

Construction Design and Defect Litigation: Using Daubert/Frye to Challenge Admissibility of Expert Witness Testimony

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**Strafford Publishing Presents:
Construction Design and Defect
Litigation - Using Daubert/Frye to
Challenge Admissibility of Expert
Witness Testimony**

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Daubert/Frye Motions

General Purpose/Reason For Bringing Motion

- It's pronounced "Dow-Burt"
- Daubert/Frye motions used as rule of evidence to attempt to exclude expert testimony
- Motion can typically be brought at any time before trial
 - Typically as motion in limine
 - Check local rules



Daubert/Frye History and Evolution

Frye v. United States, 292 F. 1013 (D.D. Cir. 1923)

- 1923 Federal Court appellate ruling regarding admissibility of polygraph evidence
- Frye rule – “general acceptance”
- May exclude accurate and reliable results if the theories are too new
- Minority standard – still used in a handful of states including California, Illinois, Maryland, New Jersey, Pennsylvania, and Washington



Daubert/Frye History and Evolution

Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128 (9th Cir. 1991)

- The “scientific knowledge” standard
- Birth defect caused by Benedictine ingestion
- Defendant files for summary judgment
 - Epidemiologist declaration – no study showing a causal link
- Plaintiff’s expert – relied on animal, pharmacological studies



Daubert/Frye History and Evolution

Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128 (9th Cir. 1991)

- District Court holds testimony inadmissible citing the Frye “general acceptance” rule
 - Summary judgment granted
- Ninth Circuit affirmed
- Supreme Court vacated and reversed
 - Frye standard did not survive the adoption of Federal Rule of Evidence 702
 - However, the trial court is still the “Gatekeeper”



Daubert/Frye History and Evolution

Daubert v. Merrell Dow Pharm., Inc., **951 F.2d 1128 (9th Cir. 1991)**

Supreme Court set out these nonexhaustive factors:

1. Whether the theory or technique presented as expert testimony and evidence can be (and has been) tested;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error;
4. The existence and maintenance of standards controlling the technique's operation; and
5. "General acceptance."



Daubert/Frye History and Evolution

General Electric Co. vs. Joiner, 522 U.S. 126 (1997)

- Plaintiff failed to show that exposure to PCBs was the cause of his lung cancer
- Supreme Court further clarifies the expert testimony standard
 - Proper standard of review is abuse of discretion
 - Trial judge’s authority under “gatekeeping function” includes rationale and conclusions – not just methodologies



Daubert/Frye History and Evolution

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

- Tire blow out caused fatal accident
 - Plaintiff's expert stated defect in the tire
 - Physical inspection and no evidence of other issue
- Summary judgment granted
- 11th Circuit reversed and remanded
 - Stating Daubert limited to scientific testimony



Daubert/Frye History and Evolution

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

- Supreme Court states that Daubert applies to all expert witness testimony
 - Reliability factors not a definitive checklist, just factors court uses at its discretion
- 2000 – Congress amends Rule 702
 - If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.



Is the Expert Qualified?

- Must be qualified “by knowl-edge, skill, experience, training, or education.”
 - Court is looking for “sufficient specialized knowledge” to assist the trier-of-fact
- No perfect formula, case by case basis
- Court’s “gatekeeping” role includes making sure the expert does not exceed the scope of his/her expertise



Is the Expert Qualified?

United States ex rel. M.L. Young Const. v. Austin Co.
2005 WL 6000505 (W.D. Okla. Sept. 29, 2005)

- Plaintiff's expert's CV showed experience as a construction manager and construction expert
- Defense disputes qualifications stating the expert did not publish any articles on scheduling or delay damages
- Court stated his previous experience was enough and publication of articles was not necessary



Is the Expert Qualified?

Weitz Co., LLC v. MacKenzie House, LLC
2009 WL 4030756 (W.D. Mo. Nov. 19, 2009)

- Engineer expert provided opinion as to topics he was qualified for and topics not qualified for
- The court did not want to go line by line in report and described generally the topics that were excluded
- Court stated it would entertain objections if/when expert gave improper testimony



Is the Expert Qualified?

Freesen, Inc. v. Boart Longyear Co.

2009 WL 4923598 (C.D. Ill. Dec. 8, 2009)

- Plaintiff's expert's qualifications challenged in connection with lost opportunity damages claim
- Expert was a CPA and had extensive experience in construction accounting
- Court holds he was allowed to testify
 - The “alleged lack of experience in one specific area goes to the weight of his testimony, not its admissibility.”



