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Texas Board of Legal Specialization
Civil Trial Law

October 5, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

As you know, the Advisory Committee on Evidence Rules is considering an amendment to Federal Rule 702 to clarify that the reliability and relevance requirements for admissibility of expert opinion evidence are threshold issues to be decided by the Court. The undersigned are trial lawyers whose practice regularly requires us to address expert evidence admissibility issues. Our practice is primarily on the defense side of toxic tort matters. Mr. Scott has defended and tried toxic tort cases in state and federal courts dating back to the late 1970's. Ms. Jordan and Mr. Scott have sought to limit and/or exclude unreliable expert opinion evidence in numerous cases. While most of those cases involved claims that exposure to chemicals caused a Plaintiff to develop cancer, we also have recent trial and Rule 702 experience in a maritime personal injury case involving the medical cause of the Plaintiff's amputated leg.

We would like to describe some of our experiences in addressing these issues in the hope that it may assist the Advisory Committee in understanding the need for clarity and consistency among federal courts evaluating the admissibility of scientific and technical evidence. Most of the federal court cases we have had involving Rule 702 issues have been heard by thoughtful and conscientious judges who took their evidentiary gatekeeping role seriously. Because that approach differs significantly from our experience in a number of state courts, we will compare our state and federal court experiences to demonstrate just how important it is that federal trial courts engage in a critical evaluation of the objective reliability of expert evidence. We are hopeful that our experiences, both favorable and unfavorable, will provide a helpful perspective to the Advisory Committee.

We begin with the observation that Rule 104 clearly requires the Court to decide preliminary questions under Rule 702, not only regarding witness qualifications, but also admissibility of evidence. The language of Rule 104 (a) is mandatory: "The court *must* decide any preliminary question about whether . . . evidence is admissible." If proffered evidence

doesn't meet the standards of Rule 702, it should be considered no evidence or at a minimum incompetent evidence, like hearsay. In the same way that we don't ask a jury to decide questions surrounding hearsay, relevance, or other admissibility questions, Rule 104 (a) makes those determinations for the Court and Rule 104(b) even presumes the Court, not the jury, will hear proof of whether a fact exists to determine relevance.

It can and has been reasonably argued that the current language of Rule 702 is not vague or ambiguous. Rule 702 establishes what expert evidence is admissible and would make little sense if the jury was to decide admissibility. The very basis for allowing expert testimony is that the expert evidence will assist the lay trier of fact in understanding a technical or specialized subject. Even then, Rule 702 (b), (c) and (d) require that the proffered expert evidence must be based on sufficient facts, reliable methods and the reliable application of the methods to the facts. Unfortunately, perhaps based on the same concerns that Justice Rehnquist raised in his concurrence and partial dissent in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),[1] many trial Judges conclude that the reliability and relevance questions inherent in determining the admissibility of scientific and technical evidence are matters better left to the jury.

Federal Court consideration of the reliability of expert evidence – Our experience

We describe three cases below in which the admissibility of expert evidence was a key issue. Two of the cases we describe below involved complicated medical and scientific evidence regarding the question of admissibility of expert opinion evidence that certain chemical exposures were capable of causing a hematologic malignancy known as acute myeloid leukemia. *See, Castellow v. Chevron USA, et al,* 97 F. Supp. 2d 780 (S.D.Tx. 2000) and *Burst v. Shell Oil Co., 120 F. Supp. 3d 547* (E.D.La. 2015), *aff'd, 650 Fed. Appx. 170* (5th Cir. 2016), *cert. den.*, 2016 U.S. LEXIS 6219 (U.S., Oct. 11, 2016). In both instances, the trial court conducted a somewhat lengthy *Daubert* hearing at which experts retained by both the proponent of the evidence and by our clients who opposed the evidence as inadmissible testified before the Court. In both cases, the trial court's opinion excluding expert evidence and granting summary judgment, was published. In *Burst*, the trial court order excluding experts and granting summary judgment were appealed to the Fifth Circuit, but affirmed. The third case we describe, *Gowdy v. Marine Spill Response Corporation*, was brought by a seaman who claimed that an alleged injury incurred on a merchant vessel resulted in the amputation of his leg. While the Court did not conduct a formal *Daubert* hearing, the proffered expert evidence was addressed based on the expert report and deposition testimony and severely limited. That case, with the limitations on the scope of an expert's opinions was tried to a defense verdict.

