandated by Rule 702 and *Daubert*. By allowing the admission of this expert testimony without evaluating whether the proffered expert testimony was the product of reliable principles and methods and whether the expert opinion reflected a reliable application of those principles and methods to the facts of the case, the court failed in its role under Rule 702.

[8] *See id.* at 1185.
[9] *Id.*
[10] *Id.*
[11] *Id.* (citing *Quiet Technology*, 326 F.3d at 1341).

The District of Columbia Circuit

By: Raymond G. Mullady, Jr.

Ray Mullady is a Director in the Washington, D.C. office of Berkeley Research Group. At BRG, Mr. Mullady uses his experience as a litigator to provide strategic consulting advice to help clients identify and select the right experts relevant to their unique needs. He is a seasoned trial lawyer and business strategist who has more than forty years of experience as a partner at notable AmLaw 100 law firms. He has focused his legal career in the defense and prosecution of complex business, product liability, and class action litigation.

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A. District of Columbia Circuit Cases

SeaWorld of Florida, LLC v. Perez[1]

SEAWORLD of Florida, LLC, operates a theme park in Orlando, Florida, that is designed to entertain and educate paying customers by displaying and studying marine animals. Following the death of one of SeaWorld's trainers while working in close contact with a killer whale during a performance, the Occupational Safety and Health Review Commission found that SeaWorld had violated the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970[2], by exposing the trainers to recognized hazards when working in close contact with

[1] 748 F.3d 1202 (D.C. Cir. 2014).

[2] 29 U.S.C. § 654(a)(1).

killer whales during performances, and that the abatement procedures recommended by the Secretary of Labor were feasible. SeaWorld challenged the order with respect to one citation. Concluding its challenges were unpersuasive, the court denied the petition for review.

The court held, in pertinent part, that the administrative law judge did not abuse his discretion in crediting the Secretary of Labor's expert, D.A. Duffus, Ph.D., as to the aggressive behavior of killer whales. SeaWorld contended that Duffus's testimony was unreliable because his experience was confined to observing wild whales, he had not conducted any studies on captive whales, he admitted not knowing whether being in captivity altered killer whale behavior, and he had no experience training killer whales. Duffus did not claim that he had expertise about killer whales in captivity, and the ALJ did not so qualify him; rather, the ALJ ruled that he "is qualified to talk about the nature of killer whales in terms for their predictability of behavior" and about "safety measures to be taken."[3] The ALJ acknowledged that the expert's experience with safety measures necessary for observing wild killer whales from boats might not directly relate to safety measures for close interactions with captive killer whales, but concluded this went to the weight of his testimony, not its admissibility.

This case is no longer good law in the D.C. Circuit under the 2023 amendment to Rule 702, which requires the trial judge to find by a preponderance of the evidence that the Rule's three admissibility requirements (Rule 702(b)-(d)) are met. The expert's experience with safety measures necessary for observing wild killer whales from boats, the court's acknowledgment that the expert's experience might not directly relate to safety measures for close interactions with killer whales, and the expert's admission that he did not know whether being in captivity altered killer whale behavior, individually or collectively, should have rendered his opinion inadmissible.

United States v. Straker[4]

This case involved a prosecution brought under the Hostage Taking Act for conspiracy and conspiracy to commit extraterritorial hostage taking of a United States citizen resulting in death. An issue at trial was the admissibility of expert fingerprint testimony. A note was linked to the defendant through the testimony of FBI fingerprint examiner Dawn Schilens.

Schilens had testified "on her qualifications as an expert in the field of fingerprint identification and analysis, which included employment as a physical scientist/forensic examiner in the

[3] *Perez,* 748 F.3d at 1214.

