Earl O'Conner Inn of Court

May 8, 2012 CLE

DAMAGE EXPERTS: HOW TO DEVELOP, ATTACK, AND DEFEND DAMAGES EXPERTS IN DISCOVERY AND TRIAL

Presenters:

The Honorable David Hauber

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PRESENTATION OUTLINE

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II. **Direct and Cross-Examination of a Disability Expert**

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EXPERT TESTIMONY—DAUBERT VS. FRYE

State Court Standards For Admissibility Of Expert Testimony

K.S.A. 60-456 generally governs the admissibility of all opinion testimony in Kansas state courts,[1] regardless of the subject matter of the testimony or of the categorization of the witness as lay or expert. That statute provides:

> (a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.
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> (b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.
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> (c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.
>
> (d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

The district court's application of K.S.A. 60-456 is reviewed under an abuse of discretion standard. *Kuhn v. Sandoz Pharmaceuticals Corp.,* 270 Kan. 443, 455, 14 P.3d 1170 (2000).

In addition to considering K.S.A. 60-456, a district court must determine whether any opinion based on scientific methods or procedures meet the test for admissibility set forth in *Frye*

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[1] The admission of expert opinion testimony in Missouri is governed by V.A.M.S. § 490.065, which is modeled after Rule 702 of the Federal Rules of Evidence and provides:

> 1. In any civil action, 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.

Under Missouri law, the essential test of admissibility is whether an expert's opinion will help the trier of fact. *See State v. Rios*, 314 S.W.3d 414 (Mo.App. W.D. 2010).

v. United States, 293 F. 1013, 1014 (D.C.Cir.1923). The *Frye* test requires a showing that the basis of a scientific opinion is generally accepted as reliable within the expert's particular scientific field. *See Kuhn,* 270 Kan. at 454; *State v. Witte,* 251 Kan. 313, 323, 836 P.2d 1110 (1992). Kansas first cited the *Frye* test with approval in *State v. Lowry,* 163 Kan. 622, 629, 185 P.2d 147 (1947). The Kansas Supreme Court examined the purpose of the *Frye* test in *State v. Washington,* 229 Kan. 47, 53, 622 P.2d 986 (1981):

> "... *Frye* requires that, before a scientific opinion may be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the *Frye* standard, if a new scientific technique's validity has not been generally accepted or is only regarded as an experimental technique, then expert testimony based upon its results should not be admitted into evidence."

This test applies when a new or experimental scientific technique is used. *State v. Canaan,* 265 Kan. 835, 848, 964 P.2d 681 (1998). Moreover, the *Frye* test applies only to testimony based on a scientific method or procedure; it does not apply to pure opinion testimony developed from inductive reasoning based on the expert's own experiences, observations, or research. Rather than being subject to a *Frye* analysis, the validity of pure opinion is tested by cross-examination of the witness. See *Kuhn,* 70 Kan. at 457. "The distinction between pure opinion testimony and testimony based on a scientific method or procedure is rooted in a concept that seeks to limit application of the *Frye* test to situations where there is the greatest potential for juror confusion." *Id.,* 270 Kan. at 460. Inductive reasoning moves from the specific observations of the expert to that expert's general conclusion about them. Such opinions aren't subject to the *Frye* test. By contrast, when an expert reaches a conclusion based on deductive reasoning, that's subject to *Frye. Id.*, 270 Kan. 443, Syl. ¶ 5.

A *Frye* hearing may be required to determine the admissibility of testimony based on novel scientific techniques. If the evidence is generally accepted as reliable, no hearing is

required. *See State v. Heath,* 264 Kan. 557, 577-78, 957 P.2d 449 (1998) (battered child syndrome). Testimony regarding the results of accepted scientific tests may be excluded when the evidence does not show that the tests were performed in accordance with the accepted methodology. *State v. Miller*, 240 Kan. 733, 735–38, 732 P.2d 756, 758–60 (1987) (excluding expert testimony because methods used by sheriff's technician in tests for marijuana differed from those described by the KBI lab administrator as generally accepted). Moreover, in contrast to the Federal Rules of Evidence, an expert's opinion under the Kansas Rules of Evidence may not be based on inadmissible data. Pursuant to K.S.A. 60-456(b)(1), the facts upon which an expert opinion is based must be either personally known to the expert or made known to the expert at the hearing. *See West v. Martin,* 11 Kan.App.2d 55, 60–61, 713 P.2d 957, 961 (1986) (expert testimony inadmissible when based on computer interpretations of plaintiff's psychological test, which constitutes hearsay).

On appeal, while the admission of expert testimony is generally subject to an abuse of discretion standard, the determination of whether the *Frye* test was correctly applied is subject to de novo review. *Kuhn,* 270 Kan. at 456, 14 P.3d 1170; see *State v. Elnicki,* 279 Kan. 47, 51, 105 P.3d 1222 (2005).

Kansas courts have recently applied the *Frye* test to expert opinions as to emerging medical diagnoses, *see Kuxhausen v. Tillman Partners, L.P.*, 40 Kan.App.2d 930, 197 P.3d 859 (Kan.App. 2008) (excluding opinion on multiple chemical sensitivity as having no general acceptance), to a Walgreens DNA kit, *see Guth v. Wagner*, 234 P.3d 866 (unpublished) (Kan.App. 2010), and to certain opinions about blood alcohol content, see *State v. Shadden,* 235 P.3d 436 (Kan. 2010) (police officer's testimony, that defendant's failure on NHTSA

standardized walk-and-turn test meant there was a 68 percent probability defendant BAC above .10, was inadmissible without laying a *Frye* foundation).

Federal Standards For Admissibility Of Expert Testimony

In the federal courts, the trial court has broad discretion in whether to admit or exclude expert testimony, which applies both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. Fed. R. Evid. 702; *Goebel v. Denver & Rio Grande Western Railroad, Co.*, 346 F.3d 987, 990 (10th Cir. 2003). Federal Rule of Evidence 702 provides for the presentation of testimony through an expert as follows:

> 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.

Fed. Evid. R. 702.

In *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 593-94 (1994), the Supreme Court imposed a gate-keeping function upon district courts to determine whether or not proffered expert opinion testimony based on scientific knowledge is admissible. Specifically, when faced with a proffer of expert testimony, a district court "must determine at the outset, pursuant to Fed.R.Evid. 104(a), whether the expert will testify to (1) scientific knowledge that (2) will assist the trier of fact. *Id.* at 590. Although the district court has discretion in how it conducts the gatekeeper function, it may not abrogate its gate-keeping function altogether. *Goebel,* 346 F.3d at 990. The Supreme Court has defined scientific knowledge as follows:

> In order to qualify as scientific knowledge, an inference or assertion must be derived by scientific method. Scientific method is a grounding in the methods

> and procedures of science. . . that connotes more than a subjective belief or unsupported speculation and that applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."

Daubert, 509 U.S. at 590. These are commonly known as the reliability and relevance tests. The reliability of expert testimony is determined by assessing whether the reasoning or methodology underlying the testimony is scientifically valid, and relevance depends upon whether that reasoning or methodology properly can be applied to the facts in issue. *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193 (10th Cir. 2002).

The proponent of expert evidence bears the burden of proving by a preponderance of evidence that conditions of admissibility exist. Fed. Rules of Evid. 702. As set forth in *Daubert*, the following factors should be applied to determine the reliability of an expert's testimony:

1) whether the proposition is testable;
2) whether the proposition has been tested;
3) whether the proposition has been subjected to peer-review and publication;
4) whether the methodology or technique has a known or potential error rate;
5) whether there are standards for using the technique; and
6) whether the methodology is generally accepted.

Daubert, 509 U.S. at 590. These factors are not exclusive, and a court may use them in addition to other relevant factors, including: (1) whether the underlying data is untrustworthy for hearsay or other reasons; (2) whether the underlying data excludes other causes to have a reasonable confidence level; (3) what leading professional societies say about this specialty or this type of testimony; (4) whether any or all of the technique is based on the subjective analysis or interpretation of the alleged expert; and (5) the judge's experience and common sense. *See Hein v. Merck & Co.*, 868 F.Supp. 230, 231 (M.D. Tenn. 1994).

The *Daubert* analysis has been extended to apply to all expert testimony "whether such testimony is based on scientific, technical or other specialized knowledge." *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Ingersoll-Rand, Co.,* 214 F. 3d 1235, 1244 (10th Cir. 2000).

While expert opinions "must be based upon facts which enable the expert to express a reasonably accurate conclusion as opposed to conjecture or speculation, absolute certainty is not required." *Goebel,* 346 F.3d at 987. Rather, there must be a showing that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts that satisfy Rule 702's reliability requirements. *Id.*

Generally, the district court should focus on the expert's methodology rather than the conclusions. *Daubert*, 509 U.S. at 595. Scientific method today is based on generating hypothesis and testing them to see if they can be falsified. *Daubert*, 509 U.S. at 593. However, an expert's conclusions are not immune from scrutiny, and may be excluded if there is simply too great an analytical gap between the underlying data and the opinion offered. *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003). Under *Daubert*, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology. *Dodge*, 328 F.3d at 1222, quoting *In re: Paoliarr Yard PCP Litigation*, 35 F.3d 717, 745 (3rd Cir. 1994). In other words, an inference or assertion must be derived from the scientific method and supported by appropriate validation. *Dodge*, 328 F.3d at 1222. It is critical that the district court determine whether evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist. *Id.* Close judicial analysis of such technical and specialized matters is necessary not only because of the likelihood of juror misunderstanding, but also because expert witnesses are not necessarily always unbiased. They are paid by one side for their testimony. *Turpin v. Merrell-Dow Pharm., Inc.*, 959 F. 2d 1349, 1352 (6th Cir. 1992). Nothing in *Daubert* or the Federal Rules of Evidence require a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *Dodge*, 328 F.3d at 1222.

The Court of Appeals for the Tenth Circuit has held that Rule 702 requires a party seeking admission of expert testimony to meet a two-pronged test before a judge will permit an expert witness to testify. *United States v. Nichols*, 169 F.3d 1255, 1265 (10th Cir. 1999). First, the witness "must be an 'expert,' thus making the testimony reliable," and second, the expert testimony "must assist the trier of fact." *Id.* at 1265-66. An expert witness "must possess such 'knowledge, skill, experience, training, or education' in the particular field as to make it appear that his or her opinion would rest on substantial foundation and would tend to aid the trier of fact in its search for the truth." *Raytheon Aircraft Co. v. United States,* No. 05-2328-JWL, 2008 WL 627488, at *1 (D. Kan. Mar. 4, 2008). "[T]he touchstone of the admissibility of expert testimony is its helpfulness to the trier of fact." *Gust v. Jones*, 162 F.3d 587, 594 (10th Cir.1998) (quotation omitted). Reliability may focus on personal experience or knowledge rather than scientific foundation. *Ash Grove Cement Co. v. Employers Ins. of Wausau,* 246 F.R.D. 656, 660 (D. Kan. 2007).

In applying the Tenth Circuit's two-pronged test, the trial court "has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is admissible." *E.g., Farmland Mut. Ins. Co. v. AGCO Corp.*, 531 F. Supp. 2d 1301, 1305 (D. Kan. 2008) (quoting *Kumho Tire Co., Ltd.*, 526 U.S. at 152; *see also, Ash Grove*, 246 F.R.D. at 660. However, "[t]he rejection of expert testimony is the exception rather than the rule." *E.g., P.S. ex rel. Nelson v. The Farm, Inc.*, 658 F. Supp. 2d 1281, 1286 (D. Kan. 2009). As the comment to the 2000 Amendment to Fed. Evid. R. 702 explains:

> A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "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." 509 U.S. at 595. Likewise, this amendment [to Evidence Rule 702] is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v . Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

Fed. Evid. R. 702, cmt.

II. WHEN TO RAISE YOUR OBJECTION?

A. General Practice Tips for Challenging Scientific Expert Testimony

Few tools in a practitioner's tool kit can have as great an impact on a case as the exclusion of an opposing expert. In some cases, the exclusion of an expert can determine the outcome of the entire case. (Such as when an element of the case can only be established through expert testimony.) Even if the expert's testimony is not necessary to establish the elements of the case, there are still significant benefits to resolving expert testimony issues early in the litigation process. For example, if the strength of a plaintiff's case hinges upon the proffered expert and that expert's testimony is excluded well before trial, two things should happen: (1) the case's settlement value should drop drastically; and (2) the cost of defending the case should decline since the defendant will no longer need an expert to address or rebut the anticipated testimony of the plaintiff's expert.

Because of its potential impact on a case, it is important for the practitioner to know the applicable standards of admissibility for expert testimony and the procedure for challenging opposing experts. General tips for effectively challenging scientific expert testimony include:

(1) Get details about the opponent's experts' qualifications, opinions, and methodology.

(2) Retain your own expert.

(3) Challenge the opponent's experts' testimony early and often.

(4) Challenge the expert's testimony in a motion in limine or motion for summary judgment.

(5) Ask for a preliminary hearing.

(6) Look for other procedural or evidentiary objections.

(7) Make or renew objections to admissibility at trial.

(8) File post-trial motions based on the erroneous admission of evidence.

B. Challenging Scientific Expert Testimony in Federal Court

1. Introduction

There is no single best way to challenge an expert's testimony under the Daubert test. Expert's opinion testimony can be challenged at several stages in the litigation process, including: (1) motions to strike expert reports pursuant to Rule 37, if the report is late or the disclosures do not comply with Rule 26; (2) motions for summary judgment, if the damages calculated by the expert are unrecoverable or if flaws in the expert opinion render the claim legally insufficient; (3) motions in limine, if the expert is unqualified or the opinion is unreliable

or irrelevant; (4) a request for an in limine Daubert hearing, during which the challenged expert may be examined before the court and the opposing party may present evidence from other experts regarding the flaws in the methodology of the challenged expert; (5) objections to admissibility of the expert's testimony at trial; (6) motions for directed verdict; and (7) post-trial motions based on erroneously admitted expert testimony.

2. The Daubert Motion

One of the best methods for challenging to the admissibility of scientific testimony in federal court is a motion in limine pursuant to Rule 702 of the Federal Rules of Civil Procedure, also known as a Daubert motion. For judicial economy, you may want to include other pertinent objections. Scheduling orders in the District of Kansas may set a deadline for making substantive Daubert challenges that coincides with the deadline for dispositive motions. Consequently, there may be little opportunity to make sequential challenges to experts using both summary judgment motions and motions to strike or exclude.

The Daubert motion should:

(1) **Be concise.**
(2) Identify the objectionable proffered testimony.
(3) Apply the Daubert factors.
(4) If applicable, argue that, even if the Daubert test is met, the proffered testimony would not aid the jury in understanding the evidence or determine a fact at issue.
(5) If possible, include a concise affidavit from your own expert stating why the proffered testimony lacks scientific validity.
(6) Include a supporting brief setting forth the general standard of admissibility and any case law applicable to the particular scientific field or methodology being attacked.

3. Preliminary Determination of the Admissibility of Expert Testimony – Rule 104.

Once a Daubert motion is filed, the trial judge must make a judicial finding of fact as to a proffered expert's qualifications and the admissibility of the expert's anticipated testimony. The court makes this preliminary determination pursuant to Rule 104. "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) Scientific knowledge that (2) Will assist the trier of fact to understand or determine a fact in issue." Daubert, 509 U.S. at 592-93 (1993). Rule 104(a) provides in pertinent part:

> **Rule 104 - Preliminary Questions.**
>
> **(a) In General**. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
>
> **(b) Relevance That Depends on a Fact**. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

> **(c) Conducting a Hearing So That the Jury Cannot Hear It**. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
>
> (1) the hearing involves the admissibility of a confession;
>
> (2) a defendant in a criminal case is a witness and so requests; or
>
> (3) justice so requires.

A hearing is not necessarily required under Rule 104 for the trial court to make its determination. If there is a substantial evidentiary record in the form of expert reports, depositions, etc., the court may have sufficient information to reach a conclusion without having a hearing and receiving testimony from the proffered expert. Feit v. Great-West Life and Annuity Ins. Co., 460 F. Supp. 2d 632 (D.N.J. 2006); Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753 (8th Cir. 2003) (Although in limine hearings are generally recommended prior to Daubert determinations, they are not required; the only legal requirement is that the parties have an adequate opportunity to be heard before the district court makes its decision). However, a failure to conduct a preliminary hearing may be reversible error if the trial court does not conduct the Daubert analysis. U.S. v. Smithers, 212 F.3d 306 (6th Cir. 2000).

In Kansas, a Daubert motion accompanied by a request for an evidentiary hearing should be filed well in advance of the deadline for motions in limine, since those deadlines are routinely set shortly before trial. Remember, the denial of a pretrial Daubert motion or summary judgment motion should not prevent renewed motions to exclude expert testimony during or after trial, or motions for judgment as a matter of law. Failure to renew such motions may be deemed a waiver of the proponents' right to appeal.

4. Rule 104 Hearings

If the practitioner believes that a preliminary hearing is needed, the request for a hearing should be made through a short, concise motion pursuant to Rule 104(a) and (c). Since full hearings outside the presence of the jury are only mandated "when the interests of justice so require," the particular interests of justice involved should be identified. Finally, controlling precedent regarding a full evidentiary hearing, if helpful, should be presented.

Federal courts do not routinely utilize full evidentiary hearings for preliminary Rule 104 assessments. However, there are cases in which the court spent considerable time on Daubert issues. See Wade-Greaux v. Whitehall Lab, Inc., 874 F.Supp. 1441 (D.V.I.), Aff'd mem., 46 F.3d 1120 (3rd Cir. 1994) (Court held seven days of hearings, ultimately concluding that plaintiff's expert testimony was inadmissible because, inter alia, plaintiff's expert could not exclude all of the possible alternative causes of birth defects testified to by defendant's expert.) Do not expect this much time. The practicioner challenging the proffered expert should be extremely prepared with short, concise testimony and arguments.

Technically, once a Daubert challenge to expert testimony has been made, the burden should shift and the proponent of the challenged evidence should bear the burden of persuasion. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); Travelers Property & Cas. Corp. v General Elec. Co., 150 F.Supp.2d 360 (D. Conn. 2001) (At Daubert hearing on expert testimony,

burden of demonstrating that testimony is competent, relevant, and reliable rests with the proponent of the testimony.) At the hearing, the expert should be questioned by counsel on direct and cross-examination prior to the court's questioning, and although the court is free to interrupt, the court's questions should supplement, not supplant, questioning of counsel. Price v. Blood Bank of Delaware, Inc., 790 A.2d 1203 (Del. 2002).

In certain cases, it may be beneficial to have your own expert to challenge proffered testimony ("a challenging expert"). The benefit of live testimony is two-fold. First, the challenging expert can articulate and field questions better than the practitioner regarding the scientific issues underlying the Daubert challenge. Second, exposing the challenging expert to the court prior to trial may help the court to recognize the scientific issues at hand. The magnitude and significance of the case will likely determine whether or not a challenging expert will be brought to testify live at the evidentiary hearing. Because of the expense involved in utilizing experts, careful consideration should be made with regard to whether the benefits outweigh the costs. In complicated matters, however, every effort should be made to bring a challenging expert to the Rule 104 hearing.