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[1] Chief Justice Rehnquist concurred in part and dissented in part noting: "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role."

Castellow v. Chevron USA, et al, 97 F. Supp. 2d 780; 2000 U.S. Dist. LEXIS 9090 (S.D.Tx 2000). The *Castellow* case was brought by the family of a 30 plus year gasoline station attendant, manager and owner who developed acute myeloid leukemia ("AML") from which he died. The Plaintiffs claimed that Mr. Castellow was exposed to benzene contained as a relatively minor constituent in gasoline which he pumped into cars and used as a cleaning solvent. There was no dispute that exposure to pure benzene at sufficiently high levels was capable of causing AML. However, the studies of workers exposed to gasoline, which by definition contained some small amount of benzene, did not show any increase in the incidence of AML.

Plaintiffs retained multiple medical causation expert witnesses who generally offered opinions that benzene exposure from the gasoline Mr. Castellow used resulted in a sufficient level of benzene exposure to cause AML. Plaintiffs offered an exposure assessment expert who claimed to calculate the level of benzene exposure from the tasks in which Mr. Castellow used gasoline. Plaintiff's medical causation experts relied on that exposure assessment in reaching opinions that the benzene exposure level was sufficient to cause AML. However, when Plaintiff's exposure assessment expert was asked to use the same assumptions to calculate the level of toxic gasoline exposure, he calculated a dose that would have been repeatedly acutely lethal, forcing him to acknowledge the unreliability and, in fact, the impossibility of his estimates.

On Defendants' motion, the Court agreed to conduct a hearing with live expert evidence on the Rule 702/*Daubert* issues regarding admissibility of both the exposure assessment evidence and the Plaintiffs' expert testimony that benzene exposure from gasoline was capable of causing AML. The two-day hearing involved not only a detailed critical evaluation of the exposure assessment but also of the scientific literature studying workers exposed to gasoline. The Court concluded that the exposure assessment of Plaintiffs' expert relied on modeling rather than published studies of workers who performed the same tasks as Mr. Castellow, repeatedly utilized assumptions which were inconsistent with the actual undisputed facts and had been repeatedly revised by the expert sponsoring it to correct admitted errors.[2] With regard to the question of whether gasoline exposure can cause leukemia, the Court concluded that the "pertinent studies show that persons exposed to gasoline, by occupation, do not reflect a statistically significant excess rate of AML, or even leukemias generally." Having found the Plaintiffs' expert evidence unreliable and inadmissible, the Court granted the Defendants' summary judgment motion.

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[2] Interestingly, some trial courts have suggested that the Rule 702/*Daubert* gatekeeping function is meant to "screen the jury from unreliable nonsense opinions, but not to exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.,* 738 F.3d 960, 969 (9th Cir. 2013). That analysis forgoes the threshold established by Rule 702 that the proffered expert evidence must meet reliability and relevance standards to be admissible. The trial court in *Castellow* noted the Defendants' asserted the proffered evidence did not meet the "laugh test," yet nevertheless, performed the required detailed analysis of that evidence.

The level of detail in the *Castellow* Court's analysis reflects exactly the approach that should be dictated by Rule 702 and *Daubert*. The Court did not supplant the jury because a jury should only hear relevant and admissible evidence. In the same way that courts regularly evaluate questions of relevance, hearsay or similar evidentiary considerations to determine admissibility, the court determined that there was no admissible factual or scientific foundation for the opinions of the Plaintiffs' experts.

