FORD MOTOR COMPANY'S COMMENTS TO THE ADVISORY COMMITTEE ON EVIDENCE AND ITS RULE 702 SUBCOMMITTEE

September 26, 2020

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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Amending Federal Rule of Evidence 702

Ford Motor Company ("Ford") appreciates the opportunity to submit its Comments to the Advisory Committee on Evidence and its Rule 702 Subcommittee ("Subcommittee") in support of amending Federal Rule of Evidence 702.

INTRODUCTION

Ford urges the Subcommittee to recommend an amendment to Rule 702 that would add explicit direction that trial courts must determine, by a preponderance of the available evidence, whether each of the admissibility requirements set forth in Rule 702(b), (c) and (d) have been met before an expert's opinions may be presented to the jury. In concluding that Rule 702 needs to be amended, Ford draws on its extensive litigation experience. Over the past 20 years Ford has tried to verdict more than 1,000 cases, including product liability, personal injury, employment, class actions, intellectual property, commercial, and consumer warranty. Ford has seen that many judges fail to recognize the courts' obligation to determine if an expert's analysis meets all elements of Rule 702.

FORD'S EXPERIENCE WITH RULE 702

Ford's experience shows that even appellate decisions giving strong direction about the courts' gatekeeping duties have been insufficient to impress upon trial judges what they must do to fulfill their role under Rule 702. *Nease v. Ford Motor Co*., a recent product liability lawsuit, illustrates the point. The plaintiffs in that case offered expert testimony that contaminants caused the subject vehicle's speed control cable to bind, leaving the throttle stuck in the open position and causing a crash.[1] Ford challenged the admissibility of these opinions due to the expert's insufficient factual basis and unreliable methodology as applied to the facts of the case:

[1] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 4508691, at *2 (S.D. W.Va. July 24, 2015).

- inspections of the vehicle showed the speed control cable was not bound up and no materials were actually found wedged between the components at issue;
- the expert's borescope examination of the subject vehicle's components could not be distinguished from a different vehicle that was known not to have experienced a stuck throttle event;
- the expert never demonstrated speed control cable binding on the subject vehicle;
- the expert did not conduct any tests showing that accumulation of contaminants could ever overcome the spring pressure to cause a throttle to remain in the open position.[2]

The district court rejected Ford's motion to exclude this opinion testimony, declaring – despite the directives of Rule 702(b) and (d) – that "[e]very argument raised by Defendant goes to the weight, not admissibility, of his testimony."[3] The viability of the plaintiffs' case depended entirely on this opinion testimony. The lawsuit went to trial and the jury returned a verdict for the plaintiffs.

The Fourth Circuit, after reviewing how the district court addressed this key opinion testimony, concluded that "the court abandoned its gatekeeping function[.]"[4] The expert's opinions were not "based upon sufficient facts or data or the product of reliable principles and methods applied reliably to the facts of the case,"[5] and the district court's unconsidered dismissal of Ford's motion to exclude reflected a failure to understand the court's duty under Rule 702:

> For the district court to conclude that Ford's reliability arguments simply "go to the weight the jury should afford Mr. Sero's [plaintiff's expert witness] testimony" is to delegate the court's gatekeeping responsibility to the jury. The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. The district court's "gatekeeping function" under *Daubert* ensures that expert evidence is sufficiently relevant and reliable <u>when it is submitted to the jury</u>. Rather than ensure the reliability of the evidence on the front end, the district court effectively let the jury make this determination after listening to Ford's cross examination of Sero.[6]

Despite the clear guidance that the Fourth Circuit provided, Ford observes that even in the immediate aftermath of *Nease,* courts within that circuit do not grasp that fulfilling Rule

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[2] *Id*.

[3] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 1181643, at *1 (S.D. W.Va. March 13, 2015). *See also Nease*, 2015 WL 4508691, at *3 (denying Ford's Rule 50(b) post-trial motion, stating "[t]he Court finds that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility.").

[4] *Nease v. Ford Motor Co*., 848 F.3d 219, 230 (4th Cir. 2017).

[5] *Id*. at 232.

[6] *Id*. at 231(emphasis original)(quotation omitted).