5. Summary Judgment

In Daubert, Justice Blackmun responded to concerns that abandonment of the Frye test would lead to a "'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." Daubert, 509 U.S. at 595-96. Among the points he made was the observation that if the trial court concludes that "the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court may grant summary judgment before trial or direct a judgment as a matter of law under Rule 50(a) during trial. Id. at 596.

If an essential element of a claim (such as causation) depends entirely on expert testimony which is challenged under Daubert, the determination of admissibility may be addressed in a motion for summary judgment. Obviously, a determination under Rule 104(a) must precede, or be resolved contemporaneously with, the motion for summary judgment. Indeed, the resolution of the prior Rule 104(a) hearing may obviate the need for, or dictate the result of, the later summary judgment motion.

If, on the other hand, the issue is not the admissibility of the expert evidence but, rather, its sufficiency to raise a genuinely disputed issue of material fact, no antecedent Rule 104 evidentiary hearing is required. The court simply assesses the sufficiency on the basis of the summary judgment materials properly before it. However, if the scientific issues are not easily understood, it will be easier for the court to rule on the sufficiency point if there is a prior admissibility hearing under Rule 104(a).

C. Objection to Expert Testimony in State Court

1. Introduction

In federal court, Daubert and its progeny provide ample guidelines for the admissibility of expert testimony. There is a steadily growing volume of cases excluding experts, countless articles, and even entire books have been written about how to exclude expert testimony in federal court. In contrast, there are fewer resources addressing the subject of the admissibility of expert testimony in Kansas state court.

The standard of admissibility is perhaps less stringent under Frye than Daubert. Furthermore, unlike the federal requirements of admissibility under Daubert, Kansas courts do not apply the Frye analysis to nonscientific expert testimony. See, infra, Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443 (2000). As a result, Kansas state courts play less of a "gatekeeper" role concerning the admissibility of expert testimony than their federal counterparts. Id.

2. Statutes– K.S.A. 60-456 and 60-457

The Kansas Rules of Evidence, specifically K.S.A. 60-456 and 60-457, provide the statutory framework for challenging the admissibility of expert testimony in state court. K.S.A. 60-456 governs the admissibility of all opinion testimony in Kansas state courts, regardless of the subject matter of the testimony or of the categorization of the witness as lay or expert. It states:

> **K.S.A. 60-456 - Testimony in the Form of Opinion.**
>
> (a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.
>
> (b) **If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.**
>
> (c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.
>
> (d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

K.S.A. 60-457 is the state counter-part to Rule 104 and provides for the preliminary examination of witnesses. It states:

> **60-457. Preliminary examination**

> The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

3. Motion in Limine

Once a Frye objection is raised, the district court must determine whether the Frye test has been met. Specifically, the Court must decide if the proffered scientific opinion is generally accepted as reliable within the expert's particular scientific field. State v. Shadden, 290 Kan. 803, 819 (2010). This determination must be made before the proffered expert opinion may be received into evidence. State v. Cobb, 30 Kan.App.2d 544, 565 (2002), citing Kuhn, 270 Kan. 443, Syl., ¶¶ 2, 3.

Similar to federal court, the proponent of the proffered expert bears the burden of proof. The party seeking to admit the scientific evidence has the burden of satisfying the Frye test by proving the reliability of the underlying scientific theory upon which the evidence is based and the acceptance of it in the appropriate scientific field. State v. Graham, 275 Kan. 176, 184 (2003), citing State v. Warden, 257 Kan. 94, 108 (1995).

4. The Preliminary Examination

From both a tactical and efficiency perspective, it is usually best to address expert testimony challenges well in advance of trial. A "Frye hearing" may be required to determine the admissibility of testimony based on novel scientific techniques. Under K.S.A. 60-457, the trial court has the authority to require the witness be examined concerning the data upon which the opinion is based, before the expert is allowed to state their opinion. Chandler v. Neosho Memorial Hospital, 223 Kan. 1 (1977). If the evidence is generally accepted as reliable, no hearing is required. State v. Heath, 264 Kan. 557, 557 (1998).

5. Trial – Fighting Experts with Experts

Even if the trial court admits expert testimony over a Frye objection, the opposing party may introduce contrary expert testimony that the opposing expert's scientific principle is not reliable or accepted. In State v. Hodges, 241 Kan. 183 (1987), the defendant was convicted of involuntary manslaughter when she killed her husband after he had repeatedly and severely abused her. The trial court prohibited the defendant from offering evidence regarding battered woman syndrome, holding the evidence did not meet the Frye test. On appeal, the Kansas Supreme Court disagreed and found the theory underlying the battered woman syndrome had gained enough acceptance to be admissible under the Frye analysis. The case was remanded for a new trial.

On remand, the trial court allowed the defendant's expert to testify regarding battered woman syndrome but refused to allow the prosecution to present expert testimony to the contrary. The jury acquitted the defendant, and the prosecution appealed the exclusion of its expert's testimony. The Kansas Supreme Court reversed the trial court's decision again. The Court explained it had not held that the battered woman syndrome was determinative—only that the theory and methodology underlying the syndrome were generally accepted. Once the trial court determines that the methodologies used are generally accepted, "each side may introduce

expert opinion evidence allowing the jury to decide which opinion is more reliable in a particular case." Hodges, 241 Kan. at 188.

6. Additional Expert Issues

i. The Expert's Reliance on Inadmissible Evidence.

In contrast to the Federal Rules, an expert's opinion under the Kansas Rules of Evidence may not be based on inadmissible data. In West v. Martin, the Court excluded expert testimony based on computer generated printouts. West v. Martin, 11 Kan. App. 2d 55, 60-61 (1986). Pursuant to K.S.A. 60-456(b)(1), the facts upon which an expert opinion is based must be either personally known to the expert or made known to the expert at the hearing. Id.

The facts made known to an expert and upon which his or her opinion is based should be in evidence before the witness states his or her opinion. Where facts and data are not perceived by or personally known by expert witness, they must be supplied to witness before he or she testifies by having him or her attend throughout trial or by the attorney providing the expert with the necessary factual background. Chandler v. Neosho Memorial Hospital, 223 Kan. 1 (1977).

ii. The "Pure Opinion Exception to Frye

Kansas courts do not apply the Frye test to expert opinions based solely on inductive reasoning; such testimony is considered pure-opinion testimony. Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443 (2000). The pure-opinion or inductive-reasoning exception to the Frye test does not apply, when the proposed expert relied on articles and lectures by others or when the expert arrived at a specific conclusion from a general proposition. Kuxhausen v. Tillman Partners, L.P., 40 Kan. App. 2d 930 (2008), review granted, (Sept. 2, 2009) and judgment aff'd, 2010 WL 4026155 (Kan. 2010).

District Court of Kansas.
Johnson County
Pantelis POURNARAS, Plaintiff,
v.
WESTAR ENERGY, INC., Defendants.
No. 09CV5443.
November 30, 2010.

Order on Motion to Exclude Expert Testimony

David W. Hauber, District Court Judge.
Defendant Westar Energy, Inc. ("Westar"), has filed a motion in limine to exclude or limit the testimony of experts for Plaintiff Pantelis Pournaras in this overhead high voltage power line personal injury case. Plaintiff has two liability experts. One is Dr. William Vigilante, Jr., a "human factors and ergonomics expert," and another is Wayne B. Roelle, an electrical engineer. Throughout their testimony, plaintiff's counsel has utilized various PowerPoint slides to illustrate and/or underscore their opinions. The slides have headings such as *"Needless Public Danger"* (Exhibit 34) and *"Half the State at Needless Risk"* (Exhibit 28).

The Court previously held a hearing with oral argument on this matter but indicated that it would issue a written opinion to ensure compliance with the guidelines contained herein.

Standard for Excluding Evidence or Expert Testimony

The operative rule of evidence pertaining to expert testimony is K.S.A. 60-456(b):
If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

"Perceived" means knowledge acquired through one's own senses. K.S.A. 60-459(c). "Made known" refers to facts put into evidence. *Plains Transp. of Kan., Inc. v. King,* 224 Kan. 17, 21, 578 P.2d 1095, 1099 (1978); *Casey v. Phillips Pipeline Co.,* 199 Kan. 538, 546, 431 P.2d 518, 526 (1967).

In addition to expert rules of evidence, the Court must consider whether evidence is relevant but prejudicial. K. S.A. 60-401 (b) defines relevant evidence as "evidence having any tendency and reason to prove any material fact," and K. S.A. 60-407(f) states, "all relevant evidence is admissible." A trial judge, however, has discretion to exclude otherwise relevant evidence when its probative value is outweighed by the danger that its admission risks unfair and harmful surprise. K.S.A. 60-445. This decision is subject to the abuse of discretion standard. *Folks v. Kansas Power & Light Co.,* 243 Kan. 57, 66, 755 P.2d 1319, 1328 (1988).

I. USE OF POWERPOINT SLIDES

In addition to the slides mentioned above, and in order to convey the dangers of contact with overhead lines, plaintiff offers a "Three Electric Chairs" slide that shows three electric chairs with plus signs and an equals sign

next to two utility poles linked by a transmission line. At the bottom of the slide, in large red letters, is "7200 Volts." Defendant objects to this and other slides which it says depict "gruesome" electrical burns or show cutaways of the human body or demonstrations of how electricity travels through the body. As noted previously at the hearing of this matter on November 19, the Court will exclude plaintiff from using argumentative slides headings as "evidence" during opening statement or during the trial. Headings may be used in closing when argument is properly linked to the Court's instructions.

The Court incorporates its previous rulings on the record but specifically notes that the slide depicting three electric chairs together has connotations of a criminal execution, linked to defendant's transmission lines and the same is too prejudicial to be used in the instant case. Plaintiff's expert can refer, by way of example, to the amount of electricity used in an electric chair in his testimony but without the illustration. Therefore, plaintiff may not use such a slide during any aspect of the case. Other slides that attempt to make arguments are improper as demonstrative aids during the presentation of evidence.

The Court finds that to the extent the argumentative heads are removed, and the information on the same is accurate and contains proper foundation, such slides may be useful as demonstrative aids to illustrate expert opinions but they are not evidence. Medical slides that demonstrate subjects which are not generally known by the jury, such as the path of electrical current and the illustrative damage in the body, or cutaways that demonstrate the nature of tissue damage, while graphic in some instances, are not so "gruesome" as to require exclusion. Plaintiff will be allowed to use all damage slides which the Court has held are not so prejudicial or surprising so as to require exclusion under K.S.A. 60-445.

II. EXCLUDING TESTIMONY OF PLAINTIFF'S EXPERTS

In addition to the foregoing, defendant seeks to exclude the testimony of Mr. Roelle and Dr. Vigilante. The Court will address each in turn.

A. *The Testimony of Wayne B. Roelle.*

Mr. Roelle is an electrical engineer in the power electrical field, having obtained a bachelor of science degree in electrical engineering in 1955 and a masters degree in 1968. He worked for various public utilities, including Consumers Public Power District and Nebraska Public Power District, where he held numerous positions from field engineer to chief engineer of distribution, where he presided over distribution design, substation design and transmission design. He retired at age 65 in 1997, and, since that time, has provided consulting services with Olsson consulting engineers. He has served on various committees and subcommittees related to determining national electrical standards and, in fact, has been involved in the National Electrical Safety Code provisions.

During his deposition, Mr. Roelle noted that his expertise is in the design and distribution of electrical power but necessarily in safety rules, although he is familiar with design standards of overhead lines which anticipate clearance and maintenance of such lines.

Defendant seeks to exclude testimony of Mr. Roelle as it pertains to the failure of a guy wire anchor rod and the timing of its separation. Westar argues that Mr. Roelle has no experience and training in examining different types of metal to determine how and when an anchor rod would separate from its anchor and that his opinions are not based upon scientific principles or tests and are too remote and speculative to be considered competent evidence because his opinion is based upon a review of the photograph of the anchor rod, not a physical examination of the same.

Defendant also states that this issue was not properly disclosed and that opinions regarding the rust and cone shape at the end of the rod, showing separation due to a traumatic event (*e.g.,* a car striking the anchor rod) between the date of installation in 1983 and 1993, should be excluded. The Court finds that Mr. Roelle is qualified to render an opinion as both an engineer and a person who has experience and would be familiar with the construction, design and maintenance of electrical distribution systems, which includes anchoring rods used to secure transmission lines. His testimony related to an examination of photographs of the same goes to the weight and credibility of his testimony, and it should not be excluded on foundational reasons. Moreover, the Court ensured that defendant would have an opportunity to full depose Mr. Roelle on this topic, if need be, and respond with its own expert opinion on the anchor rod. Having been given that opportunity, the Court finds no reason to exclude Mr. Roelle on this topic which was disclosed at his deposition shortly after defendant removed the anchor rod, which was buried and not previously known to plaintiff until defendant decided to repair the transmission line shortly before his deposition.

B. *The Testimony of Dr. William Vigilante*

Dr. Vigilante is a human factors expert who was hired by plaintiff to provide expert opinions regarding the safety practices of the defendant and the risk perception and foreseeability of plaintiff's accident. In his affidavit, he provides multiple opinions based on the alleged violation f the NESC by Westar and the standard of care for an electrical company. Westar seeks to exclude any opinions based on alleged violations of the NESC as outside the scope of Vigilante's knowledge and experience because he admitted in his deposition that he is neither an electrical engineer nor an expert on the NESC.

Dr. Vigilante's affidavit states that he will render opinions about unsafe clearance distances and hazards associated with primary lines, Westar's failure to implement a hazard control program and that its failure to implement the same resulted in a foreseeable injury to plaintiff, that data collected through injury bulletin boards and weekly safety summaries provided notice that injuries to the general public were occurring, that Westar had a responsibility to improve their safety program, that Westar failed to provide adequate training and procedures to its employees to monitor the overhead lines, that Westar's inspection program was deficient and that Westar had a responsibility to implement an adequate inspection program. Additionally, Dr. Vigilante has opinions about the general public's lack of understanding and experience and appreciation of hazards associated with overhead lines and he purports to condition application of the Kansas Overhead Power Line Accident Prevention Act on appreciations of danger or line voltages.

While defendant complains about Dr. Vigilante assuming the validity of Mr. Roelle's opinion, Westar's objections go far deeper than rendering an opinion based on another opinion. If read closely, it does not appear that Dr. Vigilante's opinions break any new ground in terms of scientific or experimental techniques, where an expert typically is allowed to testify and base opinions on deductive reasoning in which application of scientific principles must be generally accepted and reliable in a particular field. *State v. Canaan,* 265 Kan. 835, 848-49, 964 P.2d 681 (1998); *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923).

Rather, his opinions seem to be more in the "pure opinion" category which can be allowed if following inductive reasoning that is based on the witness' own experience, observations and research, the validity of which then is tested by cross-examination. *Kuhn v. Sandoz Pharmaceuticals Corp.,* 270 Kan. 443, 459, 14 P.3d 1170, 1181 (2000) (*citing Logerquist v. McVey,* 196 Ariz. 470, 1 P.3d 113 (2000) (holding that *Frye* is not applicable when a qualified witness offers relevant testimony or conclusions based on experience and observation of human behavior for the purpose of explaining that behavior)).

When one examines Dr. Vigilante's curriculum vitae, his experience is as a research assistant at several university psychology departments from 1992 to 2001, with bachelors, masters and doctorate degrees in 1993, 1997 and 2001, respectively. He worked for IBM from 1997 to 2003, primarily on issues pertaining to laptop computers, and as a consultant for consumer product safety hazard litigation from 2001 to 2003. He finally has worked as an associate for a forensic engineering firm, Robson Forensic, Inc., since 2003. As to his "pure" opinions related to Westar's operations, it is evident that he has no apparent industrial or utility experience upon which he can base any of his opinions about power line safety, maintenance, inspection or operations.

Lacking such foundation, his opinions fail to meet the standards of K.S.A. 60-456(b) because they lack experience and would not be "helpful" to a jury trying to understand issues of which they may have no lay experience. In order to opine about certain industry practices, an expert must be familiar with them. *See Parker v. Wal-Mart Stores, Inc.* 267 F.R.D. 373, 376 (D. Kan.2010) (court excludes testimony of slip-and-fall expert on inadequacy of store's mode-of-operation or maintenance program where expert did not rely upon standards and lacked knowledge of specific incidents or details of other accidents to render an opinion).

In the case of *In Re Central Kansas Electric Coop, Inc.*, 224 Kan. 308, 582 P.2d 228 (1978), the court held that the trial court should have stricken the testimony of an expert witness who had no experience in the field, basing his opinion solely upon four studies he had reviewed. In *Choo-E-Flakes, Inc., v. Good.* 224 Kan. 417, 580 P.2d 888 (1978), the court upheld restriction of an expert's testimony on grain milling and feed mixing where he had no experience in either area. *Id.* at 419. Expert testimony should be based upon techniques that are of general acceptance in an expert's particular field, *State v. Graham.* 275 Kan. 176, 182-183, 61 P.3d 662 (2003), and only when it may be of special help to the jury on technical subjects with which it is not familiar to arrive at a reasonable factual conclusion from the evidence. *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, 626, 822 P.2d 591 (1991).

Here, because Dr. Vigilante lacks any experience in industrial safety or, more particularly, in utility safety/maintenance/inspection programs, his opinions about the inadequacy or insufficiency of Westar's programs are rendered without the validity of personal experience and they more likely will confuse a jury with establishing a standard of care that does not exist. Significantly, his opinions about the applicable law or foreseeability invade the province of the Court and jury.

The question of the applicable standard of care is an issue to be determined by the Court. *See Schrader v. Great Plains Electric Co-op, Inc.*, 19 Kan.App.2d 276, 278, 868 P.2d 536 (1994) ("Whether a duty exists is a question of law, although whether the duty has been breached is a question of fact."). Moreover, a jury can decide from all of the evidence what is a foreseeable injury after being duly instructed as to the standard of care. A jury can determine notice issues without expert help. In *Moore v. Associated Material & Supply Co., Inc.*, 263 Kan. 226, 948 P.2d 652 (1997), the court determined that a sufficient number of witnesses existed so that "where the causal nature of an action is self evident, an expert is not required in order to submit a matter for decision to a jury, regardless of the existence of other complicating factors." *Id.* at 239.

Dr. Vigilante's opinions readily cross over into the realm of proximate cause, foreseeability and the relative preventability of plaintiff's accident. *See* Exhibit 70, Vigilante Aff, ¶6. However, a lay jury can determine any of these issues without expert assistance. In some respects, any opinions by Dr. Vigilante may confuse a lay jury into ignoring the instructions that the Court will have to give in this case. Accordingly, his opinions about standards of care will be excluded.