Burst v. Shell Oil Co., 120 F. Supp. 3d 547 (E.D.La. 2015), *aff'd, 650 Fed. Appx. 170* (5th Cir. 2016), *cert. den.,* 2016 U.S. LEXIS 6219 (U.S., Oct. 11, 2016). The *Burst* case involved claims by Plaintiff Burst that her husband developed AML as a result of exposure to benzene from the use of gasoline over 40 years after his work as a service station mechanic and attendant. There is no question that all gasoline contains some benzene (roughly, less than 1% to as much as 4%). Plaintiff filed an early motion for partial summary judgment asking the Court to find as a matter of law that "benzene can cause AML" trying to frame the general causation issue. The Defendants acknowledged that under some circumstances (not present in or relevant to the *Burst* case), benzene exposure can cause AML. However, the Defendants responded that the "proper general causation question is whether exposure to *gasoline*, not benzene, can cause leukemia [arguing] that there is no established causal connection between exposure to gasoline, which contains a small amount of benzene, and development of leukemia." *See*, U.S. District Judge Sarah Vance August 8, 2014 Order and Reasons in Civil Action No. 14-109 (E.D.La.) Judge Vance agreed "that the proper general causation question in this case is whether exposure to gasoline containing benzene can cause leukemia, not whether exposure simply to benzene can cause leukemia." *Id.*

Plaintiffs proffered experts on exposure assessment and on the question of whether gasoline (or benzene in gasoline) exposure can cause AML. Defendants filed Rule 702/*Daubert* motions, supported by expert affidavits, seeking to exclude all of the experts designated by Plaintiff, including both exposure assessment and medical causation experts. The Court reviewed the Plaintiffs' expert reports as well as the controverting reports of defense experts and scheduled a *Daubert* hearing at which she requested testimony from one Plaintiff expert and two defense experts. At the hearing, each side questioned the experts as did the Court. Following the *Daubert* hearing, the Court in extraordinarily detailed opinions excluded the Plaintiffs' experts as unreliable and granted summary judgment because the Plaintiff proffered no admissible evidence on general causation. *See*, U.S. District Judge Sarah Vance June 29, 2015 Order and Reasons in Civil Action No. 14-109 (E.D.La.)

Gowdy v. Marine Spill Response Corporation, 925 F.3d 200, 208 (5th Cir. 2019). Plaintiff James Gowdy alleged that he injured his left foot when he stepped off the last rung of a ladder that was dangerously raised four feet off the floor, while employed as a seaman aboard a Marine Spill Response Corporation ("MSRC") vessel. Mr. Gowdy further alleged that this injury caused a neuropathic condition which ultimately resulted in the amputation of his foot. It was undisputed that Mr. Gowdy suffered from several pre-existing conditions, including a documented history of uncontrolled diabetes, which is well-established within the medical

community as being the most common cause of the neuropathic condition which resulted in his foot amputation.

Mr. Gowdy initially failed to designate any expert testimony on the issue of medical causation and MSRC moved for summary judgment, which was granted by the trial court. On Appeal, the Fifth Circuit reversed the trial court's ruling on the narrow issue that expert testimony was not required because "[s]tepping down from a high ladder rung and fracturing one's foot is closer to breaking one's leg after being hit by a car than to developing cancer after years of toxic tort exposure or experiencing a back injury explicable only by general working conditions underneath a train. The causal link in this case can be understood by jurors based on everyday knowledge and experience."

However, during the trial of the case, Plaintiff attempted to present expert testimony evidence from his treating podiatrist and other lay witnesses that the alleged fracture sustained by Mr. Gowdy ultimately caused various complex medical complications, like the neuropathic condition which resulted in the ultimate amputation. MSRC argued that Plaintiff should not be permitted to present any such expert evidence based on Gowdy's failure to timely designate experts or alternatively, that a Daubert hearing was necessary to test the sufficiency of the evidence under Rule 702. The trial court agreed and granted MSRC's motion in *limine* on complex medical causation. The Court excluded testimony from the podiatrist on the clearly expert questions regarding whether the alleged foot injury stepping off the ladder caused the neuropathic condition and amputation, while allowing the podiatrist to discuss his treatment of the foot injury.

The federal Courts in the three cases described above, exercised their gatekeeping role in exactly the way anticipated by Rules 104 and 702. We have had a very different experience in *Daubert* state courts across the country in which the court was reluctant to or simply refused to engage in any meaningful evidentiary gatekeeping exercise. The reason for the different approach may be that state court judges typically do not have the resources and law clerks that federal trial courts have or that elected judges are not inclined to grant dispositive motions. Nevertheless, the typical approach to consideration of challenges to technical and scientific evidence in *Daubert*-following state courts, in our experience, is to declare a battle of the experts and leave it to the jury to resolve the dispute with no evaluation of whether the challenged evidence is based on a sufficient factual predicate, an appropriate and accepted methodology and application of that methodology to the facts. Evaluation of those factors is essential to the Court's determination that the evidence will assist the lay trier of fact in understanding a specialized subject.