Is the Testimony Reliable?

- Courts have held that when an expert’s opinion is “so fundamentally unsupported that it can offer no assistance to the jury,” the opinion should be excluded.
 - Factual basis for testimony typically applied toward credibility, not admissibility
 - However, the court has broad discretion to decide reliability
- The court’s focus will typically be on the expert’s methodology and soundness of the general principles



Is the Testimony Reliable?

Steadfast Insurance Co. v. SMX 98, Inc.,
2009 WL 890398 (S.D. Tex. Mar. 30, 2009)

- Expert provided opinion as to the reasonableness of a premium insurance rate based on various assumptions
- Court allowed the testimony
- Court held that the assumptions were not clearly erroneous or unfounded based on the records
 - Any issues could be dealt with in cross-examination



Is the Testimony Reliable?

Steffy v. The Home Depot, Inc.,

2008 WL 5189505 (M.D. Pa. Dec. 10, 2008)

- Two expert challenges involving a construction project where plywood was allegedly releasing formaldehyde
- Plaintiff's expert challenged because he didn't account for other potential sources of form-aldehyde, other tests available
 - Court held failure to perform other tests did not make methodology unreliable, instead, it affects the weight of his conclusions
- Defense expert's opinion that improper HVAC created some of the issues challenged because he relied on other's results
 - Court allowed the testimony stating not only did he rely on another expert's scientific testing, but also used other data to formulate an opinion within his area of expertise



Is the Testimony Relevant?

- Opinion must work directly with the facts and law at issue to be relevant
- Courts look to exclude testimony that juries are capable of understanding without an expert opinion or opinion that restates fact witness testimony
- Can't testify regarding conclusions of law



Is the Testimony Relevant?

Steffy v. The Home Depot, Inc.,

2008 WL 5189505 (M.D. Pa. Dec. 10, 2008)

- Real estate appraiser's opinion regarding the proper use of the property was questioned
 - Expert stated that property could be valued as a home based business
 - Zoning laws would not allow this
 - Court excluded the opinion
- Expert testimony is irrelevant if the expert relies on assumptions that do not have support in the record.



Is the Testimony Relevant?

Billiot v. Cove Mountain Realty, Inc.,
2008 WL 269540 (E.D. Tenn. Jan. 29, 2008)

- Defense architect gave testimony on whether defective stairs complied with building code
- Plaintiff argued the issue of what building code to apply is a question of law
 - Court agreed that the building code that should have been applied is a question of law
 - However, whether the stairs complied with the code is a question of fact and admissible



Is the Testimony Relevant?

Hutton Contracting Co., Inc. v. City of Coffeyville,
2004 WL 2203449 (D. Kan. Sept. 24, 2004)

- Plaintiff's expert testified about weather and material related extensions to the project schedule
 - Opinion based on industry custom even though they were in conflict with the terms of the contract
 - Defendant moved to exclude
- Court excluded the testimony stating the expert never contended the contract was ambiguous



Challenging Scheduling Expert Testimony

- CPM scheduling testimony is typical in construction disputes
- Various industry approved methods used for CPM schedules
- Courts look to the methodology when determining the reliability of scheduling testimony
 - The more widely used, the more likely to be admissible
- Other cases to review
 - *MACTEC Inc. v. Bechtel Jacobs Co., LLC*, 2008 WL 250518 (E.D. Tenn. Jan. 28, 2008)
 - *Weitz Co., LLC v. MH Washington, LLC*, 631 F.3d 510, 526-27 (8th Cir. 2011)

Challenging Scheduling Expert Testimony

RLI Insurance Co. v. Indian River School District,
2007 WL 4292109 (D. Del. Dec. 4, 2007)

- Scheduling expert's report was contested as unreliable because it didn't identify critical path and causal links
 - Methodology used was not in report
 - Court allowed expert time to remedy the deficiencies in the report
- The court instructed the expert to identify methodology with “greater clarity and precision” and to “more clearly identify the critical path at the start of the project in his discussion for the initial schedule, and throughout his entire analysis.”