[4] 800 F.3d 570 (D.C. Cir. 2015).

latent print operation unit of the FBI, her certification following an 18–month training program, and her experience in having conducted over 140,000 fingerprint comparisons."[5] When the government offered Schilens as an expert in the field of fingerprint identification, Straker did not object. After she testified, however, Straker moved to strike her testimony under *Daubert*, arguing that Schilens failed "to articulate an error rate" in the fingerprint methodology she used.[6]

The court rejected the defendant's argument that fingerprint identification using the ACE-V method was unreliable. The expert testified that there are two different types of error – the error rate in the methodology and human error. She further testified that there is a "zero rate of error in the methodology."[7] She did not articulate the rate of human error, though she acknowledged the potential for such error. The defendant argued that the failure to articulate the rate of human error in the ACE–V methodology rendered her testimony based on that methodology inadmissible. But the court disagreed, arguing that "the factors listed in *Daubert* do not constitute a definitive checklist or test" and that "[n]o specific inquiry is demanded of the trial court."[8] The court stated that the reliability of the ACE-V methodology was "properly taken for granted" because courts routinely find fingerprint identification based on the ACE–V method to be sufficiently reliable under *Daubert*.[9] The court found no abuse of discretion by the ALJ in admitting the Secretary's expert opinions.

This case is no longer good law in the D.C. Circuit under the 2023 amendment to Rule 702, which requires the trial judge to find by a preponderance of the evidence that the Rule's three admissibility requirements (Rule 702(b)-(d)) are met. The court's statement that "[no] specific inquiry is demanded of the trial court" is no longer true (if it ever was). Rather, a court deciding the same case today under Rule 702 as amended would be required to determine whether an expert opinion based on a methodology having the potential for a rate of error the expert did not articulate, was based on sufficient facts or data. Additionally, it would be error for a court today to skirt the admissibility requirements of Rule 702 by articulating that the reliability of the ACE-V method "[is] properly taken for granted."

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[5] *Id.* at 631.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

B. District Of Columbia District Court Cases

Bazarian International Financial Associates, LLC v. Desarrollos Aerohotelco, C.A.[10]

In this case, an investment bank brought an action against a hotel developer and related parties; alleging the breach of a written agreement requiring payment of a fee to the investment banking company for facilitating the financing for construction and operation of the hotel. Before the court was defendants' motion *in limine* to exclude the testimony and reports of the company's expert witness, Williston H. Clover. The court denied the motion and held, *inter alia*, that Clover's proposed testimony was admissible.

The defense contended that the opinions of the proffered expert, Clover – who conceded he was not an investment banker – failed to satisfy the reliability requirement of Rule 702 and *Daubert* because he failed to employ *any* methodology, let alone one that was valid and consistent. Defendants argued that the expert "merely referred to what he claimed is 'custom in the industry' or industry standard, but failed to explain how he complied with each to come to his opinions."[11] The court held that the expert's "reliance on his extensive experience in the industry is sufficient to support the opinions proffered in his Report."[12]

Defendants also asserted that the expert made "multiple factual errors and wrongful assumptions in coming to his opinions …."[13] In this regard, the court wrote: "The crux of the defendants' argument is that Clover's opinions disregard other witnesses' testimony, which the defendants argue is correct. This does not constitute a factual error or wrongful assumption, but a dispute of fact properly left to the jury. Furthermore, even if Clover made factual errors or incorrect assumptions, these go only to the weight, not admissibility of Clover's testimony."[14]

This case is no longer good law under the amendment to Rule 702, as the court did not assess the admissibility of the expert's opinion under Rule 702(a)-(d). Had the court done so, it would have concluded that Clover's opinion was not based on sufficient facts or data; that his testimony – given that it was not based on *any* methodology – was not the product of reliable principles and methods that could be applied to the facts of the case.

[10] 315 F. Supp.3d 101 (D. D.C. 2018).
[11] *Id.* at 112.
[12] *Id.*
[13] *Id.* at 113.
[14] *Id.*

DL v. District of Columbia[15]

In this case, a class of disabled District of Columbia children brought an action against the District and others alleging violations of the Individuals with Disabilities Education Act (IDEA), Rehabilitation Act, and District of Columbia law.