This Court notes that at least one other court has reached a similar conclusion. In *Wald v. Costco Wholesale Corp.*, 2005 WL 425864, *3 (S.D.N.Y. 2005), a product liability helmet warning case, the court concluded that while he Dr. Vigilante apparently has devoted many years of his life to studying the effects of warning labels on consumers, his testimony would not be helpful on the ultimate issue of whether packaging sufficiently warned of a particular danger. The court said that whether a reasonable person would consider himself adequately warned or to pay attention to a warning was one that a lay juror was qualified to address. *Id.* at *5.

The *Wald* court further notes that even if it were inclined to accept scientific evidence on this matter, that Dr. Vigilante had cited no empirical studies that are sufficiently specific to the facts at hand to be helpful and that his generalized opinions, *e.g.*, that consumers tend to rely on information conveyed on labels, are little more than common sense and that his application of those theories were "more impressionistic, subjective and conclusory than scientific." *Id.* at *6. Finally, the court was "skeptical of the reliability of Dr. Vigilante's discipline as applied to a specific case, and it therefore does not matter whether his methodology is accepted within the relevant scientific community." *Id.* At best, the court concluded, his opinions were irrelevant and unhelpful, and, at worst, they would confuse and prejudice the jury from forming its own opinions. *Id.*

This Court likewise concludes that with the exception of Dr. Vigilante's possible role of providing opinions about the perception of overhead high voltage line dangers, which appear to be within his field of human factors, he offers little to a jury without the danger of confusion. During the November 19 hearing, the Court reviewed Exhibit 123, which contains a number of abstracts by psychologists and human factors practitioners regarding electrical dangers and hazards, perceptions of the same, "inattentional blindness," visual performance, ergonomics, behavioral expectations, etc. These are not subjects that are within the common experience of most jurors, and they cut across a number of disciplines.

Because defendant has raised K.S.A. 66-1711 and whether a rebuttable presumption of negligence exists as to plaintiff's conduct, the Court notes that Dr. Vigilante may have sufficient basis or experience in the area of psychology or human factors to explain why plaintiff or any other reasonable person might move into a 10-foot danger zone beneath a high voltage power line and not realize the danger. To the extent Dr. Vigilante may be used defensively to respond to a presumption of negligence against the plaintiff, his opinions may be helpful.

The Court cautions that Dr. Vigilante should not stray into opinions about what is "reasonably foreseeable" or on the fault or negligence or lack thereof of any party, including any opinions about the applicability of the Kansas Overhead Power Line Accident Prevention Act. These invade the province of the jury and court. While the Court notes Westar's arguments that most lay jurors would appreciate the dangers of overhead lines and do not need an expert providing testimony on this topic, the Court believes that expertise in the areas of human perception and dangers are ultimate issues the jury will have to decide and Dr. Vigilante's opinions may be helpful in this area, assuming a proper foundation is laid.

Finally, the Court notes that because Dr. Vigilante is an out-of-town witness and now has been rendered a rebuttal expert on Westar's affirmative allegations of negligence, and that there is little doubt these issues will be raised in plaintiff's case-in-chief, the Court will exercise its discretion in controlling the order and presentation of the evidence to permit Dr. Vigilante to testify out-of-order which will aid in witness planning and minimize delays in the trial.

IT IS SO ORDERED.

Dated

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DAVID W. HAUBER

District Court Judge, Division 7

Pournaras v. Westar Energy, Inc.
2010 WL 4859768 (Kan.Dist.Ct.) (Trial Order)

END OF DOCUMENT

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District Court of Kansas.
Johnson County
Steven D. CHUBB, et al., Plaintiffs,
v.
RYDER INTEGRATED LOGISTICS, INC., et al., Defendants.
Nos. 07 CV5397, 07 CV5399.
September 10, 2009.

Orders on Motions for Partial Summary Judgment and Defendant Cheadle's Motion in Limine[FN1]

FN1. The Court is confining this order to the limine topic of Cheadle's marijuana metabolites.

David W. **Hauber**, District Court Judge.
Defendant Ryder Integrated Logistics, Inc. ("Ryder"), and defendant James E. Cheadle ("Cheadle") have filed separate motions for partial summary judgment in this wrongful death action. In a prior order, Doc. 119, the Court sustained a motion by defendant Ryder on the question of negligent hiring. In this motion, defendant Ryder now moves to supply the Court with additional information regarding whether it was negligent in giving insufficient directions for deliveries to Cheadle that allegedly caused the U-turn accident that resulted in the death of plaintiffs' decedent, Greta D. Chubb.

Defendant Cheadle also files a motion for partial summary judgment and a motion in limine with regard to drug testing performed on defendant that revealed the presence of marijuana metabolites that did not result in any reportable levels. The Court will present below the facts previously derived from Doc. 119, as they may be relevant, and those facts deemed uncontroverted for purposes of Ryder's latest motion.

STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. K.S.A. 60-256(c). An issue of fact is not genuine or material unless it has legal controlling force as to a controlling issue. A court resolves all facts and inferences, which reasonably may be drawn, in favor of the nonmoving party. *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009).

Disputed immaterial facts do not preclude summary judgment especially when they cannot affect the judgment as a genuine issue of material fact. *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 246 Kan. 450, Syl. ¶ 2, 790 P.2d 404 (1990). Flimsy or transparent allegations are insufficient to allow submission to the trier-of-fact. *In re Mullin's Estate*, 201 Kan. 756, 761, 443 P.2d 331 (1968). The nonmoving party must do more than simply controvert facts; it has an affirmative duty to come forward with facts to support its claim. Sup. Ct. Rule 141(b) (2008); *State ex rel. Stephan v. Commemorative Servs. Corp.*, 16 Kan. App. 2d 389, 840-841, 823 P.2d 831 (1991).

UNCONTROVERTED FACTS

This case involves the death of plaintiffs' decedent, Greta D. Chubb, after Ryder's leased driver, James E. Cheadle (Cheadle), an employee of Truckers Plus, attempted to execute a U-turn near 75th and Woodson in Overland Park on

November 2, 2006, shortly after proceeding north on Nall and overshooting one of his delivery locations at a CVS pharmacy at 9622 Nall Avenue, Overland Park. Cheadle began his trip that day by departing from Ennis, Texas, and planned on making five or six deliveries to CVS locations in Kansas City. He was not familiar with Kansas City and usually had delivered to distributions centers.

The Alleged Negligence Related to Directions Ryder Provided to Cheadle

Other than the vicarious liability alleged against Ryder in connection with the operation of the Ryder truck at the time defendant Cheadle made a U-turn, plaintiffs allege direct negligence against Ryder for failing to provide proper support or instructions for the deliveries that were to be made by Cheadle the day of the collision. Presumably, it was this failure to provide such support or instructions that caused Cheadle to make a U-turn which, in turn, resulted in the accident.

The plaintiffs admit that the following facts in defendant's brief are uncontroverted: Facts numbered 1, 2-3, 5, 8, 10-14, 15-29, 31, 33-42, 44-52. These facts indicate that Cheadle was a leased driver from Truckers' Plus which Ryder uses when it needs extra drivers. He was assigned to the Ennis, Texas, CVS client facility supported by Ryder. Drivers are provided with directions and maps using MapQuest software together with maps copied from route books which are available to all drivers at the facility. Communication is maintained between Ryder and the driver through either a cell phone or a Nextel push-to-talk phone. According to Cheadle, he was given a "direction pack:" but they were "not the most accurate" and he would not contact Ryder "unless something happened. You were pretty much the supervisor of yourself because you was [sic] in control of the tractor."

On the day in question he did not call Ryder before the accident occurred because it was after 5 p.m. "and I know a lot of guys don't answer the phone or the phone doesn't get answered because pretty much everybody is gone." Cheadle depo. 38:3-25; 49:6-17. Cheadle, however, was provided with a contact list prior to his dispatch on November 2,2006. His truck was not equipped with a CB radio or GPS system. Ryder has the driver's cell phone number, and Cheadle had his phone with him on the day of the accident. Out of three previous trips, Cheadle made one call to Ryder for directions to a different distribution center because of traffic problems in Los Angeles.

On this trip to Kansas City, Cheadle had five or six drops to make with no set time to complete the same. He got lost in Kansas City on his way to the first drop. He did not believe the directions were accurate, and he testified he did not know Kansas City the way he should have known it. He had not delivered to stores directly before, only distribution centers. He contacted Ryder to get directions to the first CVS store. By the time Ryder got back to him, Cheadle had called the store for directions. He made his first drop at 5 p.m. He had no trouble getting to his second drop because the directions were mapped "pretty well - it was right off the main street."

After his second drop, Cheadle began heading north on Nall, past the CVS store he recently had left. He was looking for a store on the corner of Nall and 96th Street but the directions did not say the store was on the corner. The store he was looking for is at 9622 Nall Avenue in the Nall Hills Shopping Center at the southwest corner of 95th Street and Nall Avenue.

Cheadle continued to travel north on Nall until he reached 75th Street, when he realized he had missed 95th and 96th streets. He then made a left turn from Nall into the westbound right-hand lane of 75th Street. He intended to go back to the store he had just left and ask the manager if the store was nearby. Otherwise, he was going to "just crash out at the store" because he knew he was almost out of time for the day and he was going to complete the two or three remaining drops the next day. Cheadle did not attempt to call Ryder or to stop and ask for directions. From the time that Cheadle turned left onto 75th Street until the time of the accident, it was not necessary to look at any documents or maps. Cheadle thought it would take him 30 seconds to make a U-turn and go back to the store and thought it was "the smartest thing for me to do, being unaware of where I was and the nature of the cargo that I was carrying." Cheadle depo. At 57:11-21. After waiting for traffic to stop, and with his flashers on, Cheadle attempted a U-turn

when Ms. Chubb passed around the stopped traffic and ran into the side of the trailer.

The accident occurred at 7:16 p.m. Cheadle then called Chris Albritton, the local manager at the Ennis, Texas, facility, on his cell phone to report the accident.

The Alleged Violation of Regulations Related to Marijuana Metabolites

Plaintiffs allege that defendant Cheadle breached duties owed to Ms. Chubb by violating 49 C.F.R. § 382.213(a), 49 C.F.R. § 382.501(a), and 49 C.F.R. § 392.4(a). In Cheadle's motion for summary judgment, uncontroverted facts numbered 1-10, 12-21, 24-27 and 29-31 are not controverted. According to these facts and those provided by plaintiff, within an hour of the accident, defendant Cheadle provided a blood sample for alcohol and drug testing. It was analyzed by the Kansas Bureau of Investigation (KBI), which showed a positive screen via immunoassay, confirming the presence but not the quantity of marijuana metabolites via gas chromatography/mass spectrometry (GC/MS). The metabolite found was 11-nor-delta-9-tetrahydrocannabional-9 carboxylic acid (THC-COOH), an inactive metabolite.

According to defendant's expert, Dr. Robert Palmer, a board certified toxicologist, there was no evidence that Cheadle was actively using any controlled substance at the time of the accident and no evidence of impairment. The KBI results show no quantity of metabolite present or any of the active components of marijuana. There is no scientific evidence that supports any conclusion that Cheadle was under the influence of any drug prohibited by 21 C.F.R. § 1308.11 Schedule I substance, according to Dr. Palmer. The active drug prohibited on Schedule 1 is THC.

Plaintiffs claim that there is circumstantial evidence that Cheadle was impaired on November 2, 2006, because he later admitted to consuming marijuana a week earlier, he became lost in Kansas City, he traveled 2.5 miles beyond the missed drop location before realizing the same, he became stuck after attempting a U-turn with a 53-foot trailer, and he did not get out of his truck to flag down traffic.

At the accident scene, police saw no signs of impairment, Cheadle was not cited for the same, he has not been disqualified from commercial driving, and plaintiffs have no expert witness to analyze the test results or their significance. According to Dr. Palmer, predictive models for estimation of the time of marijuana smoking typically rely upon measurements of the active ingredients of marijuana, THC or 11-OH-THC, which are then applied in a ratio with THC-COOH, the inactive metabolites. Therefore, he opines, an isolated concentration of THC-COOH, without evidence of THC, is a poor predictor of marijuana exposure. Controlled, scientific studies have proven that the presence of low levels of marijuana metabolites in the blood are meaningless in determining driving impairment, he opines.

Defendant submits that while the initial laboratory test conducted by the KBI showed a positive screen via immunoassay, the KBI laboratory test only confirmed the presence of 11-nor-delta-9-tetrahydrocannabionl-9 carboxylic acid via GC/MS without reporting a specific quantity. Cutoff concentrations for initial and confirmation urine tests are governed by 49 C.F.R. § 40.87. On an initial urine test, a laboratory must report a result below the cutoff concentration as negative. 49 C.F.R. § 40.87(b). The cutoff concentration for an initial test for marijuana metabolites is 50ng/mL. 49 C.F.R. § 40.87(a). If the result is at or above the cutoff concentration, the laboratory must conduct a confirmation test. 49 C.F.R. § 40.87(c). The cutoff concentration for a confirmation test of Delta-9-tetrahydrocannabinol-9-carboxylic acid (THC) is 15ng/mL. 49 C.F.R. § 40.87(a). A result below 15ng/ML must be reported as negative. 49 C.F.R. § 40.87(c). A laboratory test ordered by plaintiffs' counsel and conducted by NMS labs on the same blood sample used by the KBI laboratory reported a result of 7.9 ng/mL.

DISCUSSION

James Cheadle's Motion for Partial Summary Judgment

In his motion, Mr. Cheadle seeks summary judgment with respect to plaintiffs' claims that he breached a duty of care by (1) negligently operating a Ryder tractor-trailer after using marijuana in violation of several federal regulations and (2) failing to adequately warn oncoming traffic after he became stuck making a U-turn.

(1) *Marijuana Metabolites and the Alleged Violation of Federal Regulations*

With respect to the post-accident drug testing that was performed, Mr. Cheadle maintains that nothing exists for the jury to consider because his post-accident drug levels, specifically the inactive marijuana metabolites, did not meet certain threshold requirements set by federal regulations. Mr. Cheadle asserts, *inter alia,* that the evidence is so insufficient that no reasonable fact-finder could conclude Mr. Cheadle was impaired.

Plaintiffs contend, however, that Kansas law permits proof of intoxication through means other than expert analysis of toxicology tests. *See* Miles v. West, 224 Kan. 284, 287-288, 580 P.2d 876 (1978) (question of intoxication was proper issue to present to a jury); *but see* Garrison v. Marlatt, 224 Kan. 390, Syl. ¶ 2, 580 P.2d 885 (1978) ("The mere presence of alcohol on the breath of a driver, with nothing more, is not enough to justify a jury instruction on intoxication."). Plaintiffs argue that taken together, Mr. Cheadle's marijuana use, questionable driving, and post-accident positive test result are evidence of impairment.

Mr. Cheadle does not dispute that inactive marijuana metabolites were present in his system as determined through the KBI's post-accident blood test. While the KBI results do not quantify the amount detected, NMS labs detected 7.9 ng/mL of an inactive metabolite, and Mr. Cheadle, himself, admitted to smoking marijuana approximately one week before the accident.

The only evidence presented, however, indicates that the low-level marijuana metabolites present in Mr. Cheadle's system did not contribute to the accident. The defendant's retained expert witness stated in an affidavit that the presence of the inactive metabolite is meaningless in terms of determining driving impairment. After smoking marijuana, the inactive metabolite can remain in one's system for several days, long after the drug's intoxicating effects have subsided. Further, the accident report states that while the drug test resulted in a positive cannibinoids result, Mr. Cheadle showed no signs of impairment. The evidence available indicates that marijuana use did not contribute to the accident. Even if the test results are assumed to be relevant, the probative value of such evidence is substantially outweighed by its prejudicial and confusing effect. Thus, to the extent the evidence is to be used to show impairment at the time of the accident, Mr. Cheadle's motion in limine is granted. *See* State v. Foiles, No. 88,423, 2003 WL 21947332, *1-3 (Kan. App. Aug. 8, 2003) (expert testimony inadmissible under ***Frye*** test because observations on how inactive marijuana metabolites affect a person's driving were mere speculation).

In addition, plaintiffs' other theory is that Mr. Cheadle was negligent in driving and performing certain functions after *using* marijuana in violation of several federal regulations. Under 49 C.F.R. § 382.213(a), "[n]o driver shall *report for duty* or remain on duty requiring the performance of safety-sensitive functions[, which includes time spent driving and remaining in attendance upon a disabled vehicle,] *when the driver uses* any controlled substance...." (Emphasis added). Drivers who violate § 382.213 are prohibited from performing safety-sensitive functions under 49 C.F.R. § 382.501(a). In addition, 49 C.F.R. § 392.4(a) provides that "[n]o driver shall be *on duty and... use"* marijuana, a 21 C.F.R. § 1308.11 Schedule I substance. (Emphasis added). For many of the same reasons stated above, the motion in limine is sustained to the extent the plaintiffs are attempting to prove Mr. Cheadle was on duty and using marijuana. The regulation does not prohibit the off duty use of the same. *See* Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1490 (10th Cir. 1989) (in employment discrimination suit, the court found the district court correctly interpreted 49 C.F.R. § 392.4 so as not to prohibit off duty use).

Even to the extent plaintiffs allege "use" under 49 C.F.R. § 382.213(a), the motion in limine is granted. While federal regulations require urine testing, 49 C.F.R. § 382.303(g)(1) provides that post-accident breath or blood tests for

the use of alcohol "conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer." *See also* 49 C.F.R. § 382.303(g)(2) (stating the same as to urine tests for controlled substances). Assuming for the purposes of the motion that Mr. Cheadle was in violation of 49 C.F.R. § 382.213(a), the purpose of the federal regulations is to "establish programs designed to help prevent accidents and injuries *resulting from* the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101 (emphasis added).

As discussed above, even if the test results are of some limited probative value, such evidence thinly supports the theory that the accident resulted from Mr. Cheadle's use of a controlled substance and its value is substantially outweighed by the potential for prejudice. Plaintiffs claim Mr. Cheadle was negligent by driving after using marijuana in violation of several federal regulations, but there must be a causal connection between a duty breached and injuries suffered. *See Deal v. Bowman,* 286 Kan. 853, 858, 188 P.3d 941 (2008) (setting forth the elements of negligence). In this case, the causal connection between the positive drug test and accident are simply too remote. The KBI test results merely indicate there was a positive screen via immunoassay and the presence of an inactive marijuana metabolite confirmed via GC/MS. The results, however, are not quantified. Furthermore, a law enforcement officer observed that Mr. Cheadle showed no signs of impairment. A jury would have to speculate on impairment from the use of any drugs without competent scientific evidence.

Although an independent lab test quantified the results, it is unclear whether such results would have resulted in a positive reporting under federal regulations. The inactive metabolite level was very low, and the defendant's expert opines that the presence of the inactive metabolite is a very poor indicator of impairment. Assuming the federal regulations were violated and the decedent suffered injuries, the evidence of impairment, which would establish a causal connection between the violation of federal regulations and the injuries, is slight, amounting to little more than a bare allegation.