Challenging Construction Defect Testimony

Weitz Co., LLC v. MacKenzie House, LLC,
2009 WL 4030756 (W.D. Mo. Nov. 19, 2009)

- Defendant's sought to exclude plaintiff's expert's delay/damage analysis
 - Argued that the opinions failed to account for certain facts
- Expert used a “window” methodology
 - Court stated it was an industry accepted methodology
 - Issues with factual analysis should be covered in cross-examination



Challenging Construction Defect Testimony

- Construction defect related testimony usually based on a mix of science and expertise/knowledge
- Challenges usually focus on methodology or standards
 - Was the right building code standard used?
- Challenges will also be made to qualifications
- If challenging a scientific method, it makes sense to produce an expert to describe the flaws
- Other cases to review
 - *Burbach Aquatics, Inc. v. City of Elgin*, 2011 WL 204800 (N.D. Ill. 2011)
 - *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, 2010 WL 4065465 (S.D. Tex. 2010)

Challenging Construction Defect Testimony

First Assembly of God Church v. Fondren,
2003 WL 25685226 (E.D. Tex. Jan. 8, 2003)

- Building collapsed from alleged faulty construction during a snowstorm
- Plaintiff's expert claims it was due to lack of flange braces
 - Defense argues the expert failed to account for other issues in his calculation including force and shear
- Court found testimony reliable and admissible
 - Defense failed to show why additional calculations were necessary
 - Lack of other calculations could be dealt with in cross

Challenging Construction Defect Testimony

Phillips v. Water Bay Management Corp.,
2002 WL 31415693 (D.V.I. Apr. 8, 2002)

- Slip and fall case
 - Plaintiff's safety expert argued stairs were defective
- Court held references to ADA and OSHA standards were inadmissible and irrelevant
 - Standards didn't define the standard of care owed to a business invitee

Challenging Construction Defect Testimony

Residences at Ocean Grande v. Allianz Global Risks,
2009 WL 7020044 (N.D. Fla. Sept. 9, 2009)

- Green board at Trump Palace alleged to absorb water and create mold growth
- Expert concluded green board didn't meet water resistance and caused mold growth
 - Plaintiff argued report was not reliable because the sample size was too small
 - Expert stated ASTM protocols were used, but with minor deviations to the test
- Report was considered relevant and deviations handled in cross-examination



Challenging Damages Expert Testimony

- Successful challenge can really disrupt a case
- Important issues for these experts:
 - Accepted methodology
 - Have their assumptions tested?
 - Inclusion of all relevant documents
 - Subject the work to peer review
- Other representative cases:
 - *AMEC Civil, LLC v. DMJM Harris, Inc.*, 2009 WL 1883985 (D.N.J. June 30, 2009)
 - *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, 2010 WL 4065465, (S.D. Tex. Oct. 8, 2010)



Challenging Damages Expert Testimony

Safeco Insurance Co. of America v. S & T Bank,
2010 WL 786257 (W.D. Pa. Mar. 3, 2010)

- Actual Cost Method vs. Total Cost Method
- Plaintiff's expert was using a modified total cost method
 - Defense challenged the reliability of the total cost method
- The court allowed the testimony
 - Third Circuit and state courts had previously allowed the methodology

Challenging Damages Expert Testimony

Busch v. Dyno Nobel, Inc.,

2002 U.S. App. Lexis 14724 (6th Cir. 2002)

- Unpublished case demonstrating the trial court failing to do its job during a Daubert hearing
- Court ruled the testimony related to lost profits was inadmissible because underlying reasoning/methodology was speculative and lacked foundation
- Appellate court remanded and told trial court to fulfill its gatekeeping role because it failed to provide factual support in its ruling



Challenging Damages Expert Testimony

GASA, Inc. v. United States,
88 Fed. Cl. 752 (2009)

- Defense wanted to exclude expert from discussing delay damages
 - The expert revised the damages calculation and the defendant argued the methodology was improper
 - Expert stated the revised costs were a simple mathematical calculation
- Court held the testimony was admissible and whether the correct amounts were added go to the weight of the testimony



Impact on Case Management

- Increasingly common to challenge experts
- Timing and sequence of expert disclosures
- Pretrial discovery and production of expert files
- Investigative discovery outside the rules
- Timing and sequence of expert depositions
- Expert rebuttal
- Build enough time into the schedule



Impact on Case Management

- Timing of a Daubert motion
 - At close of expert discovery
 - At same time as dispositive motion
 - As part of motions in limine
- On average, federal courts take 84 days to rule on Daubert motion (James Cooper, *Timing and Disposition of Daubert Motions in Federal District Courts: An Empirical Examination*, George Mason University School of Law (2015))