Plaintiffs moved the court for partial summary judgment as to the District's liability with respect to the claims of each subclass. The District moved the court to exclude the expert reports and testimony of two of plaintiffs' expert witnesses, Dr. Carl Dunst and Dr. Leonard Cupingood, under Federal Rule of Evidence 702 and to grant summary judgment in its favor as to the claims of all plaintiffs from March 22, 2010 to the then-present.

Denying the motion as to plaintiff's expert Dr. Carl Dunst, the court stated that "[w]hile the District has identified cogent concerns about the methodology underlying the [expert's report], the Court finds that these concerns go to the weight, not the admissibility of his report, especially in a bench trial where there is no concern about jury confusion or prejudice …."[16]

A review of Dunst's opinion, and the court's analysis of it, reveals that the court did not assess whether the opinion was admissible by a preponderance of the evidence as required by the 2023 amendment to Rule 702.

The court had previously determined Dr. Dunst to be a "qualified expert in analyzing the District of Columbia's Child Find-related obligations, as they relate to preschool children, ages three to five."[17] The District argued that Dr. Dunst's expert opinions were inadmissible because they "(1) rest nearly entirely on the analysis of Plaintiffs' counsel, not on their own merit; (2) derive from a methodology that [Dunst] himself rejects; (3) are inadmissible hearsay; and (4) require an analytical leap from data to conclusion that no reasonable person could credit."[18]

The court found that Dr. Dunst's use of an analysis as a datum in reaching his conclusions was not unreliable, despite noting that the District had "identified cogent concerns about the methodology underlying the summary."[19] The court also concluded, incorrectly, that these concerns went to the weight, not the admissibility, of his report, "especially in a bench trial where there is no concern about jury confusion or prejudice …." [20]

This premise would be correct only if the court had first assessed the admissibility of the expert's

[15] 109 F. Supp.3d 12 (D. D.C. 2015).
[16] *Id.* at 29.
[17] *Id.* at 28-29.
[18] *Id.* at 29.
[19] *Id.* at 29.
[20] *Id.*

testimony under Rule 702(a)-(d), which it did not – regardless of whether the trier of fact was the court, not a jury.

In re *Greater Southeast Community Hospital Corp.*[21]

In this bankruptcy bench trial, the trial judge admitted the testimony of plaintiff's expert, Neil H. Demchick, following denial of the defendants' motion to preclude Demchick's testimony under Rule 702. Specifically, the defendants contended that Demchick's net asset valuation should be excluded as unreliable and that he was not qualified to appraise the value of the real estate and equipment at issue in the case. The defendants further contended that Demchick was biased, that the methodology and analyses he employed in his income approach to valuation and solvency analyses were unreliable, and that he lacked adequate experience to render expert solvency opinions in the litigation.

After conceding that Demchick selectively relied on data favorable to plaintiff's litigation position, the court denied defendants' motion, reasoning that Demchick's selective reliance warranted "close scrutiny by the court, but [did] not warrant exclusion of Demchick's testimony at this juncture."[22]

The court's opinion set forth in detail various "indicia of unreliability" in the expert's analysis, including Demchick's failure to rely on data points of experts in his field that undermined his opinions. Nonetheless, the court wrote: "Although it remains the [plaintiff's] burden to establish the reliability of Demchick's proffered testimony, and although there remain doubts as to whether the [plaintiff] can carry its burden, the court is not currently prepared to exclude Demchick's testimony as unreliable under Rules 702 and 703 and will not, at this juncture, exclude Demchick's report or testimony based upon Demchick's failure to consider the [contrary data] in formulating his valuation opinion. Instead, given that this is a bench rather than a jury trial, the court deems it more appropriate to 'hear the evidence and make its reliability determination during, rather than in advance of trial.'"[23]

In short, the court impermissibly deferred the admissibility of Demchick's opinion to the trier of fact where the opinion did not meet the admissibility requirements of Federal Rule 702(b)-(d).