In *Bieberle v. U.S.*, 255 F. Supp. 2d 1190, 1202 (D. Kan. 2003), the court granted summary judgment on a claim that an air traffic controller was under the influence of drugs while directing the plaintiffs' aircraft:
The parties disagree whether the record contains sufficient evidence for a finder of fact to reasonably conclude that Ms. O'Bryan was impaired by marijuana in the performance of her duties. In support of their argument, plaintiffs cite the fact that Ms. O'Bryan tested positive for the use of marijuana, she made certain corrections to a written statement given after the accident, and she invoked the Fifth Amendment at her deposition when asked about use of marijuana. These factors, however, are of limited significance, whether considered singly or together. Given the relatively brief period in which THC remains in the system after use of marijuana and the much longer period thereafter in which THC metabolites can be detected, the fact that Ms. O'Bryan tested positive for THC metabolites on May 24th does not establish any probability that she was impaired on that date. It merely indicates that she used marijuana at some point in the recent past. Likewise, Ms. O'Bryan's invocation of the Fifth Amendment at her deposition (during which she also denied using marijuana on the 23rd or the 24th) does not reasonably infer that she was impaired at the time of the accident. It would be pure speculation to assume from this evidence that Ms. O'Bryan was impaired by drugs in the performance of her duties.

Similarly here, whether considered singly or together, Mr. Cheadle's admitted use, manner of driving on the day of the accident, and "positive" test result are of limited significance to the question of impairment given the long period in which inactive marijuana metabolites can be detected in one's system. Mere speculation is insufficient to avoid summary judgment. *Seitz v. The Lawrence Bank,* 36 Kan. App. 2d 283, Syl. ¶ 8, 138 P.3d 388 (2006). Therefore, Mr. Cheadle's motion for partial summary judgment as it relates to the claim that he was negligent in driving after using marijuana in violation of federal regulations is granted. Mr. Cheadle's motion in limine as to the marijuana metabolites is likewise granted.

(2) *The Failure to Warn Oncoming Traffic*

Under the failure to warn argument, Mr. Cheadle contends that under K.S.A. 8-1745(b) and 49 C.F.R. § 392.22, he had no duty to place warning devices such as cones and barriers in the roadway if his tractor-trailer was disabled or stopped for less than 10 minutes. Cheadle himself anticipated that it would take approximately thirty seconds to perform the U-turn. Witnesses have testified that the lapse of time between the start of the maneuver and the collision was less than one minute. There is some dispute as to whether Mr. Cheadle employed his emergency flashers, but even assuming he did so, compliance with K.S.A. 8-1745(a) and 49 C.F.R. § 392.22 does not require a determination, as a matter of law, that Mr. Cheadle was not negligent.

Plaintiffs persuasively argue that compliance with a statute, regulation, or ordinance does not conclusively prove certain conduct was non-negligent. *See Cerretti v. Flint Hills Elec.*, 251 Kan. 347, 353, 837 P.2d 330 (1992) ("While it may be evidence of due care, compliance with industry standards, or standards legislatively or administratively imposed, does not preclude a finding of negligence where a reasonable person would have taken additional precautions under the circumstances."). Thus, while a violation of certain statutory duties may constitute negligence, *see PIK - Civil 4th* 121.01 (violation of law constitutes negligence), it does not necessarily follow that compliance with the statutory and regulatory minimums found in K.S.A. 8-1745 and 49 C.F.R. § 392.22 precludes a finding of negligence where a reasonable person would have taken additional precautions under the circumstances. As a result, Mr. Cheadle's request for summary judgment as to the failure to adequately warn oncoming traffic is denied.

Ryder's Motion for Partial Summary Judgment

Ryder seeks summary judgment on plaintiffs' claim that it was negligent in failing to provide Mr. Cheadle with adequate delivery directions and logistical support. The elements of negligence are familiar: a duty breached, an injury suffered, and a causal link between the two. *Deal*, 286 Kan. at 858. More simply put, negligence is the failure of a reasonably careful person to exercise ordinary care in light of existing circumstances. *Id.*

Ryder first contends that there is no evidence that Ryder failed to provide Cheadle with adequate directions. It is uncontroverted that Ryder provides all drivers with directions and maps, and Mr. Cheadle was treated no differently. While the maps are not available for review, Mr. Cheadle testified that the maps were not the most accurate but the first few stops were mapped "pretty well." At his deposition, Mr. Cheadle also noted that he was not completely familiar with the Kansas City area, that he had never worked with Kansas CVS Pharmacies, and that he did not have a GPS system or CB radio. Contrary to Ryder's assertions, there is some evidence the directions were inadequate.

The Court, however, finds Ryder's causation argument persuasive. In *Cochrane v. Schneider Nat'l Carriers, Inc.*, 980 F.Supp. 371,373-374 (D. Kan. 1997), the court granted summary judgment on the basis that injury caused was not the natural and probable consequence of the wrongful act:
The court agrees that any negligence by defendant in giving its driver directions to her destination was not a proximate cause of the accident as a matter of law. Defendant's sending its driver to the intersection in question, at which a perfectly legal left-hand turn may be made, did not produce the injury here in natural and continuous sequence, and the injury was not the natural and probable consequence of the wrongful act. Any causal connection between defendant's giving the driver instructions and the injury was broken by efficient intervening causes such as the decedent's driving, the manner in which Ms. Young made the turn, and possibly, as discussed below, Ms. Young's decision to attempt a turn there at all given the conditions at the time. It is not reasonable to require defendant to have foreseen such negligent conduct at the time it formulated directions for its driver. Although defendant's instructing the driver may have been a cause-in-fact and brought about the situation in which the driver and decedent found themselves, that cause is too remote and indirect to serve as a basis for liability here.

The plaintiffs contend, however, that genuine issues of material fact exist. In Kansas, whether negligent conduct is insulated as a matter of law by an intervening negligent act is determined by a foreseeability test:
If the original actor should have reasonably foreseen and anticipated the intervening act causing injury in the light of the attendant circumstances, his act of negligence would be a proximate cause of the injury. Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is

sought. When negligence appears merely to have brought about a condition of affairs or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct and proximate cause and the former only the indirect or remote cause. [Internal quotations and cites omitted].

Davey v. Hedden, 260 Kan. 413, 427, 920 P.2d 420 (1996). Foreseeability is typically determined by the jury, but when reasonable minds could reach but one conclusion, the causation issue may be decided as a matter of law. *Id.* at 427-428.

Plaintiffs attempt to distinguish the *Cochrane* decision in that the plaintiff there alleged that the trucking company was negligent in giving a specific direction to its driver. As plaintiffs contend, in this case Ryder failed to generally provide adequate directions and logistical support. As the Court reads the *Cochrane* decision, while the directions given may have been a cause-in-fact of the situation in which the driver and decedent found themselves, the cause simply was too remote to serve as a basis for liability. The same reasoning can be applied here.

Furthermore, the Court disagrees with the plaintiffs' characterization that hazardous and unsafe driving is a "normal consequence" of using inadequate directions. In this case, giving directions to Mr. Cheadle did not amount to control of the vehicle. It is the manner in which the vehicle was driven by Mr. Cheadle, and not the route or direction driven, that caused the collision. *See Cochran,* 980 F.Supp. at 373 ("Any causal connection between defendant's giving the driver instructions and the injury was broken by efficient intervening causes such as the decedent's driving, the manner in which [the driver] made the turn, and possibly, ... [the driver's] decision to attempt a turn there at all given the conditions at the time."). Assuming without deciding the directions were inadequate, the causal connection between the directions and the injuries suffered are too remote to serve as a basis for liability.

Last, the Court agrees with Ryder that the evidence is insufficient to show Ryder failed to otherwise provide logistical support. Mr. Cheadle asserted in his deposition that he did not seek help from Ryder because he "knew" no one would answer his call. It is uncontroverted, however, that Ryder maintains communications with its drivers by cellular phone or Nextel push-to-talk technology. Mr. Cheadle was provided with a contact list prior to his dispatch, and Ryder had Mr. Cheadle's cell phone number. Out of three previous trips, Mr. Cheadle only made one call to Ryder, and he successfully received information regarding a different distribution center. On the Kansas City trip, he contacted Ryder for directions to the first store, but by the time Ryder returned his call, Mr. Cheadle had called the store for directions. After the accident occurred, it is further uncontroverted that Mr. Cheadle was able to contact Chris Albritton, the local manager at the Ennis, Texas, facility, using his cell phone.

Most importantly, Mr. Cheadle did not seek help from Ryder before the collision occurred based on his assumption that no one would answer his call. He further testified that he felt the "smartest" thing to do would be to return to the store he just left to obtain directions to the next store. The situation presented is not one where Mr. Cheadle had a call go unanswered. He simply did not attempt to contact Ryder for further logistical support because he felt it would be better to obtain directions from the store he had just left. Had Mr. Cheadle called and received no support, to the extent a duty existed, it may have been breached by the failure to answer, but because Mr. Cheadle did not attempt to contact Ryder before the accident, Ryder did not have the opportunity to provide the support it may have owed Mr. Cheadle.

Yet, even assuming logistical support was unavailable, it is the manner in which the vehicle was driven by Mr. Cheadle, and not the lack of support, that caused the collision. The causal connection between the alleged failure to provide support and the injuries suffered is likewise too remote to serve as a basis for liability. Ryder's motion for partial summary judgment is sustained.

CONCLUSION

Accordingly, Mr. Cheadle's motion in limine as to the marijuana metabolites and motion for partial summary judg-

ment as to the claim he was negligent in driving and performing safety sensitive functions after using marijuana in violation of several federal regulations are SUSTAINED. Mr. Cheadle's motion for partial summary judgment related to the alleged failure to warn oncoming traffic is DENIED, and Ryder's motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.

David W. **Hauber**

District Court Judge, Div. No. 7

Chubb v. Ryder Integrated Logistics, Inc.
2009 WL 2968434 (Kan.Dist.Ct.) (Trial Order)

END OF DOCUMENT

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District Court of Kansas.
Johnson County
Marlantheis A. SEAHORN, Plaintiff,
v.
Sueann C. LEMOS And Farmers Insurance Co Inc., Defendant.
No. 08CV7648.
January 11, 2010.

Division 7

Order in Limine on Expert Deposition Objections and Potential Cross-Examination on Secondary Gain

David W. Hauber, District Court Judge.
Before the Court are deposition objections related to defendant Sueann Lemos' defense expert, Dr. Jeffrey MacMillan, an orthopedic surgeon, whose deposition the parties will read at trial. Dr. MacMillan was designated by defendant on October 19, 2009. Doc. 54. His videotaped deposition was taken November 9, 2009. Both parties wish to use portions of the deposition as the witness is unavailable for trial. Accordingly, the Court has been provided with highlighted portions of the deposition and relevant objections which it will rule upon to avoid trial delays.

Additionally, the Court has decided to issue a written opinion on the discrete subject of "secondary gain" as it is a topic that often comes up in personal injury actions. In this respect, the Court does not find oral argument to be of material assistance and it will decide the same without oral argument. Sup. Ct. Rule 133.

I. DEPOSITION OBJECTIONS.

Issues related to trauma reflected by automobile collision photographs

One of the first objection is by plaintiff at page 11, which relates to the scope of Dr. MacMillan's ability to "appreciate the nature and scope fo the damage to vehicles" involved in the accident in order to comment on the kind of injuries at issue. The Court overrules such objection. Orthopedic surgeons repeatedly are called upon to assess traumas and their effect on the human body. No other objection is registered.

Issues related to facts injected about playing basketball before the ER visit

Next is an issue over medical causation of the plaintiff's injuries. In his report, Dr. MacMillan provided an opinion that he believed the emergency room bill was causally related to the automobile accident. *See* p. 22, line 25 to p. 24, 1. 20, Expert Disclosure, Doc. 54, p. 3 of 10/6/09 Report. In order to impeach, in essence, his own witness, defense counsel suggested facts that plaintiff had played basketball in between his emergency room exhibit and the automobile accident at issue to place in doubt Dr. MacMillan's opinions about whether the emergency room visit (and cost) were causally related to the accident, as opposed to a basketball game. Plaintiff interposed objections to this line of questioning, p. 23, 1. 14-16, as exceeding the witness disclosure and injecting "unfair surprise." Mr. Seahorn's deposition was scheduled to be taken on July 7, 2009. *See* Amended Notice, Doc. 25.

Thus, defendant presumably would have known of this information before Dr. MacMillan's disclosure and independent medical examination, which followed a court-ordered extension. Doc. 38.

It is clear that defendant was required to fully disclose the basis of Dr. MacMillan's opinions. *See* Case Management Order, Doc. 23 at 3 ("[T]he designation must state the subject matter on which each designated expert is expected to testify, the substance of the facts and opinions of the expert and a summary of the grounds for each opinion." This, essentially, is the directive of K.S.A. 60-226(6)(B), with a supplemental disclosure requirement included in subparagraph (C).

Although the subject of basketball came up in the report, it was in the context that plaintiff played almost every week prior to the accident and Dr. MacMillan either made no inquiry or comment on a game before the ER visit in his report. While he opines on the issue of causation he relates no facts to place doubt on his conclusion that the ER visit was causally related to the accident. *Id.* at 3 of Report. The thrust of his opinion as to subsequent pain, etc., relates to the "significant hiatus in his treatment." P. 3 of Report.

Here, the Court is concerned that defendant either failed to fully inform Dr. MacMillan of facts that were required for his disclosure and ME, or held back with a critical causation fact and surprised plaintiff with this opinion at an evidently deposition, when trial was previously scheduled on December 7, 2009, within a month of the deposition. A trial continuance was granted on October 29, 2009, at the request of plaintiff. Thus, it is further clear that Dr.MacMillan's testimony injected new facts for an opinion that was not previously disclosed. Accordingly, the Court sustains plaintiffs objections to this entire line Of questioning at pp. 23-24.

II. QUESTIONS RELATED TO "SECONDARY GAIN"

In addition to the foregoing, plaintiff's questioning of Dr. MacMillan posed the question as to whether Dr. MacMillan had any reason to disbelieve the patient's complaint of back pain. Defense counsel objected that it "calls for a witness to comment on the credibility of another witness, which is specifically prohibited under Kansas law." *Seep.* 37, lines 144 of depo. The Court would have sustained this objection but plaintiff withdrew this question in his designations. Accordingly, the Court need not rule on this objection. Later, however, defense counsel used plaintiff counsel's question as an opportunity to question the witness about "secondary gain."

This line of questioning, *see* pp. 49, line 22 to 53, line 23, was prefaced with the statement by defense counsel that if his objection to plaintiffs question was not sustained he would seek opinions or comment to establish whether secondary gain can exist without objective findings and, essentially, to have the witness to define the concept - *i.e.,* a claimant who perpetuates symptoms for secondary goals in the form of financial compensation and/or sympathy from friends. Based on the Court's understanding, the withdrawal of plaintiffs question requires the deletion of this line of questioning at pp. 50-53.

The foregoing completes the Court's rulings on deposition objections. It will now generally address the topic of secondary gain because defendant has announced that plaintiffs witnesses will be cross-examined about the same.

Issues of secondary gain related to potential cross-examination

Plaintiff recently filed an Amended Motion in Limine that raises this topic, seeking to preempt "any and all argument or evidence regarding personal or financially related generalities of injured litigants in general, including but not limited to, secondary gain and compensation neurosis." Motion at 8. Plaintiff does not specifically

cite the basis for an order in limine, but the Court presumes that counsel is referencing K.S.A. 60-445, by which the trial judge may exclude evidence if "its probative value is substantially outweighed by the risk that its admission will *unfairly and harmfully surprise a party* who has not had reasonable opportunity to anticipate such evidence would be offered." (Emphasis added.)

Gard and Casad, KANSAS LAW AND PRACTICE, p. 559-560 (2003), outlines in the Analysis to the Commentary on K.S.A. 60-445, that trial judge discretion is much broader than the "surprise" element to which this provision seems limited:

This section mentions only the element of surprise in recognizing the discretion of the trial court to exclude admissible evidence. Traditionally, surprise has only slight recognition as a basis for exclusion, whereas the risk of danger of undue prejudice, confusion or misleading from evidence of slight value and collateral or inflammatory in character, or the taking of unnecessary time by the introduction of tedious evidence on a collateral matter, or which is repetitious or cumulative, have always been recognized by common law procedural concepts as legitimate bases for control by the trial judge.

It probably would have been better to include all of the elements, any one of which would support the discretionary action of the judge, but failure to do so does not alter the inherent authority involved. The making of all relevant evidence admissible under K.S.A. 60-407, unless expressly excluded by a specific rule, does not mean that simply because it is admissible it must be admitted and may not yield to the discretionary authority to weigh its value against the compensating risks.

The Commentary goes on to note that this rule is inadequate and attempted to fill in a gap on the issue of surprise because the other evidentiary bases for exclusion of such evidence are "scattered" among common law decisions that support the discretionary power to exclude.[FN1] Plaintiff does not indicate how this issue may arise, but states that defendant has not designated an expert to testify as to secondary gain and that a proper foundation must be laid through an expert and requires that evidence be specific to the individual, namely, the plaintiff. *Id.* at 8-9.

> FN1. In this respect, Fed. R. Evid. § 403 codifies what is recognized in state common law: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by its consider of undue delay, waste of time, or needless presentation of cumulative evidence.

It is in this framework, then, that the Court must consider if plaintiff's motion in limine raises the kind of topic which the rules are intended to include. Plaintiff does suggest that the introduction of issues related to secondary gain would "inflame the passion of a jury" and warrants exclusion, citing *Sledd v. Reed,* 246 Kan. 112, 785 P.2d 694 (1994), a medical malpractice case. In *Sledd,* defense appeals to prejudice over whether a procedure would be eliminated if the defendant was found liable, were held to be improper argument, but not unduly prejudicial. The court warned that experienced defense counsel should not make remarks that are irrelevant to the issues and suggested a curative instruction should have been appropriate. *Id.* at 117.

Defendant responds by citing *Watson v. Taylor,* 477 F. Supp.2d 1129 (D. Kan. 2007), a decision by Magistrate Judge O'Hara who rejected a limine request by plaintiff to prevent cross-examination on secondary gain (and denied a new trial motion), concluding that "defense counsel was clearly within his prerogative to ask plaintiffs various treating physicians whether secondary gain was playing any kind of role in plaintiffs situation, given the types of damages plaintiff is seeking to recover in this litigation." *Id.* at 1136. In *Watson,* a malpractice case, plaintiff's claimed damages involved subjective complaints of pain, just as plaintiff here seeks to recover for low

back pain and similar subjective complaints. In this respect, defendant offers that it intends to cross-examine plaintiffs treating chiropractor and retained medical expert, Dr. John Pazel, on credibility issues over whether they failed to consider secondary gain as a factor.