702's obligations demands that courts assess as a preliminary admissibility question whether the requirements of Rule 702(b), (c) and (d) are established by a preponderance of the evidence.[7] Three rulings exemplify this point. In *Sardis v. Overhead Door Corp*., the court rejected a motion to exclude based on the inadequacy of the expert's factual basis without finding that the expert had a sufficient foundation. The court declared that "a lack of testing, however, affects the weight of the evidence, not its admissibility" and noted that the defendant could address the expert's deficiencies with "vigorous cross-examination[.]"[8] Similarly, in *Patenaude v. Dick's Sporting Goods, Inc.*, the court dismissed a challenge aimed at the inadequacy of an expert's factual basis by stating, in contradiction to Rule 702(b), "it is well settled that the factual basis for an expert opinion generally goes to the weight, not admissibility."[9] Most recently, the court in *Rhyne v. U.S. Steel Corp*. repeatedly brushed aside arguments about the foundational deficiency of an expert's differential diagnosis, indicating that the factual basis is a matter solely for the jury to assess when deciding the weight to be given the opinions.[10] In doing so, the *Rhyne* court quoted a Fourth Circuit opinion issued just two months after the *Nease* decision that controverts both Rule 702(b) and the core *Nease* holding: "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility."[11]

In Ford's view, the bewildering situation in the Fourth Circuit reveals the depth of ongoing judicial confusion about the courts' role in gatekeeping. Even following the *Nease* ruling and its unambiguous directive that "Rule 702 imposes a special gatekeeping obligation on the trial judge," many trial judges still will not evaluate the sufficiency of an expert's factual foundation or the reliability of the expert's methodological application to the facts of the case.[12]

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[7] The Fourth Circuit is certainly not unique in this regard, although Ford will confine its comments to the caselaw of the Fourth Circuit as a concise example of the widespread judicial inconsistency.

[8] Case No. 3:17-CV-818, 2019 WL 560273, at *3 (E.D. Va. Feb. 12, 2019)(quotation omitted).

[9] Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019).

[10] Case No. 3:18-CV-00197-RJC-DSC, at *11, *16, *17-18 (W.D.N.C. July 23, 2020).

[11] *Bresler v. Wilmington Trust Co*., 855 F.3d 178, 195 (4th Cir. 2017). Notably, this statement quotes *Structural Polymer Grp. v. Zoltek Corp*., 543 F.3d 987, 997 (8th Cir. 2008), but that opinion discloses that the proposition actually comes from a pre-*Daubert* ruling, *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.,* 974 F.2d 1015, 1019 (8th Cir.1992). This is a common occurrence. *See* Lee Mickus, "Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence," Washington Legal Foundation Working Paper No. 217, at 25 n.77 (May 2020)("Pronouncements that challenges to an expert's factual basis or application of the methodology bear only on the weight of the testimony, not its admissibility, consistently stem from pre-*Daubert* decisions."). The tendency of some courts to structure their expert assessments around stale caselaw statements contributes to the courts' inconsistency and confusion about the admissibility standard. *Id*. at 24-25.

[12] Remarkably, district courts in recent cases such as *Rhyne*, *Patenaude* and *Sardis* have quoted the *Bresler* statement that "questions regarding the factual underpinnings of the expert witness's opinion affect the weight and credibility of the witness's assessment, not its admissibility" even though that language was specifically identified as an example of "wayward case law" that disregards Rule 702(b). Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 44-45 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018). *Rhyne* even post-dates Judge Schroder's identification of the *Bresler* statement as "effectively

The lack of uniformity in the treatment of opinion testimony leaves litigants guessing about how courts will address evidence critical to the viability of claims and defenses.

If a circuit ruling like *Nease* will not focus the attention of judges within that same circuit on the findings the court must make when applying Rule 702, then an amendment to Rule 702 is necessary to re-align the courts with the intended operation of the rule and bring consistency to the gatekeeping function. An amendment should add direction that the court must find by a preponderance of the evidence that the requirements of Rule 702(b), (c) and (d) have been established.[13] This change to the rule should be accompanied by a detailed Committee Note indicating that prior cases declaring an expert's factual foundation or methodological application to be questions of weight solely for the jury to determine do not reflect the Rule 702 standard. Ford expects that these actions would bring court approaches to expert admissibility in line with the intended operation of Rule 702.

CONCLUSION

Ford appreciates the Subcommittee's interest in examining Rule 702 practice and the beneficial effect an amendment would have to address ongoing court confusion about the expert admissibility standard. Please do not hesitate to contact Ford if the Subcommittee would like Ford to provide further information or assistance.

Ford Motor Company

John Mellen
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vitiat[ing] the application of Rule 104(a) to Rule 702(b)." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2050 (2020).

[13] *See*, *e.g.*, International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping at 6 (July 31, 2020)(suggesting language for amendment). In other contexts, Federal Rules of Evidence specify that judges must determine particular issues and incorporate the burden of production. *E.g.*, Fed. R. Evid. 411(b)(2)("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."); Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following. . .").