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[21] Case No. 02-02250, 2007 WL 7230958 (Bankr. D. D.C., Jan. 2, 2007), available at https://ecf.dcb.uscourts.gov/cgi-bin/show_public_docbin/show_public_doc?2004-10366-405.
[22] *Id.* at *16.
[23] *Id.* at *18.

Paige International, Inc. v. XL Specialty Insurance Co.[24]

In this case, although the court critically assessed how the expert applied the methodology, it made this disturbing comment in dicta:

> In any event, clarifying and contesting the methodology of a proffered expert witness is generally better achieved through vigorous cross-examination and the presentation of contrary evidence, or the introduction of a competing expert report, the latter of which Plaintiff declined to do. Contrary to Paige's contention, furthermore, Harrington in several places in both his affidavit and Report does articulate his methodology and approach.[25]

The amendment to Rule 702 makes clear that the admissibility of the expert's opinion is a threshold determination that cannot be left to the jury, vigorous cross-examination and presentation of contrary evidence notwithstanding.

Pierce v. District of Columbia[26]

This was a civil rights case brought under the Americans with Disabilities Act and Rehabilitation Act by a deaf inmate who communicated with American Sign Language, but who had been forced to communicate with staff and other inmates only through lip reading and written notes due to lack of an interpreter to assist him.

Before the court were the parties' cross motions for summary judgment, as well as the District's motion to exclude the testimony of plaintiff's two experts – Martina Bienvenu and Richard Ray. Bienvenu was proffered to testify about ASL, deaf culture, literacy within the deaf community, lipreading, the importance of using qualified ASL interpreters, and plaintiff's own communicative abilities and needs. Ray was proffered to give expert testimony about the accommodations that would have provided plaintiff with the means to communicate effectively and have meaningful access to prison programs, services, and activities during plaintiff's incarceration in early 2012.

The District argued that neither of these experts would help the trier of fact, because their testimony did not speak to what accommodations

[24] No. 14- 1244, 2016 WL 3024008 (D. D.C. May 25, 2016).

[25] *Id.* at 12-13 (internal citations omitted; emphasis in the original).

[26] 128 F. Supp.3d 250 (D. D.C. 2015).

were necessary for the plaintiff in the instant case, as opposed to the deaf community at large. The District also argued that the proffered testimony was not based on sufficient facts and was not the product of reliable scientific methods, because the experts did not evaluate what accommodations were available at the prison, what accommodations plaintiff actually requested, and what accommodations were necessary for plaintiff to participate in the programs and activities at the prison.

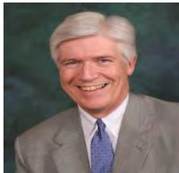
Denying the motion, the court wrote: "Even assuming *arguendo* that the District's objections have a sound legal basis, they clearly relate to the *weight* of the proffered expert testimony, not its admissibility."[27]

These generalized statements would be correct provided the court had first assessed the admissibility of the expert's testimony under Rule 702(a)-(d). The court did not engage in such analysis, making the case no longer good law under Rule 702 as amended.

[27] *Id.* at 275 n.13 (citations omitted).

The Federal Circuit

By: James L. McCrystal, Jr.



James L. McCrystal Jr. has spent four decades handling product liability cases. He has represented the manufacturers of tires, automobiles, trucks, farm equipment, industrial products, and power systems as well as handling construction litigation and commercial disputes. Mr. McCrystal chairs the Legislation and Rules Committee in the DRI Center for Policy and Legal Reform and has served on DRI's Board of Directors. He has been Program Director for the National Institute for Trial Advocacy for over 20 years. He is a past chair the IADC CLE Board, Business Litigation Committee and Legal Technology Committee, as well as having served on the Trial Academy faculty.