In *Watson,* the court addressed the issue on a new trial motion and notably cited *Beller v. Saari,* 1994 WL 608593, at *2 (D. Kan. Oct. 27, 1994), where Judge Lungstrum held that evidence regarding secondary gain was relevant on a disability issue, even though it might reflect unfavorably on the plaintiff's motivation. The conclusion was that its probative value was not substantially outweighed by the risk of unfair prejudice. 477 F. Supp. 2d at 1136.

In Beller, specifically, the issue of secondary gain was raised in the context of when plaintiff had hired an attorney:
It was the defendant's position in this case that plaintiff was attempting to posture herself for a lawsuit. While that may have been an entirely appropriate course of action by plaintiff, *it was also consistent with the secondary rain explanation for her complaints that emanated from one of her own treating physicians. Dr. Anglan. Secondary gain, as testified to by Dr. Anglan, is a medically recognized phenomenon where* a patient *has some incentive to have* complaints. The fact that plaintiff had been in contact with an attorney is not inherently prejudicial, but it is certainly consistent with defendant's theory of the case. The plaintiff has pointed the court to no authority to the contrary and it continues to be this court's belief that, under the circumstances of this case, the evidence survives a Fed.R. Evid. 403 balancing analysis.

1994 WL 608593, at *2. *Beller* cites no Kansas authority for its decision.

In *Watson,* plaintiff urged the court to consider several Missouri cases which found that general statements about secondary gain motivations were irrelevant to prove a particular plaintiff is motivated by secondary gain and precluded the same as prejudicial. 477 F. Supp. 2d at 1136 (*noting Yingling v. Hartwig,* 925 S.W.2d 952 (Mo. Ct. App.1996), and *Carlyle v. Lai,* 783 S.W.2d 925 (Mo. Ct. App.1989)). Judge O'Hara rejected this position and found that Judge Lungstrum's opinion was more persuasive on Kansas law. This Court does not find that either federal opinion has examined Kansas law on this topic. Rather, the federal decisions turn on Rule 403. Accordingly, this Court will examine Kansas law.

Ultimately, the question, in this context, prompts the scrutiny of what may be posed to an expert. Here, it does not implicate an expert disclosure issue because it involves cross-examination. It does not implicate a new technique or test and whether scientific theories recognize the concept of secondary gain, which otherwise would implicate *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923), the test recognized in Kansas to determine expert reliability on testing and techniques.

Rather, the issue is posed classically challenges causation and credibility by challenging experts whose opinions may appear to be more influential. The distinction here is between witness expertise and opinion, and, therefore, it is not a *Frye* issue.
The distinction between pure opinion testimony and testimony relying on scientific technique promotes the right to a jury trial. Judges generally are not trained in scientific fields and, like jurors, are lay persons concerning science. A Kansas jury has a constitutional mandate to decide between conflicting facts, including conflicting opinions of causation. Kansas Constitution Bill of Rights, § 5; see K.S.A.1999 Supp. 60-238. The district judge under K.S.A. 60-456(b) controls expert opinion evidence that would unduly prejudice or mislead a jury or confuse the question for resolution. Cross-examination, the submission of contrary evidence, and the use of appropriate

jury instructions form a preferred method of resolving a factual disputes.

Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 461-462,14 P.3d 1170, 1182 (2000).

Noting, as the Court does, that juries decide the credibility and weight to be accorded expert opinion, the question arises as to the manner in which this concept might arise with a chiropractor or physician who is not a psychologist or psychiatrist. The phenomenon of secondary gain describes a patient's motivations, as defined in one psychiatric glossary:
secondary gain The external gain derived from any illness, such as personal attention and service, monetary gain, disability benefits, and release from unpleasant responsibilities.

Shahrokh and Hales, AMERICAN PSYCHIATRIC GLOSSARY, 172 (8th ed. 2003). The concept is often an issue in workers compensation cases. *See Coonce v. Garner*, 38 Kan.App.2d 523,530,167 P.3d 801, 806 (2007) (affirming fine against claimant malingering for secondary gain after being videotaped doing heavy-duty labor). *In Rund v. Cessna Aircraft Co.*, 213 Kan. 812, 827, 518 P.2d 518, 530 (1974), a case of traumatic neurosis following a physical injury, the court reversed a determination of disability, finding that compensability was not proven by the accident.

In *Rund,* the claimant worked for Cessna, and slipped on some solvent, and twisted her knee. A day later, she contended her ankle, lower leg and foot were swollen to twice their normal size. She went to the company doctor, received pain pills and X-rays were taken. *Id.* at 814. Another physician recommended she see a psychiatrist, a Dr. Moe, who, she claimed, told her she could not return to work and that it would be a long time before she could. Testimony before the hearing examiner established plaintiff had been returned to work, and that her leg had not swollen to twice its size. *Id.* at 815.

Dr. Moe testified in Rund that the plaintiff had been administered certain psychological tests, including the Minnesota Multiphasic Personality Inventory ("MMPI"), the Bender Gestalt and others, and they revealed plaintiff was an obsessive compulsive personality, with a high degree of anxiety and a tendency toward hypochondriasis, with an indication of unconscious conflict and guilt regarding sexual matters with no pathological basis for any disability. 213 Kan. at 817. In being asked about plaintiffs hysterical reactions, Dr. Moe invokes the concept of secondary gain from psychiatric literature:
'Q. Now, you have used the term 'hysterical reaction' to that. Could you explain to us perhaps a little more fully what you mean by that?
'A. Well, an hysterical reaction may be demonstrated in various ways. In fact, the most common way and the way I mentioned here is the conversion reaction. In fact, it is diagnostically called an hysterical conversion reaction, and it is described in all the literature and in our diagnosing manuals.

'A. I would like to clarify the diagnostic impression of the hysterical conversion mechanism by reading verbatim from the diagnostic and statistical manual of mental disorders issued by the American Psychiatric Association. Under Hysterical Neurosis, Conversion Type, it says: In the conversion type the special senses or voluntary nervous system are affected causing such symptoms as blindness, deafness, loss of smell, loss of sense of touch, strange feelings

[Note: Page 11 illegible in original document]

213 Kan. at 818-819 (emphasis added).[FN2] The Court notes, however, that even psychiatric experts will opine

that one cannot test for motivations such as a diagnosis of malingering, which involves a question of intent.

> FN2. The foregoing reflects, from the Court's own experience, how a psychiatric expert might describe the phenomenon of secondary gain in the course of explaining features of a neurosis in a specific case to explain the inability of a claimant to function.

Ultimately, the supreme court reversed the disability determination, citing Dr. Moe's testimony that plaintiffs failure to return to work resulted from "her inner guilt feelings over sexual matters by simply remaining away from the Cessna plant, and that the 'injury' claimed has enabled her to remain away." *Id.* at 828. This, the court found, stemmed from

...personal reasons over which management had no control chose to wear provocative clothing, spend excessive time with makeup and be sexually provocative with male employees. The testimony of Dr. Moe is uncontradicted that the claimant's 'condition'- an inability to return to Cessna for work - is due to her unconscious guilt feelings over sexual matters, and that she resolves her problem merely by staying away from Cessna. Her emotional problems, therefore, are not causally connected to the nature and requirements of her job, but to her anxieties and inner tensions created by her conduct on the one hand and her sense of morality on the other.

213 Kan. at 829-830.

There is a concern, in such cases, particularly when non-psychiatric witnesses attempt to testify as to psychiatric dispositions, that 1) they are not reliable or qualified to discuss such concepts and 2) that the subjective nature of the opinion is an attempt to comment on the credibility of another witness. This dilemma is well illustrated in *P.S. ex rel. Nelson v. The Farm, Inc.*, - F. Supp. 2d - ,2009 WL 2913584 (D. Kan. Sept. 8,2009), another case in which Judge Lungstrum precluded a defense expert from opining about the possible advantage of secondary gain from the plaintiffs who were making an assertion of sexual abuse. A defense expert concluded that evidence of embellishment was more than likely the product of lying for secondary gain. *Id.* at * 3. Plaintiff did not object to the expert's qualifications, but attacked the reliability of his opinions, as well as whether he had impermissibly commented on the alleged victim's credibility. Noting the issue was "close" to commenting on the credibility of the plaintiffs, the court said that the expert, Dr. Frazer, was "careful not to opine on plaintiffs credibility, and that his testimony was more akin to a discussion whether plaintiffs experienced various symptoms or signs consistent with actual abuse." *Id.* at *4.

Judge Lungstrum ultimately determined, however, that defendants had not met the burden to show that Dr. Fraser's opinions were reliable, stemmed from testing or resulted from a recognized peer reviewed standard. "There is simply nothing to counter the possibility that Dr. Frazer simply made up these opinions and method from whole cloth." *Id.* at *5. The court further noted that Dr. Fraser's system of evaluation was further questionable in light of the criminal plea and admission by the perpetrator that such sexual abuse had occurred to plaintiffs.

Finally, the Court believes that the lack of scientific support for Dr. Fraser's method and opinions is especially troublesome in light of the report's clear attempts to steep its opinions in science and empiricism (including the use of a percentage in the report without supporting citation), as a jury might be more apt to lend credibility to such opinions; thus, there is a particular risk that plaintiffs would suffer unfair prejudice from the admission of opinions that have not been shown to be reliable.

In summary, TFI has not shown that Dr. Fraser's expert testimony is sufficiently reliable or scientifically valid. Therefore, the Court grants plaintiffs' motion to exclude his expert testimony.

Id. at *5.

Decisions in other jurisdictions have reached different results about allowing purported experts to use the concept of secondary gain. Some find it is merely a credibility issue for the jury.

The contention that Glamann is a malingerer, or is engaged in secondary gain, or that he exaggerated the extent of his injuries, is relevant-not only to Glamann's credibility, but also to the more fundamental question of how much harm Kirk's negligence actually caused.

Glamann's contention that the admission of evidence of malingering and secondary gain was either confusing, misleading, or unfairly prejudicial is baseless. He had the opportunity to show the validity of his injuries with the testimony of numerous experts. The substance of the testimony was that he was not malingering; the experts concurred on this. But quantity of testimony does not entitle Glamann to a judicial determination that his evidence should be believed. There was also evidence that many of Glamann's symptoms were not entirely legitimate. For example, he was physically able to do his job following the collision, including lifting ninety-three pound batteries and forty-pound tires. Dr. Ohlson, Dr. Taylor, and Dr. Fordyce all agreed that Glamann's symptoms were more psychological than physical, and that his use of narcotics was inappropriate.

Glamann v. Kirk, 29 P.3d 255, 260 (Alaska 2001).

Other courts find that putting an expert gloss on the term secondary gain without specific reference to the plaintiff is irrelevant, unduly prejudicial and likely to cause confusion.

Appellants' final point on appeal is that the trial court erred by allowing Dr. Stephen Cathey to testify regarding secondary-gain motivation. They claim that the highly prejudicial testimony significantly outweighed any slight probative value. We find merit in appellants' argument, and we reverse and remand on this issue. Dr. Cathey explained the concept of secondary-gain motivation to the jury at some length and implied that plaintiffs in personal-injury cases may exaggerate their symptoms in order to receive some financial benefit. In fact, Dr. Cathey opined that in those situations, doctors "frequently see secondary gain." He also commented that a lack of objective findings, as Dr. Cathey had observed in Rodgers's case, enters into the possibility of diagnosing someone with secondary gain.

Significantly, Dr. Cathey affirmed during cross-examination that he was not testifying that he believed that appellant was malingering or implying that Rodgers had secondary gain involved in this case. Dr. Cathey unequivocally stated that he was not giving testimony that it was his opinion that there was any secondary gain involved in appellant's case. As a result, we must agree with appellants that the testimony was irrelevant, particularly when Dr. Cathey was unprepared to state that it was a relevant issue in Rodgers's case. Ark.R.Evid. 401 defines relevant evidence as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Given Dr. Cathey's admission, we conclude that the testimony should have been excluded pursuant to Ark.R.Evid. 402, which states that evidence that is not relevant is not admissible.

Further, even if the evidence had some slight relevance, the testimony should have been excluded per Ark.R.Evid. 403 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. The jury could easily have concluded that secondary-gain issues were relevant to the case. In light of the foregoing, we hold that the trial court abused its discretion by admitting Dr. Cathey's expert testimony regarding secondary-gain motivation.

Rodgers v. CWR Const., Inc., 343 Ark. 126, 133-134, 33 S.W.3d 506, 511 - 512 (Ark. 2000)

Ultimately, the question remains what counsel expects, in good faith, to obtain from cross-examination of

plaintiff's treating chiropractor or Dr. Pazell. At trial, a lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by *admissible evidence,* assert personal knowledge of facts in issue except when testifying as a witness, *or state a personal opinion as to* the justness of a cause, *the credibility of a witness,* the culpability of a civil litigant or the guilt or innocence of an accused..." K.R.P.C. § 3.4(e) (emphasis added).

It is apparent to the Court that defendant has no expert witness to opine on the topic of secondary gain. Assuming that is true, then, the likelihood that defendant will score admissions that are relevant and pertinent to the plaintiff upon cross-examination, *i.e.,* to the effect that this plaintiff is engaged in secondary gain because he seeks compensation and does not have objective findings to justify his complaints of pain, is simply another way of indirectly asking a witness to comment on plaintiff's credibility.

K.S.A. 60-456 allows experts to provide an opinion but not up to the point where the witness is asked to pass upon the credibility of another witness or the weight of disputed evidence. *State v. Bressman,* 236 Kan. 296, 303, 689 P.2d 901,901 (1984) (*quoting Smith v. Estate of Hall,* 215 Kan. 262, 524 P.2d 684 (1974)). It is well established that the reason one witness may not express an opinion about the credibility or truthfulness of another witness is that this invades the province of the jury. *State v. Elnicki,* 279 Kan. 47, 53, 105 P.3d 1222, 1227 (2005).

In light of the foregoing, the Court is concerned that unless defense counsel intends to wing it at trial, the extent of any relevant evidence on this topic is substantially outweighed by the danger of unfair prejudice, surprise, confusion of the issues or misleading the jury. Accordingly, before raising this subject, defendant will be required to notify the Court of the good faith basis for any such line of inquiry, outside the hearing of the jury. Ultimately, this will not unfairly impact the defendant because it will retain the ability to use any and all evidence to question plaintiff's motives with respect to subjective complaints of pain through inconsistent conduct or delays in treatment. Expert opinions on such topics, moreover, are not particularly helpful to juries, who can ferret out such matters and come to their own determination.

Plaintiff's motion in limine is sustained as to topic No. 23 until it can be demonstrated to the Court that plaintiff has opened the door to this topic or defendant has a reasonable basis for inquiring into the same.

IT IS SO ORDERED.

<<signature>>

DAVID W. HAUBER

District Court Judge, Div. 7

Seahorn v. Lemos
2010 WL 2147869 (Kan.Dist.Ct.) (Trial Order)

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427 F.Supp.2d 1022, 69 Fed. R. Evid. Serv. 988
(Cite as: 427 F.Supp.2d 1022)

H

United States District Court,
D. Kansas.
SUNLIGHT SAUNAS, INC., Plaintiff,
v.
SUNDANCE SAUNA, INC., et al., Defendants.

No. CIV.A.04-2597.
April 5, 2006.

Background: Sauna manufacturer brought action against competitors to recover for tortious interference with contract, tortious interference with prospective business relationships, trademark infringement, false advertising, false description, cybersquatting, injury to business reputation, unfair competition, business defamation, conspiracy, and antitrust activity arising out of website posted for about one month about manufacturer's product. Competitors filed motion to exclude **expert's** opinion on **damages**. Manufacturer filed motion to strike facts from brief.

Holdings: The District Court, Vratil, J., held that:
(1) motion to strike fact statements from defendants' brief was inappropriate, and
(2) **expert's** calculation of **damages** from allegedly defamatory website was inadmissible.

Motion to strike overruled; motion to exclude sustained.

West Headnotes

[1] Federal Civil Procedure 170A 1101

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1101 k. In General. Most Cited Cases

Plaintiff's motion to strike fact statements from defendants' brief in support of a motion was inappropriate, as rule authorized court to strike material from pleading. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1107

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1105 Grounds
170Ak1107 k. Prejudice from Allegations. Most Cited Cases

Federal Civil Procedure 170A 1125.1

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1125 Immaterial, Irrelevant or Unresponsive Matter
170Ak1125.1 k. In General. Most Cited Cases

A court will usually deny a motion to strike unless the allegations have no possible relation to the controversy and may cause prejudice to a party. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1101

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1101 k. In General. Most Cited Cases

A motion to strike is not the appropriate method to challenge the factual support for an allegation. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[4] Evidence 157 508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

Evidence 157 555.2

157 Evidence
157XII Opinion Evidence

157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases

Under evidence rule on **expert** testimony, the trial court must act as a gatekeeper and determine at the outset whether the **expert** is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue; this entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

[5] Evidence 157 555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases

When the proffered **expert** relies on some principle or methodology, the trial court should consider a nonexhaustive list of nondispositive factors in determining whether the reasoning or methodology is scientifically valid or reliable: (1) whether it can and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known or potential rate of error; and (4) whether it has attained general acceptance in the relevant scientific community. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] Evidence 157 555.4(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(2) k. Speculation, Guess, or Conjecture. Most Cited Cases

As part of the pretrial evaluation, the trial court must determine whether the **expert** opinion is based on facts that enable the **expert** to express a reasonably accurate conclusion as opposed to conjecture or speculation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] Evidence 157 555.9

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.9 k. **Damages**. Most Cited Cases

Expert's calculation of **damages** from allegedly defamatory website posted for one month by sauna manufacturer's competitor was inadmissible in manufacturer's suit against competitors; the calculation was based on underlying assumptions regarding manufacturer's forecast of sales, the **expert** did not independently analyze the projections, nothing indicated that reasonable economist would ignore increased competition from Chinese manufacturers or exclude large initial order in month when website was removed, the **expert** did not consider market conditions or alleged wrongdoing of other competitors, and opinion was not sound or reliable or generally accepted in the field of economics. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

***1023** Kenneth P. Kula, Scott E. Dupree, Shook, Hardy & Bacon L.L.P., Kansas City, MO, Peter E. Strand, Sarita Pendurthi, Shook, Hardy & Bacon, L.L.P. Washington, DC, for Plaintiff.

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David W. **Hauber**, Lee M. Baty, Baty, Holm & Numrich PC, Kansas City, MO, Jerome T. Wolf, Rebecca S. Stroder, Sonnenschein, Nath & Rosenthal, LLP, Kansas City, MO, for Sundance Sauna, Inc.

Leslie L. Lawson, Shipley Lawson & Jacob, Kansas City, MO, for Cobalt Multimedia, Inc.

MEMORANDUM AND ORDER

VRATIL, District Judge.

Sunlight Saunas, Inc. brings suit against Sundance Sauna, Inc. and Brighton Sauna, Inc., alleging tortious

427 F.Supp.2d 1022, 69 Fed. R. Evid. Serv. 988
(Cite as: 427 F.Supp.2d 1022)

interference with contract, tortious interference with prospective business relationships, trademark infringement, false advertising, false description, cybersquatting, injury to business reputation, unfair competition, business defamation, civil conspiracy, antitrust activity and other tortious and deceptive trade practices arising under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the state laws of California and Kansas. This matter comes before the Court on *Defendants' Dispositive Daubert Motion To Exclude Plaintiff's Expert* (Doc. # 185) filed on January 17, 2006 and *Plaintiff's Motion To Strike Defendants' Purported Statement of Facts* (Doc. # 197) filed on February 6, 2006. For reasons set forth below, the Court finds that defendants' motion should be sustained and that plaintiff's motion to strike should be overruled.

Factual Background

Based on the briefs and exhibits filed by the parties on the current motions and the ***1024** motions for summary judgment, the Court finds the following facts:

In January of 2000, Jason Jeffers started Sunlight Saunas, Inc. ("Sunlight"). In June of 2002, he brought in as investors his sister Connie and her fiancé Aaron Zack. Zack was plaintiff's chief executive officer ("CEO"). Jeffers was chief marketing officer from June of 2002 to January 10, 2005. Connie, who later became Mrs. Zack, has been director of sales since 2003.

Sunlight sells saunas and related products over the Internet and through trade shows, showrooms and distributors throughout the United States and abroad. The sauna business is seasonal and highly competitive, and plaintiff's products compete with those of Sundance Sauna, Inc. ("Sundance"), Brighton Sauna, Inc. ("Brighton") and Sauna by Airwall, among others.

In July of 2004, Jeffers claimed that Sauna by Airwall had spread "slander and lies" about plaintiff, and in August or September of 2004, Jeffers saw the Sauna by Airwall website. One image on the website showed one of plaintiff's sauna heaters cut in half, and revealed that it had an aluminum backplate. Another image showed that plaintiff's saunas contained veneer.

Shortly after Jeffers saw these images, on October 7, 2004, Preston Hall posted a website which included the following statements.

Sunlight Saunas Lies

Lie # 1: True Ceramic Heaters

Sunlight Saunas claim that their saunas offer ceramic infrared heaters.

The Truth

Sunlight Sauna's heaters are made from steel rods and aluminum casing with pink paint. Aluminum can be incredibly toxic inside the body.

Lie # 2: Veneer Free Construction

Sunlight Saunas would have you believe that each of their saunas were 100% veneer free.

The Truth

Veneer roof, Veneer "Fresh Air Vent" (doesn't this contradict their entire sales pitch about veneer free?). Not so state-of-the-art antenna.

Lie # 3: No Safety Warnings

Sunlight Saunas has no safety compliance.

The Truth

Ever wonder why they aren't UL, CSA, or ETL certified? Ask your home Insurance company about products with heaters operating at several hundred degrees that don't meet these standards. Infrared sauna Heaters [sic] operate between 300 and 600 degrees [F]ahrenheit. Can you imagine buying an oven that has not been certified to the minimum standards the USA has established for safety? Now imagine putting those oven heating elements inches from kiln dried wood without any safety certification. Sounds crazy but Sunlight as usual takes the shortcut to profit.

Lie # 4: Lifetime Warranty

Sunlight Saunas offers a lifetime Warranty[.]

The Truth

Sunlight Saunas would have you believe they are the manufacturer, yet another lie. Do these models look

> familiar? Sunlight Saunas have changed manufacturers three times in four years. American Infrared Sauna has only been manufacturing since 2003. How can they promise a lifetime?
>
> Lie # 5
>
> ***1025** Sunlight Saunas presents a list of "exclusive" features. Claiming to be unique.
>
> The Truth
>
> Sunlight Saunas doesn't even manufacture their own saunas. Other company's [sic] offer the same products without the fraudulent claims.

Exhibit Hall # 22 to *Memorandum Of Law In Support Of Defendants' Dispositive Daubert Motion To Exclude Plaintiff's* ***Expert*** ("*Defendants' Memorandum* ") (Doc. # 186). Hall created this website in concert with Matt Thomas, CEO of Sundance. The website originally included links to websites of plaintiff's competitors. Sundance directed Hall to remove such information, however, and on October 11, 2004, he did so. Hall removed the entire website on November 5, 2004, so it was active for slightly more than one month.

A handful of customers mentioned Hall's website to plaintiff. The record contains no evidence whether those customers purchased saunas or from whom.

Except for November of 2004, plaintiff did not meet any of its monthly sales goals for the period between October of 2004 and June of 2005. March is generally the biggest sales month of the year. By March, however, Zack had cancelled the credit card which plaintiff used to pay for one of its Internet accounts, and as a result, plaintiff's Internet service was interrupted for about one week in March.[FN1] Also in March, plaintiff installed a new data base and phone system. Zack attributed the lackluster performance in March to lingering effects of Hall's website and defamation and interference by Sundance and Brighton. According to Lisa Zinnecker, plaintiff's sales manager, the new data base and phone system contributed to March not being a good month. Zinnecker testified that several other factors also contributed to plaintiff not meeting its sales goals for April and May:

> FN1. The parties dispute how many marketing accounts were interrupted and for how long. The Court construes these facts in the light most favorable to plaintiff.

> I just felt that there was a shift in the market, where typically there might have been five true competitive companies, you know. I think we were seeing a lot of the smaller types of cheaper saunas coming into play and people probably impulsively buying those cheaper saunas.... There is a shift I think with an increase of awareness of infrared. There is also an opportunity for more businesses to take the opportunity.
> L. Zinnecker Depo at 119:16-120:8, Exhibit 11 to *Plaintiff's Response To Defendants' "Dispositive" Daubert Motion To Exclude Plaintiff's* ***Expert*** (Doc. # 198) filed February 6, 2006.

On July 12, 2005, Sunlight filed suit against Jeffers, alleging that he had neglected to respond to inquiries from customers and vendors, failed to pass on inquiries to the company, failed to operate as director of marketing, and failed to contribute to plaintiff's day-to-day operation, causing a loss of potential business opportunities. Plaintiff sought to restrain Jeffers from interfering with its customers, employees and business relationships.

On December 16, 2004, plaintiff filed this suit against Sauna by Airwall, Sundance and John Does 1-2. On May 19, 2005, plaintiff added Brighton, Cobalt Multimedia, Inc. and Hall as defendants and removed John Does 1-2 as defendants. On November 2, 2005, the Court dismissed claims against and the counterclaims by Sauna by Airwall. On March 15, 2006, the Court dismissed plaintiff's claims against ***1026** Cobalt Multimedia and Hall. Accordingly, plaintiff's remaining claims are against Sundance and Brighton.

The pretrial order sets forth the following claims: tortious interference with contract (Count I); tortious interference with prospective business relationship (Count II); trademark infringement, dilution and unfair competition (Count III); defamation (Count IV); injurious falsehood (Count VI); civil conspiracy (Counts VII and VIII); prima facie tort (Count IX); unfair business practices under Cal. Bus. & Prof.Code § 17200 (Count XII); false advertising under Cal. Bus. & Prof.Code § 17500 (Count XIII); false advertising in violation of Section 43(a)(B) of the Lanham Act, 15 U.S.C. § 1125(a) (Count XIV); false description in violation of Section 43(a)(A) of the Lanham Act, 15 U.S.C. § 1125(a) (Count XV); cybersquatting (Count XVI); and antitrust activity in violation of the Sherman Act, 15 U.S.C. § 1 (Count XVII).

Plaintiff seeks economic **damages**; **damages** for lost good will, injury to reputation and dilution of its trade name or mark; statutory **damages** pursuant to the Anticybersquatting Act, 15 U.S.C. §§ 1125(d) and 1117; attorneys' fees; treble **damages** and costs; and punitive **damages**.

In June of 2005, defendants deposed Zack in this case. Zack testified that he had not calculated **damages**, that lost sales were not his expertise, and that he did not know plaintiff's market share, the number of infrared sauna manufacturers in North America, or the relative market shares of plaintiff and its competitors.[FN2] No third party industry reporting of sauna sales is available. Low-cost Chinese sauna manufacturers started to compete in the sauna market in the first part of 2005. Leo Hemandez, an employee of Sauna by Airwall, testified that new competitors from overseas were "popping up all over the place." Hernandez Depo at 90:8-20, Exhibit to *Defendants' Memorandum* (Doc. # 186).

FN2. This case apparently concerns far infrared saunas, which the parties do not define.

Since 2001-2002, plaintiff's forecasted and actual sales have been as follows:

Fiscal Year	2001-2002	2002-2003	2003-2004	2004-2005
Forecasted Sales	440	750	1170	4775
Actual Sales	443	803	1906	3588
Per cent Error	+1%	+11%	+63%	-25%
Per cent Sales Growth	-	81%	137%	88%

See Exhibit 12 to *Plaintiff's Response In Opposition* (Doc. # 198). Jeffers testified that because plaintiff doubled its sales in 2002-03, it assumed that it would double its sales every year. According to Zack, however, plaintiff used the following method to project annual sales for each year:

> The annual sales projections are determined, in part, by reviewing ... documents, including but not limited to financial documents, previous years' sales documents, and marketing documents. * * * * The annual sales projections are also based on information ... including but not limited to ... various market factors, competitors' information, and other information that may or may not affect Sunlight Saunas' upcoming sales. The finalized annual sales projections are thereafter determined by ... taking the number of sales people at Sunlight Saunas, its distributors (domestic and international), and multiplying each of them by an appropriately arrived-at***1027** forecasted number of units sold per month. In the past, a slight adjustment has been applied to the monthly unit sales number in an effort to account for historic seasonality in our sales figures.

Declaration Of Aaron M. Zack, Exhibit 1 to *Plaintiff's Response In Opposition* (Doc. # 198). In making its forecast for 2004-05, plaintiff anticipated increased competition during 2005. *Id.* at ¶ 35.

Zack testified that plaintiff's gross sales for 2004 saunas ranged between $5 to $7 million, as contrasted with 2003, which he estimated to be in the range of $2.5 to $4 million. Despite this growth, he claimed that Hall's website had "definitely impacted" plaintiff's business, A. Zack Depo (6/29/05) at 101:21-24, Exhibit to *Defendants' Memorandum* (Doc. # 186), and that plaintiff's growth in sales in 2004-2005 should have been far superior to what it was.

On August 15, 2005, Charles E. Finch, plaintiff's **expert** witness, submitted a report on **damages**. Finch is a principal and practice leader for economic advisory services in the Kansas City office of Grant Thornton, LLP, an international accounting and consulting firm. Finch is not a certified public accountant, but he has an M.B.A. in Finance and a Masters in Economics. Since 1992, Finch has primarily provided **expert** testimony and economic consulting and served as adjunct instructor of economics, finance and quantitative analysis in the M.B.A. program at Avila University. He has provided **expert** testimony in at least 22 cases.[FN3]

FN3. Finch also has provided continuing legal education seminars to attorneys on environmental issues, understanding financial state-

ments, valuing business and loss claims, statistics in litigation, and the costs and benefits of arbitration.

Finch's report purports to calculate lost profits which plaintiff sustained on account of defendants' "false or misleading claims and representations relating to the quality, safety, and characteristics of Sunlight and its saunas." Exhibit A to *Defendants' Memorandum* (Doc. # 186). In preparing his report, Finch assumed that (1) the allegations of plaintiff's second amended complaint are true; (2) plaintiff's sales projections from October of 2004 through June of 2005 are valid; (3) from October of 2004 through June of 2005, plaintiff would have sold more saunas than it projected because in the past, actual sales had exceeded projections; [FN4] and (4) any failure to meet projections resulted from defendants' conduct. Based on these assumptions, Finch used *projected* sales for October of 2004 through June of 2005 as a "base line" against which he compared actual sales to quantify **damages**. To calculate **damages**, Finch first excluded all data for November of 2004, the single month in which plaintiff's monthly sales exceeded its sales forecast.[FN5] He then calculated lost unit sales per month, as follows:

FN4. Finch's report adopted management's indication that "prior to the damage period, Sunlight had, since its inception in July 2002, consistently approximated or exceeded its monthly projected unit sales" and that "no industry or economic events or trends ... would have led to the magnitude of decline in unit sales experienced." Exhibit A to *Defendants' Memorandum* (Doc. # 186).

FN5. Finch explained this decision as follows:

> The month of November 2004 has been excluded from the damage calculation as the actual number of units sold was in excess of the forecasted number of units to be sold in that month. Management indicated that in November 2004, a new international distributor placed an initial order for 100 Solo saunas and 450 solo pads. Absent those orders, the month of November 2004 would have fallen below its forecasted number of units.
>
> Exhibit A to *Defendants' Memorandum* (Doc. # 186).

***1028** Lost unit sales per month for the period October 2004 through June 2005 were calculated by subtracting the actual unit sales, adjusted for cancellations, from the forecasted unit sales for that month.
Exhibit A to *Defendants' Memorandum* (Doc. # 186). After calculating lost sales for October and December of 2004, and January through June of 2005, Finch determined lost profits based on "the lost revenue resulting from the sale of the various models of sauna products and the actual cost to Sunlight to purchase the various models of the sauna products." *Id.* Taking into account the costs which plaintiff would have incurred in making the lost sales, Finch concluded that plaintiff had suffered lost profits of $226,986 for 2004, and $1,060,228 for 2005 through June 30, 2005, for aggregate lost profits of $1,287,214.[FN6]

FN6. Finch later reduced this figure by approximately $300,000 because he had mistakenly multiplied a variable for cost of sales against gross profit instead of gross sales. He then projected plaintiff's lost profits to be $942,000. Finch's calculations do not address the Lanham Act and Sherman Act claims, and Finch does not consider himself an antitrust **expert**.

Defendants hired Dr. Christopher C. Pflaum, an economist, to examine Finch's **expert** report. In Pflaum's opinion, a knowledgeable economist would not view plaintiff's forecasts as an accurate basis for determining lost sales. Pflaum noted that Finch did not account for (1) changing market conditions, which included a major increase in saunas imported from Asia after December 27, 2004; [FN7] (2) plaintiff's operational problems, including Jeffers' departure from Sunlight on January 10, 2005, interruption of Internet leads, and changes in the telephone and data base systems during March of 2005; or (3) disparagement by Sauna by Airwall.

FN7. On December 27,2004, Lakoda, Inc. apparently requested a tariff clarification for four types of infrared saunas imported from China-the first such request. On March 9, 2005, U.S. Customs and Border Protection apparently classified such saunas as "prefabricated buildings of wood," precipitating a major increase in the importation of far infrared saunas.

On January, 17, 2005, defendants filed *Defendants' Dispositive Daubert Motion To Exclude Plaintiff's **Expert*** (Doc. # 185). *See* Daubert v. Merrell Dow Pharms., Inc.,

509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). On February 6, 2006, plaintiff filed a motion to strike certain statements of facts in defendants' motion. *See* Doc. # 197. The Court first addresses plaintiff's motion to strike.

Analysis

I. Motion To Strike

[1] Pursuant to Rule 12(f), Fed.R.Civ.P., and the Local Rules for the District of Kansas, plaintiff moves to strike 26 fact statements from the brief in support of defendants' *Daubert* motion. *See Memorandum Of Law In Support Of Defendants' Dispositive Daubert Motion To Exclude Plaintiff's* ***Expert*** (Doc. # 186) filed January 17, 2006. Plaintiff contends that the facts are not supported by defendants' record citations. Defendants argue that the Rule 12(f) motion is inappropriate and without merit.

[2][3] Rule 12(f), Fed.R.Civ.P. provides as follows:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these Rules, upon motion made by a party ***1029** within 20 days after the service of the pleading upon the party or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

A court will usually deny a motion to strike unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties. *Nwakpuda v. Falley's, Inc.*, 14 F.Supp.2d 1213, 1215 (D.Kan.1998). A Rule 12(f) motion is not the appropriate method to challenge the factual support for an allegation. *Id.*

Rule 12(f) authorizes the Court to strike material from pleadings. A brief in support of a *Daubert* motion is not a pleading. *See* Fed.R.Civ.P. 7(a) (pleadings include complaint, answer, reply to counterclaim, answer to counterclaim, third-party complaint and third-party answer); *Trujillo v. Bd. of Educ. of Albuquerque Pub. Schs.*, 230 F.R.D. 657, 660 (D.N.M.2005) (complaint, answer and reply constitute pleadings; motions and other papers not pleadings). The Court overrules plaintiff's motion to strike for substantially the reasons set forth in *Defendants' Response In Opposition To Plaintiff's Motion To Strike Defendants' Purported Statements Of Fact* (Doc. # 216) filed March 10, 2006. Obviously, the Court will not consider facts which are unsupported by the record.

II. Defendants' *Daubert* Motion

[4] Defendants argue that Finch is not qualified to render an **expert** opinion and that he has relied on unvalidated, unsupported and unreliable projections, and seek to exclude his testimony under Federal Rules of Evidence 403 and 702 and *Daubert*, 509 U.S. at 579, 113 S.Ct. 2786. Under Fed.R.Evid. 702, the trial court must act as a gatekeeper and determine at the outset, pursuant to Fed.R.Evid. 104(a), "whether the **expert** is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* Fed.R.Evid. 702 provides as follows:

> 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.

The decision whether to admit or exclude **expert** testimony is committed to the sound discretion of the district court. *Latshaw v. Mt. Carmel Hosp.*, 53 F.Supp.2d 1133, 1136 (D.Kan.1999).

[5] "[W]hen the proffered **expert** relies on some principle or methodology," the trial court should consider a nonexhaustive list of nondispositive factors in determining whether the reasoning or methodology is scientifically valid or reliable: "(1) Can it and has it been tested?; (2) Has it been subjected to peer review and publication?; (3) Does it have a known or potential rate of error?; and (4) Has it attained general acceptance in the relevant scientific community?" *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10th Cir.1996). Since *Daubert*, the courts have continued to apply a traditional Rule 702 analysis except in cases involving unique, untested or controversial methodologies or techniques. *Id.* at 1519. Application of the four factors set out in *Daubert* "is unwarranted in cases where **expert** testimony is ***1030** based solely on experience or training." *Id.* at 1518.

[6] As part of the pretrial evaluation, the trial court also must determine whether the **expert** opinion is "based on facts that enable the **expert** to express a reasonably

accurate conclusion as opposed to conjecture or speculation." *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir.1996) (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir.1988)). The touchstone of admissibility is helpfulness to the trier of fact. *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 648 (10th Cir.1991).

[7] Defendants first argue that Finch is not qualified to render an opinion. Specifically, defendants contend that he did not consider any market data or assess relevant economic factors related to the sauna market. Plaintiff responds that defendants have not challenged Finch's credentials, and that they instead focus on the reliability of his opinion. The Court agrees and considers defendants' arguments in the later context-not as a challenge to his credentials.

Defendants argue that Finch's methodology is flawed because (1) despite the historical inaccuracy of plaintiff's sales projections, Finch based his conclusions on the assumption that plaintiff had accurately projected its sales for October of 2004 through June of 2005; (2) Zack could not account for how plaintiff reached its sales projections; (3) Finch did not take into account significant factors, aside from defendants' conduct, which could have explained the decline in the growth of plaintiff's sales; (4) Finch accepted Zack's conclusion that industry and economic events and trends could not explain the decline in plaintiff's growth from October of 2004 through June of 2005, when in fact the competition increased and plaintiff experienced internal turmoil during that time; and (5) Finch did not consider the wrongful conduct of Sauna by Airwall.

Defendants' criticisms of Finch's methodology are well taken. Finch's entire damage calculation is based on his underlying assumptions regarding plaintiff's forecast of sales. Finch did not independently analyze the projections, and plaintiff provides no coherent explanation how it arrived at the projections. Plaintiff's vague statements that it took into account "various analyses" and "numerous and various documents" are conclusory, evasive and anything but **expert**. Nothing in the record suggests that a reasonable economist would employ such a methodology to forecast sales, or assume that such a methodology, when conducted by others, is accurate. The record contains no data on market share, no market research and no evidence that absent wrongful conduct by defendants, plaintiff's sales would have increased from 1,906 to 4,775 between July of 2004 and June of 2005. On this record, plaintiff's projections are more sleight of hand than consistent with generally accepted economic methodology. No reasonable jury would accept them as valid predictors of actual sales and Finch's opinions, which assume that the projections are valid, would not assist the trier of fact. *See, e.g., JMJ Enters., Inc. v. Via Veneto Italian Ice, Inc.*, No. Civ.A. 970CV-0652, 1998 WL 175888, at *7 (E.D.Pa. Apr. 15, 1998) (**expert** had no independent verification of reasonableness of sales projections).

Although the record contains undisputed evidence regarding increased competition from Chinese manufacturers, starting in January of 2005, it is devoid of evidence that a reasonable economist would assume that such increased competition did not impact plaintiff's sales during the relevant period. *See Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415-16 (7th Cir.1992) (**expert** should separate from ***1031 damages** for defendant's alleged misconduct those **damages** which result from entry of powerful competitor). Also, Finch does not consider whether (or how) Jeffers' absence affected sales, or the loss of Internet leads during March (the historically busiest month of the year). Finch offers no explanation why, under generally accepted economic methodology, he would assume that these issues did not affect sales. In addition, he does not consider whether conduct of Sauna by Airwall impacted plaintiff's sales or accounted for a percentage of lost sales. Because Finch attributes all lost profits to defendants without considering increased competition in the market, other market conditions or alleged wrongdoing of other competitors, Finch's testimony would not assist the jury in determining the fact or the amount of **damages**. *See First Savings Bank, F.S.B v. U.S. Bancorp*, 117 F.Supp.2d 1078, 1085 (D.Kan.2000) (improper attribution of all losses to defendants' illegal acts, despite presence of other factors, infects basic methodology); *In re Aluminum Phosphide Antitrust Litig.*, 893 F.Supp. 1497, 1507 (D.Kan.1995) (prudent economist must account for differences and would perform minimum regression analysis when comparing price before relevant period to prices during damage period); *see also Bazemore v. Friday*, 478 U.S. 385, 400 n. 10, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (while failure to include variables normally will affect probativeness of analysis, some regressions may be so incomplete as to be irrelevant).

Finally, Finch offers no accepted economic methodology which can justify his decision to exclude all data for November of 2004, the one month in which actual sales exceeded plaintiff's projections and the one month which most closely follows the posting of Hall's defamatory

website. By way of facial explanation, Finch states that a new international distributor placed a large initial order. Nothing in the record, however, suggests that in calculating lost profits, standard economic methodology excludes initial large orders from new international distributors. In addition, nothing in plaintiff's forecast methodology suggests that it disregards initial sales to new distributors. On this record, Finch's methodology is simply a house of cards. It may be mathematically accurate, but he has not shown that it is sound or reliable, or generally accepted in the field of economics. Finch's damage calculations are legally unreliable and therefore inadmissible under Rule 702. Any probative value of his opinion on **damages** is substantially outweighed by the danger of misleading the jury and unfair prejudice resulting from his unsupported assumptions and failure to consider other circumstances. *See* Fed.R.Civ.P. 403.

Defendants construe their motion to exclude **expert** testimony as dispositive. Plaintiff disagrees, arguing that it seeks relief other than the **damages** calculated by Finch. The Court will address these matters in its ruling on defendants' motion for summary judgment.

IT IS THEREFORE ORDERED that *Plaintiff's Motion To Strike Defendants' Purported Statement of Facts* (Doc. # 197) filed February 6, 2006 be and hereby is **OVERRULED**.

IT IS FURTHERED ORDERED that *Defendants' Dispositive Daubert Motion To Exclude Plaintiff's* ***Expert*** (Doc. # 185) filed January 17, 2006 be and hereby is **SUSTAINED**.

D.Kan.,2006.
Sunlight Saunas, Inc. v. Sundance Sauna, Inc.
427 F.Supp.2d 1022, 69 Fed. R. Evid. Serv. 988

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183 F.R.D. 695
(Cite as: 183 F.R.D. 695)

H

United States District Court,
D. Kansas,
Kansas City.
BIOCORE, INC., et al., Plaintiffs,
v.
Hamid KHOSROWSHAHI, Defendant.
Hamid Khosrowshahi, Plaintiff,
v.
BioCore, Inc., et al., Defendants.

Nos. Civ.A. 98–2031–KHV, Civ.A. 98–2175–KHV.
Dec. 31, 1998.

Company engaged in the research, development and marketing of medical products used to promote the healing of wound injuries brought suit against former employees, alleging that they acted wrongfully while employed and revealed confidential information when they left and joined competitor. Defendants themselves filed suit, alleging that their former employer had committed various wrongful acts in the course of their employment, and suits were consolidated. On plaintiffs' response to orders to show cause, the District Court, Vratil, J., held that: (1) accountant's methods of estimating lost profits were not admissible under **expert** testimony rule for lack of evidentiary support, but (2) accountant would be allowed to testify regarding plaintiff's unjust enrichment theory of recovery.

So ordered.

West Headnotes

[1] Evidence 157 ⚿508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

The touchstone of evidence rule regarding **expert** testimony is the helpfulness of the **expert** testimony, *i.e.* whether it will assist the trier of fact to understand the evidence or to determine a fact in issue. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2] Evidence 157 ⚿508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

In deciding whether to admit **expert** testimony, district court must determine whether the proffered evidence would be helpful to the trier of fact, although doubts should be resolved in favor of admissibility. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[3] Evidence 157 ⚿508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

The requirement that **expert** testimony assist the trier of fact is a condition that goes primarily to relevance; specific subject areas of proposed **expert** testimony must therefore be examined to ascertain whether each is sufficiently tied to the facts of the particular case that they will be helpful to the trier of fact. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4] Evidence 157 ⚿146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Evidence 157 ⚿555.9

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.9 k. **Damages**. Most Cited Cases

Accountant's estimate of lost profits based on plaintiff's sales projections for 1999 through 2002 was not admissible under **expert** testimony rule; estimate was based on assumptions which lacked evidentiary support, and probative value of the opinion was outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

[5] Evidence 157 555.9

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of **Experts**
157k555 Basis of Opinion
157k555.9 k. **Damages**. Most Cited Cases

Accountant's estimate of lost profits based on the premise that in 1997, plaintiffs suffered lost sales of $4,611,577 and that 85 percent of the loss was attributable to former employee, was not admissible under **expert** testimony rule, as its basic assumptions lacked evidentiary support; **expert** assumed that sales would increase 558.7 percent in 1997 even though percentage increases in prior years were much less, and **expert** double counted losses attributable to "1996 customers with no 1997 purchases." Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

[6] Evidence 157 507

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k507 k. Matters of Common Knowledge or Observation. Most Cited Cases

Expert testimony may be deemed not helpful when offered to explain an issue or fact that the average person can understand by the use of common knowledge or common sense. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] Evidence 157 507

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k507 k. Matters of Common Knowledge or Observation. Most Cited Cases

Under evidence rule governing **expert** testimony, an **expert** can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, though not beyond ordinary understanding. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[8] Evidence 157 531

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of **Expert** Testimony
157k530 **Damages**
157k531 k. In General. Most Cited Cases

Consistent with the liberal standard of admissibility mandated by rule governing **expert** testimony, accountant would be allowed to testify regarding plaintiff's unjust enrichment theory of recovery, even though accountant's report appeared to be nothing more than a mathematical computation which the jury was fully capable of performing on its own; accountant's testimony would be helpful in explaining why particular figures were included in first place, and the meaning of certain categories of expenditures. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

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MEMORANDUM AND ORDER

VRATIL, District Judge.

On November 12, 1998, Hamid Khosrowshahi filed *Defendants' Daubert Motions To Preclude The Testimony Of Plaintiffs' **Expert** Witnesses* (Doc. # 428). At a status conference on December 14, 1998 the Court overruled that motion but entered various orders to show cause why the testimony of plaintiffs' **expert**, David Cochran, should not be stricken. The matter now comes before the Court on *Plaintiffs' Response On Orders To Show Cause* (Doc. # 496) filed December 21, 1998. The parties are fully familiar with Cochran's **expert** report and in addressing the issues raised by plaintiffs' response to the orders to show cause, the Court will not burden the record by elaborate discussion of it.

1. Method One

Cochran employs two methods of computing lost profits. Method One, which produces a lost profit claim of $105,614,236 for 1999 through 2006, depends entirely on sales projections for 1999 through 2002 for Integra LifeSciences Corporation. Cochran takes the Integra projections (which are for Viaderm, an avian-based collagen product which Integra never put on the market and which differs from plaintiffs' bovine-based collagen product) and extrapolates them to reflect Viaderm sales through 2006.[FN1] Method One makes several key assumptions:

> FN1. According to Khosrowshahi and Integra, Integra abandoned the Viaderm product between October of 1997 and January of 1998. According to plaintiffs, it is "highly doubtful" that Integra dropped the product; plaintiffs claim that Integra could have run clinical testing as late as October of 1998.

First, that the market for collagen wound products is static and that plaintiffs will have no competition except Integra, so that every sale made by Integra is a sale lost to plaintiffs. In actuality, the record suggests that the market is anything but static,[FN2] and plaintiffs now have 25 competitors and 64 competing products.

> FN2. The Court cannot determine whether the market is expanding or shrinking, but it appears to be in flux. Cochran assumes that the total market for relevant wound care products will grow at a minimum rate of eight percent per year. He assumes in Method Two that plaintiffs' market share will increase at the rate of 34.5 percent per quarter, or 558.7 percent per year. Khosrowshahi predicted, however, in September of 1997, that a possible lack of availability of collagen raw materials for medical application would make it impossible for companies who do not produce their own collagen to continue to produce collagen based wound dressings. Plaintiffs have not cited record evidence regarding these factors or other factors that would factually justify the Integra projections for Viaderm.

Second, not only that Integra's sales projections are reasonable for 1999 through 2002, but also that Cochran can reasonably extrapolate them from 2003 through 2006. In fact, Viaderm has never been marketed, so none of the projections can be tested, and the record is devoid of evidence regarding the wound care industry (and the respective roles of Integra and BioCore in it) which would independently justify the sales projections through 2003.

Third, that Integra is in the market, or will be, effective January 1, 1999. [FN3] The record, however, contains no such evidence.

> FN3. While plaintiffs argue that Method One does not depend on whether Integra actually enters the market, plaintiffs in fact will suffer no **damages** under a lost profits theory if Integra is not in the market.

On this record, the Court was concerned that the evidence to be produced at trial would not permit the

jury to reasonably agree that the relevant market is static; that every sale made by Integra would be a sale lost to plaintiffs; that Integra's untested sales projections (for a product different than plaintiffs') would afford a reasonable basis for calculating **damages**; or that Integra is ***698** going to enter the relevant market on January 1, 1999—or ever. Absent such evidence the Court feared that Cochran's opinion would not assist the jury in understanding the evidence and determining the amount of **damages**, see Fed.R.Evid. 702, and that the probative value of his opinion would be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time under Fed.R.Evid. 403. The Court therefore ordered plaintiffs to show cause in writing on or before December 21, 1998 why Cochran's opinion as to Method One should not be barred for lack of evidentiary support.

In response to the Court's concern that the relevant market is not static and that as a matter of basic economics Cochran cannot reasonably assume that every sale made by Integra will be one lost to plaintiffs, plaintiffs concede that "it is certainly possible that not every Integra sale would replace a Biocore sale." They nonetheless argue that "the intent of Integra was to market a product that directly competed with the BioCore product" and thus to "take sales from BioCore and not other manufacturers." In support of this position, plaintiffs cite evidence that Integra hired Khosrowshahi to "begin execution of an operating plan for a collagen-based wound care business," see Exhibit A to *Plaintiffs' Response On Orders To Show Cause* (Doc. # 496) [Plaintiffs' Ex. A].[FN4]

FN4. Plaintiffs also cite evidence that Khosrowshahi suggested that Integra investigate the pH levels of Medifil and arranged for Integra to secure samples of Medifil for a control study, and that in September of 1997, Integra investigated the relative properties of Medifil. Unfortunately, plaintiffs offer no explanation regarding what Medifil is or how (if at all) it relates to this case. Even if the Court were to assume that Medifil is a BioCore product and that Viaderm attempted to emulate it, the evidence which plaintiffs cite falls far short of substantiating the proposition that Integra is capable of marketing a collagen wound care product that will displace BioCore from the market. See Exhibits B and C to *Plaintiffs' Response On Orders To Show Cause* (Doc. # 496) [Plaintiffs' Exs. B & C].

In response to the Court's concern that Integra's untested sales projections do not afford a reasonable basis for calculating **damages**, plaintiffs respond that (1) Khosrowshahi prepared the Integra projections and he should not be allowed to impeach his own report; and (2) even though Viaderm never went on the market, there is no reason to believe that Integra's projections are unreasonable. As to the first point, plaintiffs do not cite Fed.R.Evid. 801(d)(2) or expressly argue that the Integra projections represent an admission by Khosrowshahi.[FN5] They have failed to provide the Court a copy of the alleged projections and they cite no affidavits or other record evidence from which the Court might find that the projections would be admissible in evidence under any legal theory. In fact, though plaintiffs allege that Khosrowshahi prepared the projections, they cite no evidence of that alleged fact. As to plaintiffs' argument that there is "no reason to believe that [the] projections ... are unreasonable," plaintiffs misconceive their evidentiary burden as a proponent of the evidence.[FN6] The projections concern a different type of product than plaintiffs' product, and they are totally untested because Integra never marketed its product. These naked facts, standing alone, raise substantial questions concerning the relevance of the evidence and the reliability of the projections. On this record those questions cannot be resolved in plaintiffs' favor.

FN5. Under Rule 801(a)(2), "a statement is not hearsay if it is offered against a party and is (A) the party's own statement in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship...."

FN6. Plaintiffs assert that "[t]he question is whether the calculations would be used by

> reasonable business men [sic] in the ordinary course of conducting their business affairs" and that "clearly, Integra used the figures in that manner." Again, however, plaintiffs cite no record evidence in support of this position.

Finally, in response to the Court's stated concern that plaintiffs lack evidence that Integra is going to enter the relevant market on or after January 1, 1999, plaintiffs ask that they be allowed to prove that Integra is ***699** "poised" to enter the market in direct competition with BioCore. As noted above, the record contains not one iota of direct evidence that Integra plans to enter BioCore's market in the foreseeable future.[FN7] Plaintiffs' entire theory is based on speculation that Integra is "poised" to enter the market; that even if Integra does not enter the market, someone else will; [FN8] that either way, BioCore will sustain devastating injury; and that even if *no one* markets a competing product, BioCore will sustain losses in the "hundreds of millions of dollars." Unfortunately, however, plaintiffs have cited no record evidence from which a jury might reasonably agree that Integra plans to enter the market; that Integra has communicated BioCore trade secrets to third parties; that third parties plan to enter the market; or that *anyone* is capable of replicating or marketing BioCore products, with or without access to its alleged trade secrets. In sum, no reasonable jury would agree with plaintiffs that "it is clear today, that BioCore will not be able to realize the profits that it would otherwise expect because Integra or some other company will be able to capture a substantial percentage of the market share now maintained by BioCore."

> FN7. Plaintiffs' only "evidence" is circumstantial, and it consists of the possibility that Integra may be lying both when it claims that it switched from a bovine collagen product (like BioCore's) to an avian collagen product (Viaderm), and when it claims that it has abandoned its effort to develop a competing product. Plaintiffs have no evidence that Integra *is* lying; they simply hope the jury will disbelieve it.

> FN8. Plaintiffs allege that "there is no telling when some other company will begin producing and marketing products based upon BioCore's trade secrets." They cite no evidence, however, that any other company has access to BioCore trade secrets.

[1][2][3] The notes of the advisory committee make clear that Fed.R.Evid. 402 is limited by Fed.R.Evid. 403 and by the rules contained in Article VII of the Federal Rules of Evidence, including Fed.R.Evid. 702. The touchstone of Fed.R.Evid. 702, as noted above, is the helpfulness of the **expert** testimony, *i.e.* whether it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir.1985). The Court therefore must determine whether the proffered evidence would be helpful to the trier of fact, although doubts should be resolved in favor of admissibility. *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1241 (E.D.N.Y.1985); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 279 (3d Cir.1983), *cert. granted*, 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985); *see also Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067, 1070 (9th Cir.1975) (within discretion of trial judge to determine whether **expert** opinion on causal connection between defects in steering column and auto accident was helpful). The requirement that **expert** testimony "assist the trier of fact" is a condition that goes primarily to relevance. *Miller v. Heaven*, 922 F.Supp. 495, 501 (D.Kan.1996). Specific subject areas of proposed **expert** testimony must therefore be examined to ascertain whether each is sufficiently tied to the facts of the particular case that they will be helpful to the trier of fact. *United States v. Norwood*, 939 F.Supp. 1132, 1136 (D.N.J.1996). "**Expert** testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02], p. 702–18.

[4] Having examined the record in this case, the Court finds for the reasons stated above that Cochran's opinion will not help the jury to understand the evidence or determine a fact in issue, see Fed.R.Evid. 702, because it does not sufficiently relate to any factual issues which the jury will decide. The probative value of Cochran's opinion as to Method One is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time under Fed.R.Evid. 403 and the Court finds that it should be excluded.

2. Method Two

[5] Method Two—which estimates lost profits at $241,190,380—rests on the premise that in 1997, plaintiffs suffered lost sales of ***700** $4,611,577 and that 85 percent of the loss was attributable to Khosrowshahi. In making his calculations, Cochran assumes that sales should have increased 34.5 percent per quarter in 1997, for a total annual increase of 558.7 percent, even though historic figures reveal actual increases of 46.7 percent (from 1994 to 1995), 87.6 percent (from 1995 to 1996), and 82.3 percent (from 1996 to 1997). [FN9] In addition, Cochran appears to have double counted losses attributable to "1996 customers with no 1997 purchases." Finally, Cochran attributes 85 percent of all losses to Khosrowshahi, based on the opinion of plaintiffs' management. Nothing in the evidence of record suggests that these assumptions are reasonable—or that a jury could find them to be reasonable, based on admissible evidence. The Court therefore ordered plaintiffs to show cause in writing why Cochran's opinion as to Method Two should not be barred from evidence because it lacks a factual foundation.[FN10]

FN9. BioCore was formed in 1988 but it had no sales until 1991. Cochran does not consider sales for 1991 through 1994.

FN10. For example, the Court was concerned that the jury would never hear admissible evidence that Khosrowshahi was responsible for 85 percent of plaintiffs' lost profits in 1997. Lay opinion is admissible under Fed.R.Evid. 701 only where "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of the fact in issue." The Court cannot imagine what testimony by BioCore management would meet this test, and plaintiffs have suggested none. Similarly, even with respect to Fed.R.Evid. 703, the record contains no evidence that certified public accountants would reasonably rely on such lay opinions in forming opinions or inferences anywhere outside the litigation arena.

Plaintiffs make no persuasive response to the Court's concerns. As to the fact that Cochran assumes a 1997 growth rate of 558.7 percent, despite an all-time previous high of 87.6 percent, plaintiffs state only that "BioCore is a relatively new company that only really started to take off in 1996 and the first half of 1997" and that it would be "unfair to examine BioCore sales figures previous to 1997 since they would unduly negatively affect the average sales figures." Plaintiffs also assert that "no one can suggest why the sales increases in 1997 are not a reasonable basis for projections within the range of acceptable error." The problems with this response are many. First, plaintiffs' statements are not supported by record evidence. Nothing about the BioCore product, plaintiffs' expenses and sales history, or conditions within the market as a whole suggests that BioCore could reasonably expect a growth rate of 558.7 percent for 1997. No **expert** has opined that such predictions are reasonable, given the market for BioCore products, and they do not pass either the smell test or the laugh test.

Plaintiffs offer no explanation for the fact that Cochran appears to have double counted losses for sales lost from 1996 customers who made no purchases in 1997.

As to the fact that Cochran attributes 85 percent of the lost profits to Khosrowshahi, based on nothing more than opinion of management, plaintiffs state only that (1) it is reasonable for Cochran to rely on BioCore management for such figures and (2) it is reasonable for BioCore management to make such calculations, based on their personal knowledge and expertise in their own business and the marketing of collagen products. Plaintiffs do not pretend to cite record evidence in support of these positions. Nor do they explain how management's opinion is based on "personal knowledge and expertise," or what BioCore management did to arrive at this figure. On this record, plaintiffs' attribution is not shown to represent anything but a number pulled from thin air.

For these reasons, applying the law previously stated, the Court finds that Cochran's opinion will not assist the jury in understanding the evidence and determining the amount of **damages**, see Fed.R.Evid. 702, and that the probative value of his opinion as to Method Two is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time under Fed.R.Evid. 403.

3. Unjust Enrichment

On the unjust enrichment theory of **damages**, Cochran calculates that plaintiffs incurred $11,714,673 in product development ***701** costs and that a BioCore competitor could enter the market without incurring those costs. Cochran reaches his damage estimate by adding various figures from plaintiffs' tax returns (1988 through 1995), a 1996 internal financial statement, a 1997 financial compilation, and an interrogatory answer.[FN11] Cochran did not prepare any of the tax returns. He did not audit or review any of the financial information, or attempt to confirm it for accuracy or completeness. He relied solely on information provided by BioCore management and his opinions are expressly contingent upon the financial and other information which it provided.

> FN11. Cochran adds expenses for research and development, startup expenditures, consulting fees, telephone/communications, travel, capitalized intangible "research & development," advertising, professional fees, legal fees—stock issuance, travel/meals/entertainment, marketing expense, literature/sales aids, printing costs, convention/exhibit expenses, 1988–1991 expenses other than listed elsewhere, AA investment in cattle facility, AB value of research & development and other related startup costs performed by Dr. Manoj K. Jain, and reimbursements and grants received.

Cochran's report appeared to be nothing more than a mathematical computation which the jury was fully capable of performing on its own. The Court therefore ordered plaintiffs to show cause in writing why his opinion should not be barred because it is not based upon scientific, technical or other specialized knowledge that will assist the trier of fact to determine any fact in issue, and why the Court should not find that the probative value of Cochran's opinion is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay and waste of time under Fed.R.Evid. 403.

Plaintiffs respond that by training and professional experience, a certified public accountant is competent to testify on the meaning of complex financial data and that Cochran's testimony is important for several reasons: (1) he will explain why the figures listed are "relevant to determine the true R & D costs" and (2) only an **expert** can testify as to the meaning of certain categories of expenditures.[FN12] In summary, plaintiffs admit that while one does not need an accounting degree to add up the numbers which comprise the unjust enrichment estimate, "one must have **expert** knowledge to know why the figures are included in the first place and to explain the meaning of the entries."

> FN12. Plaintiffs cite one example of the need for **expert** testimony: to explain a $1,900 entry for "Capitalized Intangible 'Research & Development.' " Plaintiffs also reference "item Z" on page 3 of Exhibit H, and "Sched. M1, statement 2: Sec 267 Interest Expense."

[6][7][8] **Expert** testimony may be deemed not helpful "when offered to explain an issue or fact that the average person can understand by the use of common knowledge or common sense." 4 *Weinstein's Federal Evidence* § 702.03 [3] (Matthew Bender 2d ed.); *United States v. Montas*, 41 F.3d 775, 783–784 (1st Cir.1994) (**expert** testimony "about matters that were readily intelligible" is unhelpful to jury and thus inadmissible). Under Fed.R.Evid. 702, however, "an **expert** can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [though] not beyond ordinary understanding." S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 451 (3d ed.1982). See also Notes of Advisory Committee on Proposed Rule 702 (quoting Ladd, ***Expert** Testimony,* 5 Vand.L.Rev. 414, 418 (1952)); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 702[02], at 702–12 n. 6 (citing cases). *Cf. Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1138 (3d Cir.1983) (district court has broad discretion to admit or exclude **expert** evidence, and its action will be sustained unless manifestly erroneous); *Knight v. Otis Elevator Company*, 596 F.2d 84, 87 (3d Cir.1979) (noting liberal policy of admitting **expert** testimony which will "probably aid" the trier of fact). Consistent with the liberal standard of admissibility mandated by Rule 702, the Court concludes that Cochran should be allowed to testify regarding the unjust enrichment theory of recovery.

IT IS SO ORDERED.

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(Cite as: 183 F.R.D. 695)

D.Kan.,1998.
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Admissibility of Expert Scientific Evidence in Kansas

Frye v. U.S., 54 App.D.C. 46, 293 F. 1013 (C.A.D.C. 1923).

Kansas courts, and courts generally, recognizing the persuasive impact of scientific testing on jurors, require such evidence to meet standards of reliability for admission. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443, 14 P.3d 1170 (2000) (test from *Frye v. United States*, 293 F. 1013 [D.C.Cir.1923]).

The law on the admissibility standards for admitting expert testimony in Kansas is well established....The general acceptance test set forth in *Frye* governs the admissibility of expert scientific opinion evidence in Kansas in those situations where such a test or standard is required. See *State v. Shadden*, 290 Kan. 803, 818, 235 P.3d 436 (2010); *Armstrong v. City of Wichita*, 21 Kan.App.2d 750, Syl. ¶ 3, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

The Kansas federal courts also recognize *Frye* as controlling***1111*** in Kansas state courts. *See, e.g., 103 Investors I, L.P. v. Square D Co.*, 222 F.Supp.2d 1263, 1272 (D.Kan.2002) (citing *Armstrong* in stating " *Daubert* applies to federal trial judges and not Kansas state courts"). We are duty bound to follow Kansas Supreme Court precedent and will not apply the tests set forth in *Daubert* until instructed to do so. See *State v. Merrills*, 37 Kan.App.2d 81, 83, 149 P.3d 869, *rev. denied* 284 Kan. 949 (2007).

The *Frye* test requires a showing that the basis of a scientific opinion is generally accepted as reliable within the expert's particular scientific field. See *Kuhn*, 270 Kan. at 454, 14 P.3d 1170; *State v. Witte*, 251 Kan. 313, 323, 836 P.2d 1110 (1992).

The *Frye* test applies only to testimony based on a scientific method or procedure. It does not apply to pure opinion testimony, which is an expert opinion

developed from inductive reasoning based on the expert's own experiences, observations, or research. Rather than being subject to a *Frye* analysis, the validity of pure opinion is tested by cross-examination of the witness. See *Kuhn*, 270 Kan. at 457, 14 P.3d 1170. "The distinction between pure opinion testimony and testimony based on a scientific method or procedure is rooted in a concept that seeks to limit application of the *Frye* test to situations where there is the greatest potential for juror confusion." *Kuhn*, 270 Kan. at 460, 14 P.3d 1170.

Kansas applies the *Frye* test to testimony about an emerging medical diagnosis. *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan.App.2d 930, 197 P.3d 859 (2008).

Workers' compensation

> "Given the relative equality that exists in compensation cases between lay testimony and expert testimony, it does not appear that claimant has any burden to show that his [or her] medical evidence meets any particular standard. A claimant's burden of proof in a workers compensation case is to prove that it is more probably true than not true that he or she suffers from a disabling physical condition which is the result of his or her work." *Armstrong v. City of Wichita*, 21 Kan.App.2d 750, 758, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

In *Armstrong*, a panel of this court held in a workers compensation case involving occupational disease that a physician's diagnosis of the claimant's condition need not reach the test for admission set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), or *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). 21 Kan.App.2d at 759. Under the analysis in *Armstrong*, the standard of "more probable than not" relates to a claimant's burden of proof under

K.S.A. 44-508(g), and there is no standard in workers compensation cases that a physician must use to formulate his or her opinion.

Riechman v. Eaton Corp. 96 P.3d 1124 (Table), 2004 WL 2047546 (Kan.App.)(unpublished).

It is well-established that the *Frye* test is exclusively concerned with the methodologies underlying expert testimony, rather than the conclusions of that testimony. The very wording of *Frye* demonstrates that the focus is on the underlying scientific principles from which the conclusions are deduced:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923).

Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 14 P.3d 1170, 1173 (2000).

The distinction between pure opinion testimony and testimony based on a scientific method or procedure is rooted in a concept that seeks to limit application of the *Frye* test to situations where there is the greatest potential for juror confusion.

We have yet to articulate a distinction between pure opinion testimony and testimony relying upon a scientific technique. Such a distinction, we believe, has advantages. The distinction would be consistent with Kansas appellate decisions applying the *Frye* test, almost all of which have involved devices or tests surrounded by an "aura of infallibility"

to which a trier of fact might tend to ascribe "an inordinately high degree of certainty." See *People v. McDonald*, 37 Cal.3d 351, 372-73, 208 Cal.Rptr. 236, 690 P.2d 709 (1984), *overruled on other grounds* *People v. Mendoza*, 23 Cal.4th 896, 98 Cal.Rptr.2d 431, 4 P.3d 265 (2000).

Kansas *Frye* test cases have addressed a variety of scientific techniques. See *State v. Shively*, 268 Kan. 573, 584-87, 999 P.2d 952 (2000) (polygraph evidence); *State v. Valdez*, 266 Kan. 774, 787-88, 977 P.2d 242 (1999) (statistical evidence accompanying a type of DNA testing known as polymerase chain reaction [PCR] testing); *State v. Heath*, 264 Kan. 557, 577-78, 957 P.2d 449 (1998) (battered child syndrome); *State v. Chastain*, 265 Kan. 16, 22-23, 960 P.2d 756 (1998) (the horizontal gaze nystagmus sobriety test); *State v. Canaan*, 265 Kan. 835, 852, 964 P.2d 681 (1998) (the luminol test for the presence of blood); *State v. Isley*, 262 Kan. 281, 290, 936 P.2d 275 (1997) (statistical evidence accompanying PCR testing); *State v. Haddock*, 257 Kan. 964, 985, 897 P.2d 152 (1995) (PCR testing); *State v. Hill*, 257 Kan. 774, 785, 895 P.2d 1238 (1995) (PCR testing); *State v. Colbert*, 257 Kan. 896, 910, 896 P.2d 1089 (1995) (DNA print testing and the process of restriction fragment link polymorphism [RFLP] analysis); *State v. Witte* 251 Kan. 313, 329, 836 P.2d 1110 (1992) (the horizontal gaze nystagmus sobriety test); *Smith v. Deppish*, 248 Kan. 217, 238-39, 807 P.2d 144 (1991) (DNA print testing and the process of RFLP analysis); *State v. Butterworth*, 246 Kan. 541, 550, 556, 792 P.2d 1049 (1990) (hypnosis); *State v. Hodges*, 241 Kan. 183, 187, 734 P.2d 1161 (1987) (theory and methodology underlying the battered woman syndrome); *State v. Miller*, 240 Kan. 733, 735-38, 732 P.2d 756 (1987) (the Dequenois-Levine test for determining whether a substance is marijuana); *State v. Haislip*, 237 Kan. 461, 481-82, 701 P.2d 909 (1985) (use of hypnosis to induce witness testimony); *Neises v. Solomon State Bank*, 236 Kan. 767, 774, 696 P.2d 372 (1985) (a voice lie detector test called the PSE); *State ex rel. Hausner v. Blackman*, 233 Kan. 223, 228, 662 P.2d 1183 (1983) (human leukocyte antigen [HLA] test); *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292 (1982) (psychiatric diagnosis on rape trauma syndrome admissible); *State v. Washington*, 229 Kan. 47, 53-54, 622 P.2d 986 (1981) (the Multi System method of blood analysis of polymorphic enzymes; also lists examples of the application of the

Frye test from other jurisdictions); *State v. Lowry*, 163 Kan. 622, 628-29, 185 P.2d 147 (1947) (the admissibility of a lie-detector test); *State v. Fuller*, 15 Kan.App.2d 34, 36, 802 P.2d 599 (1990) (a technique for identifying marijuana); *Tice v. Richardson*, 7 Kan.App.2d 509, 510, 644 P.2d 490 (1982) (the admissibility of HLA test in a paternity suit). See also cases in which *Frye* did not apply, *State v. Warden*, 257 Kan. 94, 106, 891 P.2d 1074 (1995) (facilitated communication); *State v. Tran*, 252 Kan. 494, 502, 847 P.2d 680 (1993) (testimony of a "gang expert"); *State v. Barker*, 252 Kan. 949, 958, 850 P.2d 885 (1993) (the use of narcotics dog).

The distinction between pure opinion testimony and testimony relying on scientific technique promotes the right to a jury trial. Judges generally are not trained in scientific fields and, like jurors, are lay persons concerning science. A Kansas jury has a constitutional mandate to decide between conflicting facts, including conflicting opinions of causation. Kansas Constitution Bill of Rights, § 5; see K.S.A.1999 Supp. 60-238. The district judge under K.S.A. 60-456(b) controls expert opinion evidence that would unduly prejudice or mislead a jury or confuse the question for resolution. Cross-examination, the submission of contrary evidence, and the use of appropriate jury instructions form a preferred method of resolving a factual disputes.

Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 14 P.3d 1170, 1181-82 (2000).

Admissibility of Life Care Plans under *Daubert*

Life Care Testimony Admitted

***North v. Ford Motor Co.*, 505 F.Supp.2d 1113 (D.Utah,2007)**(Permissible for registered nurse life care planner to rely on the reports or information of other experts, and to have modified her opinion as further such information became available).

***Marcano Rivera v. Turabo Medical Center Partnership*, 415 F.3d 162 (C.A.1 (Puerto Rico),2005)**(Although LCP projections were not subject to physician review, the life care planner had been admitted as an expert on rehabilitation and life-care planning in numerous state and federal courts and his proposed care plan was based on a review of records from the agency providing plaintiff with skilled nursing care, a letter from her physician, and an interview with plaintiff's family and caregiver).

***Pease v. Lycoming Engines*, 2012 WL 162551 (M.D.Pa.,2012)**(LCP details physical and mental condition and needs created thereby; report based on interviews with treating health care providers and review of medical records; life care planner employed reliable, reasoned approach).

***Logan v. Cooper Tire & Rubber Co.*, 2011 WL 3267769 (E.D.Ky.,2011)**(life care plan based on planner's training as a physiatrist, his experience in the field of rehabilitative medicine, and his review and observations in the case).

***Wolfe v. McNeil-PPC, Inc.*, 2011 WL 1673805 (E.D.Pa.,2011)**(Life care planner reviewed medical records, consulted plaintiff's retained experts, interviewed plaintiff, and LCP references factual support fo conclusions. That life care planner did not consult treatise, talk to treating physicians or educate herself about physical condition goes to weight of her testimony, not admissibility).

***Deramus v. Saia Motor Freight Line, LLC*, 2009 WL 1664084 (M.D.Ala.,2009)**(Life care planner qualified based on education, experience as a registered nurse, and training; LCP admissible where based on medical records, depositions of treating physicians and meetings with plaintiff).

***Payne v. Wyeth Pharmaceuticals, Inc.*, 2008 WL 5586824 (E.D.Va.,2008)** (Life care planner allowed to testify even though he never discussed his life care plan with a physician, only spent seven hours preparing his opinions did not read Plaintiff's medical records but instead relied on summary prepared by his nurse).

***Wiles v. Department of Educ.*, 2008 WL 6808426 (D.Hawai'i,2008)**(LCP based upon review of records and report, research to determine the cost of the future services, review of billing records, and independent consultation with health care professionals, a local laboratory and a local group home).

***Frometa v. Diaz-Diaz*, 2008 WL 4192501, 3 (S.D.N.Y.) (S.D.N.Y.,2008)**(*Daubert* criteria met on basis of life care planner's experience and research which was reflected in the LCP along with extensive quotes from plaintiff's medical records).

***Price v. Wolford*,2008 WL 2570957, (W.D.Okla.,2008)** (Alleged shortcomings of the data used in developing the life care plan at issue go to the weight, and not the admissibility, of the LCP).

Life Care Testimony Not Admitted

***McNamara v. Kmart Corp.*, 380 F. App'x 148 (3d Cir.2010)**(life care planner testimony excluded because "there was *no support* in [the expert's] report for such expenses.").

***Rinker v. Carnival Corp.*, 2012 WL 37381, 2 (S.D.Fla.) (S.D.Fla.,2012)**(nothing in LCP indicates future care determined; he did not speak with Plaintiff's doctors or Plaintiff; all of the projected medical care and frequency estimates are simply his opinion; no reasoning or methodology provided to support his future medical care needs projections).

***Norwest Bank, N.A. v. Kmart Corp.*, 1997 WL 33479072 (N.D.Ind.,1997)** (Life care planner unable to cite any literature to support opinion; use of recognized methodology is a substantial consideration in the *Daubert* analysis in the sense that opinion testimony is unlikely to be admitted if recognized methodologies, but use of a recognized methodology does not breathe reliability into an opinion formed without reference to scientific principle; opinions based solely training and experience rather than on any scientific principle held inadmissible).