While we have experienced many cases in which our client's legitimate challenge to expert evidence was given no more than a cursory evaluation and perhaps a short hearing with a

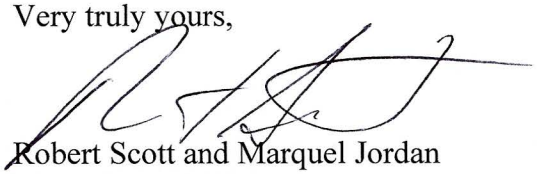
foregone conclusion, perhaps the most extreme example we have experienced of state court hostility to the gatekeeping role of the trial judge was an unusual toxic tort leukemia case in Louisiana. We were retained in the case following a trial court discovery order in which the Court struck our client's defenses as a discovery sanction. The Plaintiff suffered from a type of leukemia known as acute promyelocytic leukemia ("APL"). On the issue of causation, the plaintiff offered a medical expert who had little in-depth understanding or knowledge of APL or its etiology.

The Defendants had a well-qualified hematology expert who had collected the medical literature demonstrating that 95% of APL cases were *de novo* or of no known cause and that exposure to benzene, the chemical at issue in the case, had not been associated with the development of APL in the scientific literature. The Defendants argued that while their defenses had been struck, Plaintiff still had to put on a *prima facie* case, including on the issue of medical causation. Defendants filed a motion to exclude the Plaintiff's only medical causation expert based on the Louisiana *Daubert* rule. *State v. Foret,* 628 So.2d 1163 (La. 1993). The trial court not only refused to allow Defendants to offer their own expert on the issue of medical causation in support of the motion to exclude, the court also refused to allow Defendants to cross-examine the Plaintiff's expert on the clear science demonstrating that benzene exposure is not causally associated with the development of APL. *See Monte McWilliams v. ExxonMobil, et al*, No. 2009-2803, Div. D, Parish of Calcasieu. In short, there was no scientific evidence supporting any causal association between exposure to benzene and the development of APL.

The McWilliams case is but one in which state courts have declined to exercise the necessary gatekeeping role to ensure that juries hear reliable and relevant evidence. As we set out above, a number of federal courts have embraced the obligation that as judges, they must determine that scientific evidence is sufficiently reliable that it will assist the trier of fact. That obligation is no less important than the decisions trial judges make every day to exclude hearsay, irrelevant evidence or other incompetent evidence. We whole-heartedly endorse any amendment to Rule 702 or the Committee Notes regarding the rule which makes even more clear that the rule is mandatory and requires the trial court to make basic admissibility decisions, even if the technical subject matter seems daunting.

We would be pleased to submit our CVs or bios as well as the opinions, motions and orders from the cases referred to in this comment. Thank you for your consideration.

Very truly yours,



Robert Scott and Marquel Jordan
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From: Scott, Bob
To: RulesCommittee Secretary
Cc: Jordan, Marquel
Subject: Robert Scott and Marquel Jordan Comments on Federal Rule Evidence 702
Date: Monday, October 05, 2020 11:47:52 PM
Attachments: Robert Scott and Marquel Jordan Comments on Rule 702 amendment.pdf

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Rebecca A. Womeldorf, Secretary
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Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Ms. Womeldorf,

I have attached a letter setting out comments my colleague Marquel Jordan and I have made regarding the proposed amendments to Rule 702. Marquel and I are trial lawyers and have tried personal injury cases across the country in state and federal courts. As our comments set out, we have been fortunate to have a number of federal courts favorably consider Rule 702/*Daubert* challenges to unreliable scientific and medical evidence and testimony. Our experience in state courts in states which have adopted the *Daubert* standard has been less favorable. However, the consistency, clarity and fairness of process and result in courts which take their Rule 702 gatekeeping role seriously and conscientiously is remarkable and worthwhile.

We will be delighted to provide our CVs as well as copies of the opinions and orders to which we refer in our comments.

Thanks you for considering these comments.

Robert Scott and Marquel Jordan

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