Impact on Case Management

- “If forced to choose between filing a Daubert challenge too late to enable the trial judge properly to understand and rule on it, or filing it early enough to facilitate proper review, it is more prudent to file early.” Judge Paul Grimm (D. Md.)
- Why does timing matter?
 - Exclusion of expert evidence may prevent opponent from proving a necessary element of claim or defense
 - *Inn by the Sea Homeowner’s Ass’n Inc. v. SeaInn, LLC*, 2015 Miss. LEXIS 379 (Miss. July 30, 2015) (excluding expert and granting summary judgment); *M.B. ex rel. Scott v. CSX Transp., Inc.*, 2015 WL 5315961, -- F.Supp.3d -- (N.D.N.Y. Sept. 11, 2015) (same)



To File or Not to File a Daubert Motion

- Considerations *against* making a Daubert challenge
 - Weak arguments
 - Expose strategy prematurely
 - Limitations on resources
 - Challenge to expert's qualifications only



To File or Not to File a Daubert Motion

- Considerations *against* making a Daubert challenge
 - Challenge to expert's conclusion only
 - Matters better left for attack on cross-examination
 - Type of expert generally accepted
 - Judicial disposition towards experts



To File or Not to File a Daubert Motion

- Considerations *in favor of* making a Daubert challenge . . . opinion not reliable
 - Flaws with methodology
 - Flaws with foundation
 - Failure to follow or use an accepted methodology
 - Chosen method cannot be tested or replicated



To File or Not to File a Daubert Motion

- Additional factors *in favor of* making a Daubert challenge
 - Improper extrapolation
 - Reliance on anecdotal evidence
 - Failure to consider alternative causes
 - Failure to conduct tests or inspections
 - Expert would act more carefully in non-litigation context
 - Field of expertise is not known to reach reliable results
 - Speculation or subjective belief
- Check your jurisdiction for other factors



Other Expert Attacks

- Failure to follow the rules
 - Case Management Order
 - Rule 26 requirements
 - Late or incomplete disclosures
 - Prejudice
- Rule 37 sanctions



Other Expert Attacks

- Opinions involve matters of law
 - Meaning of a contract or regulation
 - Meaning of the standard of care
- Opinions involve matters that an average juror understands
 - Rule 702: testimony is helpful to the jury



Other Expert Attacks

- Conclusive opinions
 - Lack of specialized knowledge
- Cumulative testimony
 - Multiple experts giving same opinions
- Expert bias
 - Work history
 - Relationships
- Mistakes



Other Expert Attacks

- Prior successful challenges to expert opinions
 - Struck down or limited by other courts or tribunals
- Prior inconsistent positions
 - Testimony
 - Reports
 - Publications
 - Affiliations
- Attempt to backdoor inadmissible and prejudicial evidence as the “basis” for an opinion (Rule 703)



What Should the Motion Look Like?

- Develop arguments during discovery
- Give the judge a roadmap
- Explain the science
- Use the record to show the challenged opinion(s)
 - Attach the challenged report
- Be specific about allegations
- Be specific about requested relief



What Should the Motion Look Like?

- Rule 104(a) is not strictly applied
 - Supporting material does not have to be independently admissible
 - Supporting material that will help the court understand why the challenged testimony is not reliable
 - Supporting material outside the record
 - Affidavit of your expert witness
 - Affidavit of fact witness



What Should the Opposition Look Like?

- Explain the methodology
- Expose attacks on matters for cross-examination
 - “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.” *Daubert*, 509 U.S. at 596.
- Accepted by other courts
- Produce evidence to rebut testimony
 - *Fimbres v. Garlock Equip. Co.*, 2014 WL 2612513 (W.D. Ky. June 11, 2014)



Daubert Hearing

- Request a hearing with the Daubert motion
 - Preferable to have hearing sufficiently in advance of trial (as opposed to extended voir dire during trial)
- Hearing is discretionary
- Outside the presence of the jury
- Preview of the trial arguments and lock-in admissions
- “[A]pproach the hearing as if the judge knows nothing and spell it out for him or her using the clearest, least technical explanation possible.” Judge Paul Grimm (D. Md.)
- Rules of evidence not strictly applied



Post-Daubert Ruling

- If partial opinion excluded, make proffer at trial to preserve the record
 - *American Auto Ins Co. v. Omega Flex, Inc.*, 783 F.3d 720 (8th Cir. 2015)
- Even if motion denied, don't give up
 - Raise again during pretrial conference and at trial
 - Address specific areas of expert disagreement to narrow trial issues
 - Address in advance any expert presentations to the jury
 - Demonstrative evidence (videos, models)



Questions

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