THE United States Court of Appeals for the Federal Circuit has nationwide jurisdiction over appeals involving international trade, federal contacts, patents, trademarks, certain monetary claims against the U.S. government, such as the Vaccine Injury Compensation Program, and other federal claims. It also has jurisdiction over various administrative agency decisions, including those involving patents and trademarks, federal contracts, and federal personnel.

Because ruling on whether to admit expert testimony is a procedural issue not unique to patent law, the decisions of district courts on expert testimony are reviewed under the law of the regional circuit court.[1]

Liquid Dynamics Corp. v. Vaughan Co.[2]

A patent holder sued a manufacturer alleging its patent for a method and apparatus for handing wastewater slurries had been infringed. The trial court in the Northern District of Illinois denied judgment to the manufacturer as a matter of law for non-infringement and other issues resulting in appeal.

[1] Bose Corp. v. JBL, Inc., 274 F.3d 1354, 1360 (Fed. Cir. 2001).

[2] 449 F.3d 1209 (Fed Cir. 2006).

In its appeal, the patent holder did not challenge the reliability of the expert's computational fluid dynamics studies generally. It challenged the expert for its opinions, showing three ways the application of those studies was flawed factually. The expert admitted his models were not perfect models of the individual tanks at issue but were based on reliable scientific methodology.

In its decision, the court did not reference the 2000 version of Rule 702 and cited Eighth Circuit decisions prior to its adoption to hold that the challenge goes to the weight of the evidence, not its admissibility. In effect, the court held that whether the principles and methods were reliably applied goes to the weight of the testimony to be measured by the jury.

i4i Limited Partnership v. Microsoft[3]

Microsoft appealed an infringement judgment and challenged a patent holder's damage expert's methodology to arrive at his damage opinion. The opinion of the patent holder's expert on the reasonable royalty rate which would have resulted through hypothetical negotiations was challenged because the facts used by the expert to determine the reasonable royalty rate were not relevant to the circumstances in the case.

The court applied Fifth Circuit decisions to find, similar to the court in *Liquid Dynamics*, that "[w]hen the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not admissibility."[4]

Arkansas Game & Fish Commission v. United States[5]

Arkansas wildlife management areas were flooded annually for seven years by the defendant, damaging trees in those areas, allowing it to seek damages for the taking. At trial, an appraiser for the state based his opinion on his own experiences appraising and observing trees and their mortality rates. The federal government challenged the opinion.

The court noted that determining the value of real estate is not a science and further pointed out that "[t]he government was free to challenge the expert's estimates as unreliable, or to introduce competing evidence as to the mortality rates of the damaged trees and the value of the timber produced from the degraded trees.

[3] 598 F.3d 831 (Fed. Cir. 2010).

[4] *Id.* at 852 (citing Moore v Ashland Chem. Inc., 151 F 3d 269, 276 (5th Cir, 1998)).

[5] 736 F.3d 1364 (Fed. Cir. 2013).

In these circumstances, it was not an abuse of discretion for the trial court to conclude that the government's challenges to the expert's testimony went to the weight of the evidence, not its admissibility, and to allow the expert to testify based on his lengthy experience working in the field."[6]

Apple v. Motorola[7]

This case was part of the smartphone wars between competing patent holders and was tried in Northern District of Illinois before Seventh Circuit Judge Richard Posner. His decision was reversed principally on the basis of the court's finding that Apple's patents were subject to claims limitations.

However, the appellate panel also found, following Seventh Circuit decisions, that a judge "must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder."[8]

The court also noted "[t]hat the gatekeeping role of the judge is limited to excluding testimony based on unreliable principles and methods is particularly essential in the context of patent damages. This court has recognized that questions regarding which facts are most relevant or reliable to calculating a reasonable royalty are 'for the jury.'"[9]

[6] *Id.* at 1378.
[7] 757 F.3d 1286 (Fed. Cir. 2014).
[8] *Id.* at 1314 (citations omitted).
[9] *Id.* at 1315 (citing *i4i*, 598 F.3d at 856 ("[w]hen the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility").