MEALEY'S™

Daubert Report

September 2009 Volume 13, Issue #9

Child Murder Conviction Overturned For Expert Exclusion, Confrontation Error

DALLAS — A Texas Fifth District Court of Appeals panel on Aug. 28 reversed a nanny's conviction for the murder of one of her charges, finding that the trial court's exclusion of a cabinet-maker's testimony was error and that admission of DNA test results violated her rights under the confrontation clause. **SEE PAGE 4.**

D.C. Judge Failed To Consider Eyewitness I.D. Expert Before Exclusion

WASHINGTON, D.C. — A trial court applied incorrect legal principles and nearly adopted a per se rule of exclusion when it barred an eyewitness identification expert from testifying for the defense in a murder-kidnapping trial in which the sole evidence was witnesses' identification, a District of Columbia Court of Appeals panel held Sept. 3. **SEE PAGE 5.**

Suit Against Law Firm, Experts Resurrected For Improper Expert Exclusion

BOSTON — A man suing his law firm and his expert over their performance in underlying litigation should not have been barred because of a low response rate from presenting expert survey testimony that supported his original claim, a Massachusetts Appeals Court panel held July 14. **SEE PAGE 6.**

11th Circuit OKs Exclusion Of Damages Opinion On Hospital Group's Turbocharging

ATLANTA — Expert testimony on the damages caused to a hospital by another hospital chain's overcharging for Medicare reimbursements was overly broad because it went beyond the liability theory, the 11th Circuit U.S. Court of Appeals held Sept. 4 in affirming its exclusion. **SEE PAGE 8.**

Economist Needed To Verify Source Of Business Loss Data, Federal Judge Says

WILMINGTON, Del. — An expert who used a strategic business plan for the basis for his antitrust damages estimate must be excluded because he did not verify the data underlying the plan, a federal judge in Delaware held Aug. 20. **SEE PAGE 9.**

1st Circuit: Land Value Expert Lacked Support For Development Potential

BOSTON — A trial judge correctly excluded an expert's valuation of land being taken by the federal government because he lacked support for his conclusion that the protected coastal property would be rezoned for residential development or that sand could be extracted and sold, a First Circuit U.S. Court of Appeals panel held Sept. 11. **SEE PAGE 11.**

3rd Circuit Resurrects Employer's Claim Of Proprietary Secrets Theft

PHILADELPHIA — A New Jersey federal judge wrongly limited an engineer's testimony regarding proprietary information and reverse engineering in the rubber molding industry on grounds that he lacked experience in the specific subindustry at issue in the proprietary secrets case, a Third Circuit U.S. Court of Appeals panel held July 30. **SEE PAGE 12.**

Federal Judge In Kansas: Aircraft Safety Can't Be Predicted With Graph

KANSAS CITY, Kan. — A forensic weather analyst's attempt to predict a plane's relative safety by plotting aircraft data on a graph is untested and not generally accepted, a federal judge in Kansas held Sept. 9 in barring his testimony in the Cessna products liability multidistrict litigation. **SEE PAGE 13.**

Michigan Panel Affirms $2.5M Verdict For PIP Insurance Benefits

LANSING, Mich. — An anesthesiologist was qualified to testify about the necessity of pain management injections to a woman's face, and his treatment protocol was generally accepted and reliable, a Michigan Court of Appeals panel held Aug. 25. **SEE PAGE 15.**

Alcohol-Detection Bracelet Meets Admissibility Standard, S.D. High Court Concludes

PIERRE, S.D. — The methodology underlying an alcohol-monitoring ankle bracelet and the expert opinion on its results are sufficiently reliable to pass muster under Daubert, the South Dakota Supreme Court held Sept. 16 in affirming its admission in a probation revocation proceeding. **SEE PAGE 17.**

LexisNexis®

Kristin Casler
editor

Maureen H. McGuire
editorial director

David Eldreth
managing editor

Jennifer Hay
copy desk manager

Amy Bauer
marketing brand manager

Barbara Mather
senior production associate

Advertising opportunities
call 1-800-MEALEYS

The Report
is produced monthly by
LexisNexis® Mealey's™

1018 West Ninth Avenue
3rd Floor
King of Prussia, Pa. 19406

Telephone: (610) 768-7800
1-800-MEALEYS (1-800-632-5397)
Fax: (610) 205-1139
Email: mealeyinfo@lexisnexis.com
Web site: www.lexisnexis.com/mealeys

Print: $834* for a full year
* Plus sales tax, shipping and handling where applicable.

An online version of this report with email delivery is also available through LexisNexis on www.lexis.com. Contact your LexisNexis representative or call 1-800-223-1940 for details.

ISSN 1092-7565

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Mealey's is a trademark of LexisNexis, a division of Reed Elsevier Inc. © 2009, LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

MEALEY'S™

Daubert Report

September 2009 Volume 13, Issue #9

Cases in this Issue **Page**

Ada Betty Cuadros-Fernandez v. State of Texas, No. 05-06-01464-CR, Texas App., 5th Dist. 4
Raymond L. Benn v. United States of America, No. 03-CF-946, D.C. App. 5
Harvey Albert v. Albert P. Zabin, et al., No. 08-P-889, Mass. App. 6
Boca Raton Community Hospital v. Tenet Health Care Corp., No. 07-14352, 11th Cir. 8
ZF Meritor, et al. v. Eaton Corp., No. 06-623-SLR, D. Del. 9
Compania Embotelladora del Pacifico v. Pepsi Cola Co., No. 00 Civ. 7677 (JSR), S.D. N.Y. 10
United States of America v. 33.92356 Acres of land, et al., No. 08-2263, 1st Cir 11
Thomas & Betts Corp. v. Richards Manufacturing Co., et al., Nos. 08-3117, 08-3269, 3rd Cir. 12
In re: Cessna 208 Series Aircraft Products Liability Litigation, MDL No. 1721, Case No. 05-md-1721-KHV, D. Kan. 13
Sheri M. Anderson v. State Farm Mutual Auto Insurance Co., No. 277096, Mich. App. 15
Louise Detloff, et al., v. Absecon Manor Nursing Center and Rehabilitation Center, No. A-5941-07T2, N.J. Super., App. Div. 16
Kentucky Farm Bureau Mutual Insurance Co. v. Hitachi Home Electronics (America), Inc., No. 3: 08-30-DCR, E.D. Ky., Central Div. 17
State of South Dakota v. Neal J. Lemler, No. 24815, S.D. Sup. 17
State of New York v. Brandon W. Hampson, No. 2006NA021294, N.Y. Dist., 1st Dist., Nassau Co. 19
Claudia Rotoli v. Secretary, No. 99-644V; David Myers v. Secretary, No. 99-631V; Colleen Torbett v. Secretary, No. 99-660V; Mona Porter v. Secretary, No. 99-639V; Allison Hager v. Secretary, No. 01-307V, Fed. Clms. 19
Robert Daddio, et al., v. A.I. DuPont Hospital for Children of the Nemours Foundation, et al., No. 05-441, E.D. Pa. 20
General Motors Corp. and Ford Motor Co. v. Roland Leo Grenier Sr., Nos. 453,2007, 578,2007, Del. Sup. 22
Jeff Tamraz, et al v. Lincoln Electric Co., et al., No. 08-4015, 6th. Cir. 23
In Re: Bausch & Lomb Contact Lens Solution Products Liability Litigation, MDL Docket No. 1785, No. 2:06-MN-77777-DCN, D. S.C., Charleston Div. 24
Sharon Chism, et al. v. Ethicon Endo-Surgery Inc., et al., No. 08-341, E.D. Ark. 26
In Re: Neurontin Marketing, Sales Practices, and Products Liability Litigation, MDL Docket No. 1629, No. 04-10981, Ruth Smith, et al. v. Pfizer, Inc., No. 05-11515, D. Mass. 26
In Re: Fosamax Products Liability Litigation, MDL Docket No. 1789, No. 06-md-1789, S.D. N.Y. 28
In Re: Zyprexa Products Liability Litigation, MDL Docket No. 1596, No. 04-md-1596, Arlene Earl, et al. v. Eli Lilly & Company, No. 07-3912, E.D. N.Y. 30
Lewis E. Knapper, et al. v. Safety Kleen Systems, Inc., et al., No. 9:08-cv-00084-TH, E.D. Texas 31
Ben N. Brown, Sr. v. Shell Oil Company, et al., No. 08-CV-413, S.D. Texas 32

For other available documents from cases reported on in this issue, visit *www.mealeysonline.com* or call 1-800-MEALEYS.

In this Issue

Cabinetry
Child Murder Conviction Overturned For Expert Exclusion, Confrontation Error .... page 4

Eyewitness Identification
D.C. Judge Failed To Consider Eyewitness I.D. Expert Before Exclusion .... page 5

Survey / Damages
Suit Against Law Firm, Experts Resurrected For Improper Expert Exclusion..................... page 6

11th Circuit OKs Exclusion Of Damages Opinion On Hospital Group's Turbocharging... page 8

Economist Needed To Verify Source Of Business Loss Data, Federal Judge Says .... page 9

New York Federal Judge Nixes Damages Expert From Pepsi Contract Suit................ page 10

Valuation
1st Circuit: Land Value Expert Lacked Support For Development Potential........... page 11

Engineering
3rd Circuit Resurrects Employer's Claim Of Proprietary Secrets Theft........................ page 12

Federal Judge In Kansas: Aircraft Safety Can't Be Predicted With Graph.................. page 13

Pain Management
Michigan Panel Affirms $2.5M Verdict For PIP Insurance Benefits................................ page 15

Standard Of Care
New Jersey Court Finds Nurse Expert May Offer Opinion On Causation............ page 16

Fire
Investigation Based On National Fire Standards Reliable, Federal Judge Holds..... page 17

Alcohol
Alcohol-Detection Bracelet Meets Admissibility Standard, S.D. High Court Concludes....... page 17

Medical Causation
New York Judge Allows Zoloft Causation Opinion In Defense Of Assault Charges.... page 19

Special Master Chided; Compensation Ordered For Hepatitis B Petitioners .... page 19

U.S. Judge Says Heart Doctor's Opinion On Surgery Length Lacked Reliable Methods.... page 20

Delaware High Court: Chrysotile Asbestos Testimony Properly Admitted...................... page 22

Plaintiff Asks 6th Circuit To Order Daubert Transcripts Added In $21 Million Appeal .... page 23

Nonfungal Infection Expert Excluded In MoistureLoc MDL .... page 24

Summary Judgment Denied In Ethicon Stapler Case .... page 26

2 Suicide Causation Experts Stay In MDL Case... page 26

Fosamax Jaw Injury Claims For Short-Term Use Survive As MDL Allows 2 Experts...... page 28

Zyprexa Expert, Doctor Admissible In MDL Death Case, But Lilly Alleges 'Sham'.......... page 30

Benzene Plaintiff: Experts Used Same Methodology As Defense Experts................ page 31

Industrial Hygiene
Shell Oil Defends Industrial Hygienist's Opinion On Dermal Exposure .... page 32

News

Child Murder Conviction Overturned For Expert Exclusion, Confrontation Error

DALLAS — A Texas Fifth District Court of Appeals panel on Aug. 28 reversed a nanny's conviction for the murder of one of her charges, finding that the trial court's exclusion of a cabinet-maker's testimony was error and that admission of DNA test results violated her rights under the confrontation clause (Ada Betty Cuadros-Fernandez v. State of Texas, No. 05-06-01464-CR, Texas App., 5th Dist.; 2009 Tex. App. LEXIS 6896).

(**Opinion available.** Document #30-090928-003Z.)

Ada Betty Cuadros-Fernandez was convicted in the 380th District Court for Collin County for capital murder of 14-month-old Kyle Lazarchik. Cuadros-Fernandez was the live-in nanny for Kyle and his twin, Ryan.

Fatal Head Injuries

In October 2005, Cuadros-Fernandez called 911 and reported that Kyle had vomited and was choking. At the hospital, several head injuries were discovered. Kyle was placed on life support, but eventually he was determined to be brain dead.

Cuadros-Fernandez told investigators that she may have struck Kyle's head on a door jamb as she raced from the room with him on her hip but that she did not harm him in any other way.

The prosecution theorized that Cuadros-Fernandez struck Kyle's head on a kitchen cabinet door so severely that it broke the door. She then taped the crack with masking tape. To support its theory, prosecutors presented evidence that Cuadros-Fernandez's DNA was on the masking tape on the cabinet door and that the pattern of small nail holes on the inside of the door matched a wound on Kyle's head.

Expert Exclusion

The trial court found Cuadros-Fernandez's cabinetry expert, David Gardner, inadmissible under Daubert v. Merrill Dow Pharm., Inc. (509 U.S. 579 [1993]). He was allowed to testify as a fact witness about cabinet manufacturing. Gardner, who was production manager at the company that built and installed the Lazarchiks' cabinets, opined that the damage to the cabinet door was not consistent with something hitting against the back of it with great force. He said the most likely causes were widening of a hairline crack caused by hardware installation or someone standing on or leaning on the door. He based his opinion on his years of experience analyzing damage to cabinet doors to determine if the manufacturer or the customer was responsible for the damage and his experience testing new cabinet doors to see how different forces in different places caused damage.

Cuadros-Fernandez made several arguments on appeal, including that the evidence was legally and factually insufficient to support the jury's verdict, that the admission of the DNA test results without testimony from the analyst violated her Sixth Amendment right to confrontation and that exclusion of Gardner was improper.

The appeals panel found that the evidence was legally and factually sufficient. However, it found that admission of the DNA analyst's report and notes without her being available for cross-examination at trial violated Cuadros-Fernandez's rights. The trial judge erred in denying Cuadros-Fernandez's confrontation clause objection, and the error was not harmless, the panel held.

Regarding Gardner, the panel said he had sufficient familiarity with the subject of the causes of cabinet damage, so his opinion fit the facts of the case. The

panel also held that Gardner's testimony would have assisted the jury in determining whether the cabinet door was the murder weapon.

Legitimate, Reliable

The panel said the field of determining the cause of damage to cabinetry is legitimate because that determination is necessary to apportion liability for the cost of repair or replacement. Gardner's testimony was within the scope of that field, and he relied on and used principles involved in that field, the panel said. Gardner's years of experience in this field, his knowledge of the damage to cabinets and his testing of the stresses placed on cabinets establish the reliability of his testimony. Therefore, it was error to exclude his opinion, and the error was not harmless, the panel held.

Justice Kerry P. Fitzgerald wrote the opinion for the panel, which also included Justices Joseph B. Morris and Douglas S. Lang.

Pamela J. Lakatos of Plano, Texas, represents Cuadros-Fernandez. Jeffrey S. Garon of the Collin County District Attorney's Office in McKinney, Texas, represents the state. ■

D.C. Judge Failed To Consider Eyewitness I.D. Expert Before Exclusion

WASHINGTON, D.C. — A trial court applied incorrect legal principles and nearly adopted a per se rule of exclusion when it barred an eyewitness identification expert from testifying for the defense in a murder-kidnapping trial in which the sole evidence was witnesses' identification, a District of Columbia Court of Appeals panel held Sept. 3 (Raymond L. Benn v. United States of America, No. 03-CF-946, D.C. App.; 2009 D.C. App. LEXIS 384).

(**Opinion available.** Document #30-090928-006Z.)

The panel did not reverse Raymond Benn's conviction but remanded the case to the District of Columbia Superior Court for examination of the expert's proffer and his admissibility under Dyas v. United States (376 A.2d 827 [D.C.], *cert. denied,* 434 U.S. 973 [1977]), which established a three-part test for determining eyewitness identification expert admissibility.

Witnesses

Benn was convicted of the 1992 armed kidnapping of Charles "Sean" Williams after a second jury trial. He was found not guilty of murder. Benn's first conviction was overturned by the appeals court because the trial court erred in not allowing Benn to present testimony from his mother to back up his alibi defense.

At his second trial, Benn abandoned the alibi defense and focused on the reliability of the five witnesses who identified him as one of the men who took Williams from their apartment at gunpoint. Williams was later found murdered.

All of the witnesses, including teenagers, were members of the Mahoney family, who lived in the apartment from which Williams was taken. None of the witnesses knew Benn. In their initial conversations with police, the witnesses said a photo of Benn in a photo spread looked like one of the suspects. By the time of trial, three of the five said they were 95 percent sure the abductor was Benn, based on their initial identification and identification in court. Benn was never placed in a line-up.

Penrod

Benn sought to introduce testimony from Steven Penrod regarding the unreliability of stranger-to-stranger identifications and other factors that can affect an eyewitness's identification and recollection, including confidence level as it relates to accuracy, the impact of time delay, influences during the identification process, stress, the presence of weapons and the duration of the exposure.

The trial judge did not review the studies Penrod presented or his numerous writings on the subject, and he did not question Penrod to determine admissibility.

Under Dyas, expert testimony on eyewitness identification is admissible if the testimony is beyond the ken of the average layman, the expert has sufficient skill or knowledge and the opinion is generally accepted.

The appeals panel said the trial court did not explicitly consider any of the three Dyas factors in light of the specific and detailed proffer.

"Rather, the court appears to have excluded the expert evidence at least in part based on a prior belief that the untrustworthiness of eyewitness identification is 'one of those revealed truths in the law that somebody said about 100 years ago. . . . And we don't know that that's so.'"

Helpfulness
Additionally, the judge seemed to be swayed by prosecutor arguments that the expert would usurp the jury's role.

The appeals panel said both statements were categorical and reflect a lack of attention to the proffer and its potential relevance in this case. The panel said the trial court missed its critical role in evaluating the testimony's admissibility.

"To the extent that the trial court excluded the proffered expert testimony based on what 'most' other judges do, or because, as the government urged, that expert testimony questioning eyewitness identification is 'never' helpful to the jury, it was error to fail to exercise discretion," the panel said. "But even if the trial court did not apply an automatic rule of exclusion, the ruling was nonetheless defective because it did not address the correct legal factors set out in Dyas or apply them to the expert testimony that the defense proffered."

The panel noted that, given the abundance of scientific studies that have been conducted since its Dyas holding, a more careful review under the first Dyas factor may be in order.

Case Strength
In Benn I, the appeals panel questioned the strength of the prosecution's case, given that there was no other evidence, physical or otherwise, linking Benn to the crime. The panel noted that it was not even clear what led investigators to name Benn a suspect. The panel said the trial court was bound by its holding.

The panel said Penrod would have addressed the accuracy of each individual witness's identification and the circumstances that may have influenced the initial identifications and that made possible their mutual reinforcement as a group.

"In a case grounded on eyewitness identifications of a stranger, without other corroborating evidence, and in which the defense depends entirely upon demonstrating that the identifying witnesses are not as reliable as they believe themselves to be, to preclude the defendant from presenting the scientific testimony of a qualified expert on research that is generally accepted and not known to lay jurors to prove this point is not harmless," the panel held in ordering the remand.

Judge Vanessa Ruiz wrote the opinion for the panel and was joined by Chief Judge Eric T. Washington.

Concurring Opinion
In a concurring opinion, Senior Judge Frank E. Schwelb said the trial court erred in three ways: It considered only whether expert testimony on eyewitness identification is admissible in general; it rejected as misinformed holdings from other appellate courts that stranger-stranger identification is often untrustworthy and presents the danger of misidentification; and it questioned the reliability of the Benn I holding regarding the strength of the prosecution's case.

Judge Schwelb said remand is required solely because the judge based his exercise of discretion on incorrect legal principles.

Counsel to Benn are Lee Richard Goebes, James W. Klein, Sandra K. Levick and Erin Murphy of the Public Defender Service in Washington, D.C. Assistant U.S. Attorney Ann K. H. Simon, U.S. Attorney Kenneth L. Wainstein and Assistant U.S. Attorneys John R. Fisher, Roy W. McLeese III and Colleen Covell in Washington, D.C., represent the government. ■

Suit Against Law Firm, Experts Resurrected For Improper Expert Exclusion

BOSTON — A man suing his law firm and his expert over their performance in underlying litigation should not have been barred because of a low response rate from presenting expert survey testimony that supported his original claim, a Massachusetts Appeals Court panel held July 14 (Harvey Albert v. Albert P. Zabin, et al., No. 08-P-889, Mass. App.; 2009 Mass. App. Unpub. LEXIS 572).

(**Unpublished opinion available.** Document #30-090928-005Z.)

However, because the defendants assert other deficiencies in the survey, the panel remanded the case to the trial court to address whether those alleged deficiencies warrant exclusion of the testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc. (509 U.S. 579 [1993]).

Legal Malpractice Alleged

Harvey Albert filed claims of negligent representation and breach of contract against his attorneys, Albert P. Zabin and Robert C. Zaffrann, and their firm, Schneider Reilly, and negligence and breach of contract claims against Robert Brandwein and his company, Policy and Management Associates Inc. Albert alleges that the defendants were negligent in failing to establish his damages in the underlying litigation.

Albert has a patent for a daily disposable denture container with a built-in cleansing agent. He negotiated for three years with Warner-Lambert Co. to develop and market his product. However, Warner-Lambert terminated negotiations and informed him that its Efferdent denture cleanser could not be used in Albert's product.

Albert hired Zabin and Zaffrann to file a claim for willful misrepresentation against Warner-Lambert. He said he was coerced into ending discussions with other interested investors, and he sought lost profits he would have earned from developing his product.

Survey

Brandwein conducted a concept survey of hospitals and nursing homes. The trial judge in that matter granted Warner-Lambert's motion to exclude Brandwein's testimony, finding his survey unreliable under Daubert because Brandwein failed to follow accepted standards for concept surveys. The judge said Brandwein failed to mention the price of the product, even though it was the most influential factor in the consumer's decision to purchase the product; he did not ask respondents if they would be likely to buy the product; respondents were not screened to ensure that they were qualified; none of the respondents worked at hospitals or assisted living facilities, even though the survey purported to predict lost profits on sales to those institutions; the respondents were not randomly selected; and the sample — only 20 respondents — was too small.

The trial judge then granted summary judgment to Warner-Lambert.

For the current litigation, Albert retained Opinion Dynamics Corp. to conduct a new, reliable concept survey of nursing homes and hospitals. The defendants moved for summary judgment, arguing that the new opinion was unreliable and that Albert could not establish a causal connection between their conduct and his financial loss.

The trial judge granted the motion, finding that the new survey was not reliable under Daubert because the response rate was below 50 percent.

The appeals panel noted that because the legal malpractice claim involved an opinion survey that did not comply with Daubert, Albert must produce one that does. If he is unable to, he cannot establish causation and damages.

Admissible

Daubert, the panel said, was not meant to disqualify testimony of an expert who adopts a recognized methodology, even though it is not the methodology on which the adverse party prefers to rely and even though the adverse party makes a case that the methodology may have been incorrectly applied.

While industry standards urge caution when accepting survey results with a response rate under 50 percent, a low response rate does not require exclusion, the panel said.

Albert presented uncontested data that the nonresponder population did not significantly differ from the responder population and that no significant bias was found among the nonresponders in the nursing home and hospital groups, the panel noted.

"[W]e consider that the exclusion of the survey on that ground alone was improper," the panel said, reversing summary judgment.

On remand, the trial judge must address the defendants' remaining Daubert questions, the panel held.

The panel comprised Justices R. Malcolm Graham, Raya S. Dreben and Mitchell J. Sikora Jr.

Robert William Walker of the Law Offices of Robert D'Auria in Bedford, Mass., represents Albert. Michael J. Stone and Allen M. David of Peabody & Arnold in Boston represent the defendant attorneys. Ronald M. Jacobs and Thomas E. Peisch of Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston represent Brandwein. ■

11th Circuit OKs Exclusion Of Damages Opinion On Hospital Group's Turbocharging

ATLANTA — Expert testimony on the damages caused to a hospital by another hospital chain's overcharging for Medicare reimbursements was overly broad because it went beyond the liability theory, the 11th Circuit U.S. Court of Appeals held Sept. 4 in affirming its exclusion (Boca Raton Community Hospital v. Tenet Health Care Corp., No. 07-14352, 11th Cir.; 2009 U.S. App. LEXIS 19952).

(**Opinion available.** Document #30-090928-010Z.)

The 11th Circuit also affirmed summary judgment to defendant Tenet Health Care Corp. granted by the U.S. District Court for the Southern District of Florida. Plaintiff Boca Raton Community Hospital filed a class action against Tenet alleging Racketeer Influenced and Corrupt Organizations Act violations. It asserted that Tenet's "turbocharging" resulted in excessive payments from Medicare for outlier cases — extraordinary cost cases. Tenet's conduct caused Boca and other hospitals to receive less money for its legitimate outlier cases, Boca alleged.

Outlier Payments

The government filed its own suit against Tenet and obtained a $900 million settlement, including $800 million in outlier payments.

Under the outlier program, Medicare supplements payment for treatments that cost a specified amount more than its fixed-rate payment. This amount is called the fixed-loss threshold. Medicare pays the amount above the fixed-loss threshold.

Boca alleged that Tenet increased its outlier reimbursements by dramatically raising its charges without reference to actual cost increases, making average-cost cases look like outlier cases. The hospital said Tenet's excessive outlier payments forced Medicare to increase the loss threshold to keep total outlier payments at a target percentage. The increase in the loss threshold caused Boca to receive less outlier money for its legitimate extraordinary cases, it said.

Boca presented expert testimony to show that the overcharging caused the loss threshold to increase and that Boca would have received additional outlier payments but for Tenet's conduct. The experts recalculated what the loss threshold would have been without Tenet's alleged turbocharging and calculated the amount of outlier payments Boca would have received; this was the estimate of damages to Boca.

No Fit

The trial court excluded the expert testimony because the methodology did not fit Boca's liability theory. The experts made no attempt to figure out what Tenet could have lawfully charged, so that they could know how much Tenet overcharged, the trial court said. The expert could not know how Tenet's overcharging had impacted the loss threshold. The experts' decision to manipulate costs instead of charges made their method unhelpful and inadmissible, the trial court said.

The appeals panel agreed. The expert opinion covered too much. Under Boca's liability theory, it is not unlawful for hospitals to overcharge as long as their audited ratios do not fall below the low national threshold. Boca's expert opinion uses unaudited ratios to approximate Tenet's actual costs. The damage assessment includes the outlier payments Tenet got from lawful overcharging, as well as unlawful overcharging, the panel said.

"In that way Boca's expert opinion holds Tenet to a stricter standard for injury and damages than its liability theory does for culpability by including charges that were excessive but not so much so that they forced a hospital's audited ratio below the low National Threshold," the panel held.

"What Boca's expert opinion fails to recognize (which, by contrast, its liability theory does) is the range of behavior between clearly unlawful and perfectly lawful."

Too Broad

Because Boca's injury and damages expert opinion was not confined to charges that its liability theory considered unlawful, it was too broad, the panel said. Therefore, the trial court did not err in excluding the testimony or in granting summary judgment, the panel said.

Judge Ed Carnes wrote the opinion for the panel, which also comprised Chief Judge Joel F. Dubina and Chief Judge Jane A. Restani of the U.S. Court of International Trade, sitting by designation.

Counsel to Boca are Bruce Rogow and Cynthia E. Gunther of Bruce S. Rogow, P.A., in Fort Lauderdale, Fla. Susan Elisabeth Engel and Karen N. Walker of Kirkland & Ellis in Washington, D.C., Jay Philip Lefkowitz of the firm's New York office and Peter Prieto of Holland & Knight in Miami represent Tenet. ■

Economist Needed To Verify Source Of Business Loss Data, Federal Judge Says

WILMINGTON, Del. — An expert who used a strategic business plan for the basis for his antitrust damages estimate must be excluded because he did not verify the data underlying the plan, a federal judge in Delaware held Aug. 20 (ZF Meritor, et al. v. Eaton Corp., No. 06-623-SLR, D. Del.; 2009 U.S. Dist. LEXIS 74180).

(**Memorandum opinion available.** Document #30-090928-011Z.)

U.S. Judge Sue L. Robinson of the District of Delaware said Dr. David DeRamus' conclusions flowed from the slenderest of analytical threads — one page of estimates from a business plan prepared for a business formed within the year — whose source is both unknown to, and untested by, DeRamus.

Antitrust Alleged

ZF Meritor LLC and Meritor Transmission Corp. sued Eaton Corp., alleging that its monopoly power in the heavy duty transmissions through exclusive dealing contracts with distributors foreclosed competition and caused them injury. Eaton's long-term agreements with distributors included incentives such as price reductions, up-front payments, on-site engineering resources and other efforts to lower distributors' costs.

The plaintiffs filed claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

DeRamus calculated Meritor's damages to be between $606 million and $824 million. The judge said DeRamus' reliance on Meritor's revised strategic business plan for 2001-2005 without support for the factual basis of the plan rendered his opinion unreliable.

The judge said that it appeared that DeRamus used reliable economic methods in calculating his damages but that there was no evidence the business plan estimates were reliable.

Unsupported Data

"He did not use actual financial data in order to proj-

© Mealey's Copyright Policy

Subscribers are encouraged to copy sections of this report for use in court submissions. You also are welcome to copy a single article to send to a client or colleague, and to copy and route our table of contents. If you wish to copy and distribute sections of the report, simply contact the Editorial Director at (610) 205-1000 or 1-800-MEALEYS (1-800-632-5397).

It is a violation of our copyright to copy substantial portions of this report for any other reasons without permission. Illegal copying can seriously undermine subscription-based publications like ours; moreover, the Copyright Act of 1976 provides for damages for illegal copying.

ect the 2000 estimates. He did not apply his own assumptions, based upon his expertise, to any financial data in order to project the 2000 estimates. In short, Dr. DeRamus relied on the 2000 estimates without knowing either the qualifications of those who actually prepared them or the validity of the underlying data and assumptions upon which the 2000 estimates were based," the judge said.

Counsel to Meritor are Karen V. Sullivan of Drinker Biddle & Reath in Wilmington, R. Bruce Holcomb of Adams Holcomb in Washington, D.C., and Jay N. Fastow of Dickstein Shapiro in New York. Donald E. Reid of Morris, Nichols, Arsht & Tunnell in Wilmington and Robert R. Ruyak, Joseph A. Ostoyich, Andrew D. Lazerow and Melissa R. Handrigan of Howrey in Washington represent Eaton. ■

New York Federal Judge Nixes Damages Expert From Pepsi Contract Suit

NEW YORK — A former bottling company manager's assessment of damages to a Peruvian Pepsi distributor from unauthorized sales in its territory lacks any reliable basis and is built upon "one baseless flawed assumption after another," a federal judge in New York held Sept. 9 in excluding his testimony (Compania Embotelladora del Pacifico v. Pepsi Cola Co., No. 00 Civ. 7677 [JSR], S.D. N.Y.; 2009 U.S. Dist. LEXIS 81376).

(**Opinion and order available.** Document #30-090928-007Z.)

U.S. Judge Jed S. Rakoff of the Southern District of New York also excluded marketing testimony for similar reasons and granted summary judgment to defendant Pepsi Cola Co.

Contract Breach Alleged

Compania Embotelladora Del Pacifico S.A. (CEPSA) sued Pepsi for damages caused by an alleged breach of an exclusive bottler appointment agreement. CEPSA contends that Pepsi's failure to prevent transshipping, or unauthorized sale of its products in CEPSA's territory by other distributors and third parties, caused it damages. Pepsi filed several counterclaims, including one for liability for unpaid invoices for concentrate.

Graham Searles, an accountant and former general manager of a Peruvian Coca-Cola bottler, estimated that CEPSA's damages total $236 million. Searles used data from the market research firm Consumer Communications Research (CCR) to estimate the total volume of Pepsi products sold in Lima, which is in CEPSA's exclusive territory. He adjusted this data upward by 22.5 percent because everyone in the industry believes that CCR understates market volume to this degree.

Searles then subtracted the amount of CEPSA's own reported sales of Pepsi products to determine the amount of non-CEPSA products sold in Lima. He then extrapolated that data to the rest of CEPSA's territory, even though no specific data was available for that area.

Searles assumed that had all of that transshipping been prevented, CEPSA would have made those sales instead. He calculated CEPSA's lost profits on these lost sales by applying CEPSA's historical marginal profit rate.

Unreliable

The judge found that Searles' estimate was based on unreliable and inaccurate data, along with a series of assumptions that have no basis in fact or reality. Searles conceded that he was aware of no one who ever relied on CCR data as a measure of market volume and that he knew of no scientific studies validating or confirming its accuracy for that purpose. He also did not support his decision to correct CCR's figures or to extend them to areas beyond Lima, the judge said.

Similarly, the judge excluded the testimony of Julio Luque, a marketing consultant who opined regarding the sales volume data used to calculated CEPSA's alleged damages. He offered no support for his opinion that CCR sales volume data is reasonably accurate, the judge said.

In the absence of any admissible expert testimony on damages, the judge said summary judgment on CEPSA's sole remaining breach of contract claim is appropriate. Even with experts, CEPSA's claim would fail as a matter of law because strict interpretation of the unambiguous contract shows that Pepsi had no

obligation to prevent other bottlers and third parties from selling its products in CEPSA's territory, the judge held.

Counterclaim

The judge also granted CEPSA's motion for partial summary judgment regarding the concentrate claim, finding that the claim is being handled through bankruptcy proceedings in Peruvian courts.

Counsel to CEPSA are Daniel J. Fetterman and Trevor J. Welch of Kasowitz, Benson, Torres & Friedman in New York; Kenneth J. Vianale of Vianale & Vianale in Boca Raton, Fla.; Olga Lucia Fuentes of Gibson, Dunn & Crutcher in New York; and Robert Yancy Lewis, Alexander Todd Linzer and Jennifer Freeman of Freeman Lewis in New York.

Louis M. Solomon and Michael Lazaroff of Proskauer Rose in New York represent Pepsi. ■

1st Circuit: Land Value Expert Lacked Support For Development Potential

BOSTON — A trial judge correctly excluded an expert's valuation of land being taken by the federal government because he lacked support for his conclusion that the protected coastal property would be rezoned for residential development or that sand could be extracted and sold, a First Circuit U.S. Court of Appeals panel held Sept. 11 (United States of America v. 33.92356 Acres of land, et al., No. 08-2263, 1st Cir.; 2009 U.S. App. LEXIS 20291).

(**Opinion available.** Document #30-090928-013Z.)

The panel affirmed the U.S. District Court for the District of Puerto Rico's award of $375,300 in compensation to Juan Piza-Blondet for his 33.92 acres of land to be used by the Federal Aviation Administration for a radio beacon.

Eminent Domain

The government leased the property from Piza-Blondet for nearly 20 years. Following a lease dispute, Piza-Blondet segregated the land from his surrounding 400 acres and the government initiated condemnation proceedings. It estimated the property's value at the $375,300, based on its highest and best use applying the before and after valuation method.

The land is zoned B-2, and its use is restricted to coastal protection, scientific investigation, passive recreation and fishing — activities that do not impact the surrounding mangroves.

Piza-Blondet's expert, Carlos Gaztambide, opined that the highest and best use for the parcel was residences and sand extraction. He estimated the value of the land to be $1.12 million, with an additional $3 million to $6 million for sand extraction.

A magistrate judge found that Gaztambide's opinion was unsupported, speculative and amounted to double counting because he valued the land for development and again for its mineral deposits. The trial judge excluded his testimony, holding that it failed to meet Federal Rule of Evidence 702's relevance and reliability standards.

The trial judge refused to allow Piza-Blondet to introduce any other valuation testimony, including his own, that was not based on conservation and/or mitigation. Because of the expert order, the parties filed a stipulation for consent judgment.

Speculation

The appeals panel found that Gaztambide had not spoken to anyone on the Puerto Rico Planning Board and offered no other support for his opinion that the board would approve rezoning, a variance or permits for residential development or sand extraction on the land. He also offered no evidence that such variances had been permitted on similarly zoned parcels in the past, the panel said.

The panel found no evidence that any of the parcels Gaztambide relied on were or had been zoned B-2 or that sand extraction had ever been permitted on a B-2 property. Ten-year-old applications for residential development permits on other parts of Piza-Blondet's 400 acres had never been granted.

The panel held that the trial court did not abuse its discretion in finding that Gaztambide's testimony did not meet admissibility requirements.

Finally, the panel said the trial court did not abuse its discretion in allowing the before and after method to be used to value the property.

Judge Timothy B. Dyk of the Federal Circuit wrote the opinion for the panel, which also comprised Judges Michael Boudin and Senior Judge Bruce M. Selya.

Counsel to Piza-Blondet are Paul E. Harrison in Mandeville, La., and J. Wayne Mumphrey in Chalmette, La. Aaron P. Avila and Jeffrey M. Tapick of the U.S. Department o Justice and Acting Assistant Attorney General John C. Cruden in Washington, D.C., represent the government. ■

3rd Circuit Resurrects Employer's Claim Of Proprietary Secrets Theft

PHILADELPHIA — A New Jersey federal judge wrongly limited an engineer's testimony regarding proprietary information and reverse engineering in the rubber molding industry on grounds that he lacked experience in the specific sub-industry at issue in the proprietary secrets case, a Third Circuit U.S. Court of Appeals panel held July 30 (Thomas & Betts Corp. v. Richards Manufacturing Co., et al., Nos. 08-3117, 08-3269, 3rd Cir.; 2009 U.S. App. LEXIS 16837).

(**Unpublished opinion available.** Document #30-090928-009Z.)

The panel reversed the expert admissibility ruling and found that the U.S. District Court for the District of New Jersey created an improper standard for determining the protectibility of company information. The panel reversed summary judgment on plaintiff Thomas & Betts Corp.'s (T&B's) misappropriation claim and dismissal of its related claims for breach of contract, breach of the duty of loyalty, fraud, tortious interference with prospective advantage and unjust enrichment.

Competitor

T&B employed defendant Glenn Luzzi as director of engineering in its Elastimold division, which manufactured 600-amp underground oil-resistant electrical connectors, primarily for Consolidated Edison (Con Ed). T&B had been the exclusive supplier of connector products to Con Ed for 20 years. In 1999, Luzzi left and went to work for a T&B competitor, defendant Richards Manufacturing Co. T&B released Luzzi from any previous employment restrictions, except that he still was not permitted to share or release proprietary information.

Eighteen months later, Richards developed a compatible product line and in 2001 obtained a sole-source contract from Con Ed at a lower price than T&B.

The trial court, believing that New Jersey case law provided no clearly defined protectibility standard, fashioned its own from two holdings — Ingersoll-Rand Co. v. Ciavatta (110 N.J. 609, 542 A.2d 879 [1988]) and Lamorte Burns & Co. v. Walters (167 N.J. 285, 770 A.2d 1158 [2001]). The trial court created a four-part test for determining if information could be protected — the degree to which the information is generally known in the industry; the level of specificity and specialized nature of the information; the employer/employee relationship and the circumstances under which the employee was exposed to the information; and whether the information is "current."

Expert Limited

The trial court also significantly limited T&B's primary expert, Van T. Walworth, finding that he lacked experience in underground electrical connectors and that his methodology was unreliable.

The trial court limited Walworth's testimony to general concepts within the rubber molding industry; his personal observations of T&B's and Richards' processes; and his observations of the materials in the case, such as design drawings, that demonstrate similarities between the processes. The trial court barred Walworth from testifying about what is commonly known in the rubber molding industry; what is generally done in the rubber molding industry with respect to maintaining secrecy in manufacturing operations and whether T&B's efforts were consistent with such practices; whether Richards reverse-engineered T&B's products and what it would take to do so; the transferability of processes regarding injection molding plastics to manufacturing the products at issue;

and whether the information at issue is protectible information.

The trial court found that T&B failed to provide sufficient evidence to demonstrate that any of its 10 claimed trade secrets were secrets or that it had a protectible interest in any of the discrete items of confidential information. The trial court then granted Richards summary judgment.

Appeal

T&G did not appeal the trial court's holding regarding its claimed trade secrets, only its formation of the protectibility standard, its expert exclusion and its grant of summary judgment on the misappropriation of confidential, non-trade-secret information.

The Third Circuit panel held that while the trial court correctly barred Walworth from testifying about the ultimate issue of protectibility, it erred in excluding the remainder of his testimony. Walworth has extensive experience in manufacturing and engineering of products using rubber injection molding. He should not have been deemed unqualified just because he was not the best qualified expert in the specialization at issue, the panel held.

Walworth has participated in developing systems to maintain the secrecy of manufacturing and engineering process for rubber molding products at various companies. The trial court erred in rejecting his testimony regarding security and secrecy because what is done in the rubber molding industry is not necessarily what is done in the underground connectors market, the panel said.

"It is difficult to see . . . how Walworth's expertise in the larger industry of rubber injection molding would be irrelevant and unhelpful to a finder of fact charged with analyzing a subset of the industry, particularly given the relatively low standard for admissibility under Rule 702," the panel said.

Standard Reversed

Regarding the protectibility standard, the appeals panel held that the New Jersey Supreme Court cases relied on by the trial court involved a reasonableness review of noncompete clauses that is not relevant to this case, where Luzzi had a common-law obligation to maintain the secrecy of his employer's proprietary information.

On remand, the panel said, the trial court should consider whether the allegedly misappropriated information was provided to Luzzi by T&B in the course of his employment for the sole purpose of furthering T&B's business interests. The court should consider whether the information was generally available to the public; whether Luzzi would have been aware of the information if not for his employment with T&B; whether the information gave Luzzi and Richards a competitive advantage; and whether Luzzi knew that T&B had an interest in protecting the information to preserve its own competitive advantage. These four factors are not to be treated as essential elements of a cause of action for the misappropriation of confidential information, the panel concluded.

The panel advised the trial court to consider that the items of confidential information cited by T&B may serve as the basis for a tort action despite the fact that many of them, examined in isolation, constitute manufacturing techniques that are generally known in the industry. It also should consider that the competitive value an employer ascribes to certain information may derive solely from its relation to other information, even when, taken in isolation, that information is neither novel nor unknown, the panel said. And finally, it should consider that, at this juncture, it is asked only to determine whether there are genuine issues of material fact in dispute as to whether the information at issue is confidential and proprietary.

Judge Maryanne Trump Barry wrote the opinion for the panel, which also included Judge D. Brooks Smith and Senior U.S. District Judge Jan E. DuBois of the District Court of Eastern Pennsylvania, sitting by designation.

Counsel to T&B is Kevin McNulty of Gibbons in Newark, N.J. Steven B. Pokotilow of Stroock, Stroock & Lavan in New York, represents Richards and Luzzi. ■

Federal Judge In Kansas: Aircraft Safety Can't Be Predicted With Graph

KANSAS CITY, Kan. — A forensic weather analyst's attempt to predict a plane's relative safety by plotting

aircraft data on a graph is untested and not generally accepted, a federal judge in Kansas held Sept. 9 in barring his testimony in the Cessna products liability multidistrict litigation (In re: Cessna 208 Series Aircraft Products Liability Litigation, MDL No. 1721, Case No. 05-md-1721-KHV, D. Kan.; 2009 U.S. Dist. LEXIS 81932).

(**Memorandum and order available.** Document #30-090928-008Z.)

Plaintiffs sued Cessna Aircraft Co. and Goodrich Corp. for personal injuries and wrongful death, alleging that the Cessna 2008 Series is defectively designed or manufactured because ice accumulation caused several crashes.

NAD Theory

Plaintiff expert Peter H. Hildebrand is a research meteorologist and forensic weather consultant for weather conditions relating to aircraft accidents. He developed the norm for aircraft design (NAD) hypothesis. The NAD uses data for thrust, weight, lift and drag of all safely designed aircraft to plot points on a graph. Hildebrand then draws a straight NAD line where the average data points fall. Aircraft that fall significantly outside that norm line Hildebrand considers to be potentially unsafe.

Specifically, Hildebrand found the Cessna 208B to have significantly lower horsepower than aircraft of similar maximum weight or payload and similar wing length. The longer wings and lower horsepower could cause problems if the drag increases because of in-flight icing, Hildebrand said. The 208B also has a low sea level maximum climb rate compared to other aircraft of similar maximum takeoff weight and similar engine power, suggesting high drag and/or low lift. This suggests that the 208B is relatively underpowered and has high drag compared with the NAD, which can be severe issues during icing conditions, Hildebrand said.

Hildebrand conceded that his analysis only raised questions; it does not draw any conclusions regarding a design defect or the plane's safety.

Daubert Failings

U.S. Judge Kathryn H. Vratil of the District of Kansas agreed with Cessna that Hildebrand's methodology fails to meet admissibility requirements under Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579, 592 [1993]). Hildebrand did not test the NAD hypothesis to determine whether basic physical characteristics of an aircraft can be used to measure aerodynamic properties or whether aircraft that are at or close to the norm are safer than those that are not. Hildebrand admitted that an aircraft with a novel and unique aerodynamic design might be safe but not adhere to the norm.

The judge also found that the NAD hypothesis has not been subject to peer review and publication, and it has no known error rate. Finally, the hypothesis is not generally accepted by the scientific community, the judge said. She noted that contrary to Hildebrand's methodology, aircraft designers do not use engine horsepower as a proxy for thrust because several other factors such as accessory operation, aerodynamic efficiency of the propeller and airspeed also contribute significantly to aircraft thrust. Similarly, designers do not use maximum seal level rate of climb as a measure of aerodynamic efficiency, the judge said.

The judge held that Hildebrand's methodology was unreliable. Further, his opinions would not assist a jury, the judge held.

Finally, the judge said Hildebrand did not adequately explain the scientific background for his hypothesis or what conclusions one can draw from it. He simply presented a chart of data based on the physical characteristics of various aircraft without applying that data to accident histories to determine the safety of the Cessna's design. His testimony has a substantial potential to mislead and misinform the jury, she said.

Attorneys

Representing the plaintiffs are Donald J. Nolan and Paul R. Borth of Nolan Law Group in Chicago; J. Walter Sinclair and Mark S. Geston of Stoel Rives in Boise, Idaho; Jerome L. Skinner of Nolan Law Group in Cincinnati; Robert R. Bodoin and Thomas A. Fuller of Bodoin & Agnew in Fort Worth, Texas; Colin P. King of Dewsnup King & Olsen in Salt Lake City; Martha Knudson of Richards Brandt Miller & Nelson in Salt Lake City; David E. Keltner of the Keltner Law Firm in Fort Worth; and Donna J. Bowen and Michael L. Slack of Slack & Davis in Austin, Texas.

Also representing the plaintiffs are Stuart W. Smith, Patrick J. Kurkoski and Timothy E. Miller of Miller & Associates in Lake Oswego, Ore.; William A. Fuhrman and Christopher P. Graham of Trout, Jones, Gledhill and Fuhrman in Boise; Eugene O'Neill Jr. of Goldfinger & Lassar in New York; Scott J. Gunderson of Nelson, Gunderson & Lacey in Wichita, Kan.; Dean R. Brett, Rand F. Jack and William R. Coats of Brett & Coats in Bellingham, Wash.; Bradley Bowles of Bowles & Verna in Walnut Creek, Calif.; Arthur A. Wolk and Bradley J. Stoll of Wolk Law Firm in Philadelphia; David S. Houghton, William G. Garbina and Robert W. Mullin of Lieben, Whitted Law Firm in Omaha, Neb.; Matthew K. Clarke of Wolk Law Firm in Philadelphia; and Morton A. Rudberg in Dallas.

Representing Cessna are Caryn Geraghty Jorgensen, David M. Schoeggl and Janna J. Annest of Mills Meyers Swartling in Seattle; Dale W. Storer of Holden Kidwell Hahn & Crapo in Idaho Falls, Idaho; Don G. Rushing and Erin M. Bosman of Morrison & Foerster in San Diego; Fred J. Meier Jr. of Carstens & Cahoon in Dallas; Heather S. Woodson and John C. Nettels Jr. of Stinson Morrison Hecker in Overland Park; John J. Reenan of Winstead in Dallas; Kamie F. Brown and Tracy H. Fowler of Snell & Wilmer in Salt Lake City; Laurie A. Hand of Morrison & Foerster in Washington, D.C.; and Patrick Matthew Graber and Stephen Donald Koslow of McCullough, Campbell & Lane in Chicago. ■

Michigan Panel Affirms $2.5M Verdict For PIP Insurance Benefits

LANSING, Mich. — An anesthesiologist was qualified to testify about the necessity of pain management injections to a woman's face, and his treatment protocol was generally accepted and reliable, a Michigan Court of Appeals panel held Aug. 25 (Sheri M. Anderson v. State Farm Mutual Auto Insurance Co., No. 277096, Mich. App.; 2009 Mich. App. LEXIS 1763).

(**Unpublished *per curiam* opinion available.** Document #30-090928-004Z.)

The panel also affirmed a $2.5 million jury verdict from Wayne County Circuit Court for plaintiff Sheri M. Anderson against State Farm Mutual Auto Insurance Co. Anderson sued the insurer for personal injury protection (PIP) benefits under Michigan's No-Fault Law after it cut off payments for injections for her facial pain that resulted from a 1999 car accident.

Converse

State Farm appealed, alleging a number of errors.

The issues at trial included whether Anderson's pain was caused by the car accident or by her multiple sclerosis and whether the facial injections were reasonable and necessary.

Dr. Maurice H. Converse testified that he designed a pain management regimen that included Anderson receiving 22 facial injections twice weekly, including steroids, anesthetic and Sarapin. State Farm argued that Converse was not qualified to testify and that his methodology was unreliable.

The appeals panel found Converse qualified to testify by his more than 50 years as an anesthesiologist. Further, the panel said Converse's specialized knowledge would help the trier of fact. The panel rejected defense arguments that though Converse may have been qualified as an anesthesiology expert, he was not qualified as an expert on the specific facts of Anderson's treatment — pain management injection therapy.

The panel said it was not the role of the trial court to determine whether Sarapin was effective in pain management, only that its use had achieved general scientific acceptance. The trial court did not abuse its discretion in so finding or in concluding that Converse's use of the drug represented an accepted method of pain treatment, the panel said.

Additional Appeal Points

The appeals panel also ruled that the trial court did not abuse its discretion when it excluded evidence of Anderson's receipt of collateral source benefits. The

EMAIL THE EDITOR

email editor **kristin casler** at
kristin.casler@lexisnexis.com

panel affirmed the trial court's exclusion or limitation of State Farm's experts' testimony due to discovery delays or an admitted lack of expertise.

The panel also concluded that the trial court improperly prohibited State Farm from identifying an adjuster as working in the fraud division. This information might have been helpful to a jury in determining what triggered the investigation into Anderson's claim, the panel said. However, any error was harmless, the panel concluded.

The panel comprised Judges Deborah A. Servitto, Pat M. Donofrio and Karen M. Fort Hood.

Counsel to Anderson are Jackson Garth of Plymouth, Mich., and Mark Granzotto of Royal Oak, Mich. James G. Gross of Detroit, and Lincoln G. Herweyer of New Baltimore, Mich., represent State Farm. ■

New Jersey Court Finds Nurse Expert May Offer Opinion On Causation

TRENTON, N.J. — The New Jersey Superior Court Appellate Division on Aug. 4 reversed a trial court ruling that a nurse may not offer expert testimony in a nursing home negligence cause of action. The appeals court found that the nursing expert may testify as to causation and standard of care in a nursing home but affirmed the trial court order regarding the medical diagnosis for a wrongful death claim (Louise Detloff, et al., v. Absecon Manor Nursing Center and Rehabilitation Center, No. A-5941-07T2, N.J. Super., App. Div.; 2009 N.J. Super. Unpub. LEXIS 2088).

(***Per curiam*** **opinion available.** Document #02-090911-007Z.)

Louise Detloff, as executrix of the estate of Mary Mazzei, appealed an Atlantic County Superior Court order granting summary judgment dismissing her claims alleging negligence, carelessness and violations of the Omnibus Budget Reconciliation Act (OBRA) in the care of Mazzei at the Absecon Manor Nursing Center and Rehabilitation Center. Detloff filed a merit of affidavit by Adrienne Abner, a licensed registered nurse who specializes in wound care nursing and nursing administration.

N.J.S.A. 45:11-23(b)

However, the trial court held that as a matter of law, a nurse is not qualified to render a medical opinion with respect to causation under New Jersey Statutes Annotated (N.J.S.A.) 45:11-23(b).

On appeal, Detloff argued that Absecon Manor never challenged the adequacy of Abner's opinion.

The appellate court reversed the trial court order, finding that the lower court's overly broad interpretation of 45:11-23(b) was in error. The motion judge in the instant action concluded earlier in the proceedings that Abner was "clearly qualified" to render an expert opinion on the standard of care to which Mazzei was entitled as a home nursing patient and to also render an opinion that defendant deviated form that standard of care, the appeals court said, adding that her two reports focused on specific deviations of care directly related to the "provision of care supportive to or restorative of life and well-being."

That Mazzei suffered a fractured hip following a fall and then developed pressure sores are not disputed facts, the court said.

"The opinions reached by Nurse Abner do not require a medical diagnosis," the court said. "Indeed, it is of common knowledge that the day-to-day care of nursing home residents is generally undertaken not by physicians but by nursing staff such as licensed practical nurses and nursing aides under the supervision of a registered nurse."

The appeals court noted that given the scope of nursing care under the direction of a nursing administrator, 45:11-23(b) does not prohibit Abner's testimony on the issue of causation.

Wrongful Death Claims

However, the appeals court said Abner's testimony regarding medical causation as to the Wrongful Death Act cause of action reaches beyond the scope of her expertise and is prohibited under 45:11-23(b).

Detloff is represented by Robert Aaron Greenberg and Elizabeth Kronisch of Aronberg & Kouser in Cherry

Hill, N.J. Absecon Manor is represented by William L. Doerler, Kevin C. Cottone and Deborah E. Ballantyne of White and Williams in Philadelphia. ■

Investigation Based On National Fire Standards Reliable, Federal Judge Holds

LEXINGTON, Ky. — A fire causation expert relied on reliable national fire investigation standards in ruling out all other possible causes of a house fire and in determining that a Hitachi television caused the blaze, a federal judge in Kentucky held Aug. 20 (Kentucky Farm Bureau Mutual Insurance Co. v. Hitachi Home Electronics [America], Inc., No. 3: 08-30-DCR, E.D. Ky., Central Div.; 2009 U.S. Dist. LEXIS 73998).

(**Memorandum available.** Document #30-090928-001Z.)

U.S. Judge Danny C. Reeves of the Eastern District of Kentucky denied defendant Hitachi's motion to exclude Eric Evans' testimony.

Possibilities Eliminated

Fire destroyed the home of Kentucky Farm Bureau Mutual Insurance Co. (KFB) insureds in November 2006. After paying the homeowners' claim, KFB filed a products liability action against Hitachi, asserting claims for negligence, strict liability and breach of warranty and seeking to recover the $164,490 it paid on the claim.

Evans, who worked for the Forensic Fire Investigation Bureau, opined that the fire originated in the projection television. He eliminated other items in the area. The DVD player and satellite receiver, for example, were burned from the outside in. However, Evans conceded that he could not identify the specific malfunction that caused the fire because the TV suffered extensive damage.

As an initial matter, the judge found Evans qualified by his nearly 30 years of experience in fire investigation and as a fire investigation instructor.

The judge found his opinions reliable because he followed National Fire Protection Agency (NFPA) 921 guidelines, which have been recognized as the generally accepted standard in the fire investigation community.

Hitachi argued, however, that Evans failed to follow the NFPA 921 standards for eliminating other possible ignition sources because he was unable to examine power cords and extension cords near the television and rule them out as possible causes.

Standards Followed

"[T]he fact that Evans was unable to eliminate possible ignition sources he did not locate during the course of his investigation does not necessarily make his investigation, or his subsequent causation conclusion, inherently unreliable," the judge said.

Evans' investigation followed the NFPA 921 standards. His report demonstrates that he systematically analyzed and eliminated all other possible ignition sources observed in the room, the judge said. Thus, his conclusion that the television caused the fire is sufficiently reliable, the judge said.

The judge rejected Hitachi's argument that Evans' theory is unreliable because it was not testable or tested. The judge said the theory underlying the fire investigation standards must be testable, which they are and have been.

Finally, the judge held that Evans' testimony was highly relevant to the ultimate issue of whether a manufacturing or design defect in the television caused the fire.

Counsel to KFB are John C. Miller and Joseph A. Bott of Bertram, Cox & Miller in Campbellsville, Ky. David T. Schaefer and Patrick Shane O'Bryan of Woodward, Hobson & Fulton in Louisville, Ky., represent Hitachi. ■

Alcohol-Detection Bracelet Meets Admissibility Standard, S.D. High Court Concludes

PIERRE, S.D. — The methodology underlying an alcohol-monitoring ankle bracelet and the expert opinion on its results are sufficiently reliable to pass

muster under Daubert, the South Dakota Supreme Court held Sept. 16 in affirming its admission in a probation revocation proceeding (State of South Dakota v. Neal J. Lemler, No. 24815, S.D. Sup.; 2009 S.D. LEXIS 156).

(**Opinion available.** Document #30-090928-014Z.)

Neal J. Lemler was on probation for third-offense drunken driving. His probation was conditioned on him not consuming any alcohol. He was being monitored by a Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelet, which uses transdermal alcohol detection. Lemler's bracelet registered three drinking events and uploaded the results to Alcohol Monitoring Systems (AMS), the SCRAM manufacturer. The state petitioned for probation revocation in the Sixth Judicial District Court for Hughes County.

Drinking Events

Lemler contended that his exposure on the dates at issue to alcohol in fermenting grain on his farm, lighter fluid and graphite lubricant caused his bracelet to erroneously record a drinking event.

At the hearing, the state presented expert testimony from Jeff Hawthorne, chief technology officer at AMS and co-developer of the SCRAM. He explained that the SCRAM flags all transdermal alcohol readings of .02 percent alcohol by weight or higher. A drinking event is confirmed after three consecutive measurements over that percentage. This requires at least two drinks per hour on average. The data is used to create a curve, and it is compared with a blood-alcohol curve, which has known alcohol levels.

Hawthorne testified that the curve for alcohol consumption is different from that for an interfering topical chemical such as those Lemler claims he was exposed to. Sudden exposure to a chemical produces a spike in the readings and is disregarded. Hawthorne specifically tested the exact chemicals to which Lemler said he was exposed, and they did not create the same readings as Lemler's bracelet submitted on the days in question.

Hawthorne opined that based on his education and experience, Lemler consumed alcohol on those dates.

The judge found Hawthorne's testimony reliable under Daubert v. Merrell Dow Pharmaceuticals, Inc. (509 US 579, 113 SCt 2786, 125 LEd2d 469 [1993]).

Dueling Experts

Lemler's expert, Dr. Michael Hlastala, an alcohol physiology expert, did not dispute the validity of the science underlying the SCRAM, only its reliability given its limitations in identifying other possible sources of alcohol.

The Supreme Court rejected Lemler's argument that Hawthorne was not a qualified expert because he is not a scientist. His experience developing the SCRAM, publishing an article and his testimony in 48 prior cases qualifies him to testify, the high court said.

Regarding reliability, the high court said Hawthorne identified an analytical basis to interpret the data and account for variables that might be caused by interfering chemicals. He relied on internal testing, experience and peer-reviewed literature documenting differences in absorption rates, elimination rates and total elimination time for consumed alcohol and interferants, the high court said.

The District Court was required only to be reasonably satisfied that a probation violation occurred, the panel noted. Lemler's own expert confirmed the requisite level of reliability of the bracelet in this case, the high court said.

Daubert Met

"Although Lemler's expert opined that variables could affect the outcome or conclusion, there was evidence that the underlying scientific process was widely accepted, the theories and techniques in question either had been or could be tested, the process has been subjected to some review and publication, and potential error rates (under the evidence presented) are lower than some other accepted methods of measuring alcohol consumption," Justice Steven L. Zintner wrote for the court. "The issues concerning 'possible' interferants, as well as the possibility of inhaled ethanol from fermented grain, were factual variables argued to the factfinder. Under the circumstances, both this Court and the Supreme Court have recognized that a trial court

does not abuse its discretion in admitting the scientific evidence and then letting the fact finder resolve the factual dispute."

Counsel to the state are Attorney General Marty J. Jackley and Assistant Attorney General Max A. Gors. Rose Ann Wendell represents Lemler. All are in Pierre. ■

New York Judge Allows Zoloft Causation Opinion In Defense Of Assault Charges

HEMPSTEAD, N.Y. — A New York trial judge on Aug. 21 stood by her earlier decision to allow defense expert testimony in an assault trial that the antidepressant Zoloft can cause excessive aggression in some people (State of New York v. Brandon W. Hampson, No. 2006NA021294, N.Y. Dist., 1st Dist., Nassau Co.; 2009 N.Y. Misc. LEXIS 2182).

(**Opinion available.** Document #30-090928-012Z.)

First District Nassau County Judge Rhonda E. Fischer held that the general acceptance requirement under Frye v. United States (293 F 1013 [DC Cir 1923]) does not require unanimous acceptance of a scientific theory before it can be admitted. Therefore, even though the state's expert cited numerous studies showing no link between Zoloft and aggressive behavior, the judge said expert testimony citing other studies that support the theory is admissible.

Side Effects

The judge said Dr. Stefan Kruszewski can testify on behalf of defendant Brandon W. Hampson, who is charged with third-degree assault, attempted assault, menacing, unlawful imprisonment, harassment and criminal contempt. Kruszewski opined that impulsivity, agitation, excessive aggression, grandiosity and hypomania can appear in a small group of people who take antidepressants. The behaviors can be seen as a side effect or as a withdrawal symptom, he said. He relied on psychiatric and neuro-psychiatric literature and a Yale University medical letter.

After a hearing in April, the judge found Kruszewski's opinion admissible. After a rehearing, she again admitted his testimony.

The judge found that the literature Kruszewski relied on is generally accepted within the medical field. She rejected the state's arguments that she misapplied the Frye standard, overlooked evidence that discredited Kruszewski's testimony and that Hampson did not meet his Frye burden.

Adhering to the New York Court of Appeals' holding that Frye does not require a method or position to have unanimous support, only general acceptance, the judge found Kruszewski's opinion generally accepted.

Competing Experts

"The defendant and the People have presented distinguished experts who possess differing opinions on the effect SSRIs [selective serotonin reuptake inhibitors] may have on the population for which they are prescribed," the judge said. "Thus, the Court should not look to see which expert is correct, but whether each expert's testimony is based on reliable methods. Both experts meet that standard and the triers of fact should have an opportunity to weigh the credibility of the expert's testimony under the crucible of cross-examination."

Counsel to the state is Nassau County District Attorney Kathleen M. Rice in Hempstead. Eric R. Bernstein in New York represents Hampson. ■

Special Master Chided; Compensation Ordered For Hepatitis B Petitioners

WASHINGTON, D.C. — Saying the special master "cloaked" a causation finding as an assessment of an expert's credibility not subject to review, the U.S. Court of Federal Claims ordered compensation for three of five previously rejected petitioners who claimed that the hepatitis B vaccine caused autoimmune hepatitis (AIH), in an opinion released Sept. 8 (Claudia Rotoli v. Secretary, No. 99-644V; David Myers v. Secretary, No. 99-631V; Colleen Torbett v. Secretary, No. 99-660V; Mona Porter v. Secretary, No.

99-639V; Allison Hager v. Secretary, No. 01-307V, Fed. Clms.; 2009 U.S. Claims LEXIS 299).

(**Opinion available.** Document #56-090916-007Z.)

Judge Nancy B. Firestone said Special Master Christian J. Moran's decisions — Allison Hager's petition was rejected Oct. 15; the other four were denied in a single decision Oct. 11 — flew directly in the face of the recently decided Andreu v. Sec'y HHS (569 F.3d 1367, 1379 [Fed. Cir. 2009]). Judge Firestone said the petitioners' expert immunologist, Dr. Joseph A. Bellanti, "was a highly qualified expert whose extensive credentials are not in dispute."

"In these cases, however, the special master erroneously founded his rejection of the petitioners' theory of causation on his assessment of Dr. Bellanti's 'poor' credibility," Judge Firestone said. "The special master's discussion of Dr. Bellanti's credibility permeated his analysis of the petitioners' claims. Most egregiously, the special master included a nine-page section — a substantial portion of the total length of each decision — entitled 'Additional Comments Regarding Dr. Bellanti,' in which he questioned not only 'Dr. Bellanti's persuasiveness but also his truthfulness' as a result of various weaknesses in the evidence underlying Dr. Bellanti's claims and Dr. Bellanti's 'demeanor.'"

Damages

Given the special master's errors, Judge Firestone said, she would issue her own causation findings and remand only for damages determinations. Regarding generic causation, the judge said Bellanti's testimony and references to the literature were sufficient to show that the vaccine could cause autoimmune hepatitis through dysfunction of the CD4+ regulatory T cells in genetically predisposed individuals.

Among Bellanti's sources were "Autoimmune Diseases: The Liver," by Michael P. Manns, et al., in "The Autoimmune Diseases," third edition, edited by Noel Rose and Ian Mackay.

"Dr. Bellanti then described various mechanisms by which infections and vaccines can cause autoimmune disease — molecular mimicry, bystander activation, polyclonal activation, and dysfunction of CD4+ regulatory T cells (or 'T-reg cell dysfunction')," the judge said. "Over the course of the hearings in these cases, the last theory, CD4+ regulatory T cell dysfunction, rose to the forefront as a promising theory by which AIH might be triggered by a vaccine such as hepatitis B."

"The respondent's attack of the petitioners' evidence of a medical theory was largely focused on the quantum of evidence in the scientific literature underlying Dr. Bellanti's assertions," Judge Firestone said. "They did not present any medical literature that negated Dr. Bellanti's medical theory. Instead, they emphasized the fact that no link between the hepatitis B vaccine and AIH has been directly proven in the literature."

Specific Causation

Judge Firestone affirmed the special master's rejection of benefits for David Myers and Colleen Torbett. Myers, she said, did not have AIH but had non-alcoholic steatohepatitis (NASH) and had presented no theory of causation for that condition. The judge said NASH is a metabolic disease, not an autoimmune condition that might be traced to vaccines.

Torbett, the judge said, did not present an appropriate time frame between vaccination and the development of her condition, as required by Althen v. Secretary of HHS (418 F.3d 1274, 1278 [Fed. Cir. 2005]). Moreover, the judge said, Torbett had been taking minocycline, an antibiotic used to treat acne and known to cause autoimmune hepatitis, for approximately 13 months before having an abnormal liver test in August 1997, when she was 40 years old.

The petitioners are represented by Ronald C. Homer of Conway, Homer & Chin-Caplan in Boston. The respondent is represented by Althea Davis, Tony West and Timothy P. Garren of the U.S. Department of Justice in Washington. ■

U.S. Judge Says Heart Doctor's Opinion On Surgery Length Lacked Reliable Methods

PHILADELPHIA — A pediatric heart surgeon did not rely on appropriate studies or scientific data in forming his opinion that a defendant surgeon's devia-

tion from normal procedures during a boy's operation caused liquid to form around his lungs and ultimately caused his death, Pennsylvania federal judge held Aug. 21 (Robert Daddio, et al., v. A.I. DuPont Hospital for Children of the Nemours Foundation, et al., No. 05-441, E.D. Pa.; 2099 U.S. Dist. LEXIS 74834).

(**Memorandum available.** Document #30-090928-002Z.)

U.S. Judge Mary A. McLaughlin of the Eastern District of Pennsylvania granted defendants A.I. DuPont Hospital for Children of the Nemours Foundation and Dr. William I. Norwood summary judgment on Robert and Tracie Daddio's claims of negligence and informed consent.

Congenital Defects

Michael Daddio was born in 2001 with several heart defects. To survive, he need three surgeries to alter the flow of blood through his heart. He underwent the Norwood procedure within days of being born. Norwood performed the second surgery, known as the hemi-Fontan procedure, five months later. After the second surgery, Michael developed persistent pleural effusions, or liquid buildups surrounding the lungs. He died 20 months later.

Before the two surgeries, Norwood used deep hypothermic circulatory arrest, during which the body is cooled and the blood is removed and stored so that the surgeon operates in a bloodless field on a heart that is not beating.

Dr. Robert L. Hannan, the plaintiffs' expert, opined that Norwood made unnecessary and experimental modifications to the hemi-Fontan procedure during Michael's second surgery, which led to a 59-minute period of circulatory arrest and aortic cross-clamping, which led to increased pleural effusions. Hannan said that without the modifications to the procedure, the surgery would have been less risky and Michael would have survived.

Hannan, who does not perform the hemi-Fontan procedure, acknowledged that pleural effusions can develop after correctly performed stage-two surgeries and that it is not completely understood why effusions form. The defendants moved to exclude Hannan's testimony.

Insufficient Articles

The judge found that the articles provided by the Daddios did not constitute an adequate basis for Hannan's opinions. None of the articles provides a basis to conclude that circulatory arrest, regardless of whether it is extended beyond unspecified "standard" limits, is the cause of pleural effusions, the judge said.

Although one article said 30 minutes is a very safe interval for circulatory arrest, it does not establish that any time over 30 minutes is necessarily unsafe or that such time will lead to pleural effusions, she said.

Additionally, the judge said Hannan's opinion that unspecified, undocumented organ damage caused by the surgery prevented Michael from being able to combat the pleural effusions was guesswork and not based on scientific methods and procedures.

Summary Judgment

Without reliable expert testimony that satisfies the Daddios' burden of proving but-for causation, summary judgment for the defendants on the negligence claim is appropriate, the judge held. Similarly, without showing that but for Norwood's failure to obtain informed consent, Michael would not have developed neural effusions or that he would not have died, summary judgment also is appropriate on that claim, the judge said.

Counsel to the Daddios are Aaron J. Freiwald of Layser & Freiwald, Theresa M. Blanco and Frank M. McClellan of Eaton & McClellan and Brian E. Appel, all in Philadelphia.

Mark D. Villanueva of McCarter & English and Matthew Scott Heilman and Sara Petrosky of McCann and Geschke, all in Philadelphia, represent the

LexisNexis® Mealey's™ GUARANTEE

All of LexisNexis® Mealey's™ reports are backed by our 100% money-back guarantee. If you are not satisfied for any reason, you may cancel your print subscription within 30 days and receive a full refund.

hospital. John M. Hudgins IV of Weinberg Wheeler Hudgins Gunn & Dial in Atlanta, in addition to the hospital's defense attorneys, represents Norwood. ■

Delaware High Court: Chrysotile Asbestos Testimony Properly Admitted

WILMINGTON, Del. — A judge properly admitted expert testimony that supported a man's claim that exposure to the chrysotile asbestos in the brakes on Ford Motor Co. automobiles led to his mesothelioma, a divided Delaware Supreme Court affirmed Aug. 24 (General Motors Corp. and Ford Motor Co. v. Roland Leo Grenier Sr., Nos. 453,2007, 578,2007, Del. Sup.; 2009 Del. LEXIS 438; See April 2009, Page 9).

(**Opinion available.** Document #01-090902-016Z.)

Roland Leo Grenier Sr. sued a number of defendants in the New Castle County Superior Court, alleging that he developed mesothelioma as a result of exposure to their asbestos-containing products.

Over the Daubert v. Merrell Dow Pharm Inc. (509 U.S. 579 [1993]) objections of defendants Ford Motor Co. and General Motors Corp., Judge Joseph R. Slights III allowed Grenier to present expert testimony by Dr. Ronald F. Dodson and Richard Lemen on friction products and chrysotile asbestos causation.

Verdict

At the March 2007 trial, only Ford and GM remained, and Grenier argued that during his 35-year career as an auto mechanic and laborer in Pawtucket, R.I., he was exposed to asbestos from their brake and clutch parts. The jury returned a $2 million verdict for Grenier, assigning 70 percent of liability to GM and 16 percent to Ford. Ford and GM sought a new trial, which Judge Slights denied. GM and Ford appealed to the Delaware Supreme Court.

On Feb. 4, the high court held that Judge Slights' characterization of Dodson and Lemen's analysis was not supported by the record and remanded for reconsideration and clarification. In an April 8 report to the Delaware Supreme Court, Judge Slights held that Dodson's opinion was sufficiently reliable under Daubert and that Lemen properly relied upon it in reaching his conclusions. After GM's bankruptcy, only Ford remained in the case.

In its subsequent ruling, the Supreme Court held that Grenier's experts considered Ford's contention that the manufacturing process altered the chrysotile in a way that left it noncarcinogenic but concluded that there was no data to support the theory. The court said such a process comports with reliable methodology and that Judge Slights did not abuse his discretion in admitting the testimony.

The court also dismissed Ford's claim that Grenier failed to prove general causation. The court said Ford's argument on that point is largely a restatement of its Daubert argument. However, the court concluded that because Judge Slights found Grenier's experts reliable and admissible, the opinions provide the necessary basis for evidence of causation.

Other Exposures

The court also rejected Ford's argument that it should be granted a new trial because of evidence, discovered after trial, that Grenier filed two claims against other companies for exposure to nonfriction products. But the court said Ford was well aware that Grenier suffered exposure to asbestos from nonfriction parts of at least 30 manufacturers. The court noted that at trial, Ford pointed to these other exposures as a possible alternative cause of his mesothelioma. The addition of the two later-discovered claims would not likely have changed the result of the trial, the court concluded.

The court dismissed Ford's arguments regarding the admission of the Environmental Protection Agency's Gold Book and the inadmissibility of evidence that Grenier smoked cigarettes containing asbestos filters. The court concluded that Judge Slights did not abuse his discretion on these rulings.

Nor did Judge Slights err by allowing evidence that Ford and other defendants spent $19 million on experts, the court said. The court said funding of experts, at trial or in scientific research, is a factor to be considered when weighing the reliability of scientific conclusions and was properly admitted.

Jury Question

Additionally, the court said Judge Slights properly responded to a jury question seeking access to studies and published papers. Judge Slights responded that the papers had not been admitted as evidence — declining Ford's request to answer that such evidence was entered through expert witnesses — even though portions had been read into the record, the court noted. But the court concluded that Judge Slights' response was neither misleading nor inaccurate.

The court also dismissed Ford's claims that Grenier's lawyer's closing argument referencing Ford's expenditure on experts and noting Grenier's family standing beside a gravesite was inflammatory.

The court said that the statement regarding the gravesite was improper and that it found Grenier's claim that the statement was not made to invoke sympathy was "disingenuous." But the court said one isolated statement did not deny Ford a fair trial.

Justice Carolyn Berger wrote for the court and was joined by Justices Randy J. Holland and Jack B. Jacobs and Vice Chancellor John Noble, sitting by designation.

Dissent

In dissent, Justice Myron T. Steele said he believed Grenier's experts' opinions were admitted in error.

"The motion judge's gatekeeping role does not end when he rules that the proffered expert is qualified to testify in a particular field. An expert may be qualified in a field and his work may have been commented on by other experts, but that alone does not demonstrate that a sound, verifiable methodology underlies an opinion in a particular case," Justice Steele said.

Justice Steele said he believed it was an abuse of discretion by Judge Slights to allow Dodson and Lemen's conclusory opinions without requiring them to provide the principles and methodology to show that their opinions were reliable.

Christian J. Singewald of White & Williams in Wilmington and Eileen Penner and Andrew Tauber of Mayer Brown in Washington, D.C., represent Ford. Yvonne Takvorian Saville of Weiss & Saville in Wilmington and John J. Spillane, Kevin D. McHargue and Renee M. Melacon of Baron & Budd in Dallas represent Grenier. ■

Plaintiff Asks 6th Circuit To Order Daubert Transcripts Added In $21 Million Appeal

CINCINNATI — Welder Jeff Tamraz and his wife, Terry, said Jan. 20 that manufacturer defendants violated Federal Rule of Appellate Procedures 10(b)(2) by failing to include all the evidence in their appeal of the $20.7 million judgment against them; the manufacturers responded Jan. 30 that they followed procedures and the rule violation claim is without merit (Jeff Tamraz, et al v. Lincoln Electric Co., et al., No. 08-4015, 6th. Cir.).

(**Tamraz motion to amend record available.** Document #70-090210-016M. **Manufacturer response available.** Document #70-090210-017B.)

The defendants are appealing a U.S. District Court for the Northern District of Ohio jury award of $17.7 million in compensatory damages to Jeff Tamraz and $3 million in compensatory damages for loss of consortium to Terry Tamraz (In re: Welding Fume Products Liability Litigation [Jeff Tamraz, No. 04-18948], MDL 1535, No. 03-17000, N.D. Ohio).

The trial ended Dec. 5, 2007, with a verdict for plaintiffs Jeff and Terry Tamraz on strict liability and negligent failure to warn claims. The jury returned a verdict for Lincoln Electric Co., Hobart Brothers Co., ESAB Group Inc., BOC Group Inc. and TDY Industries Inc. on the fraudulent concealment cause of action.

ESAB Group, Hobart Brothers and Lincoln Electric filed one of the appeals (No. 08-4015). TDY Industries filed a second appeal (08-4016). Both appeals were filed Aug. 13. An Oct. 29 motion to consolidate for submission was granted Nov. 6.

Statement Of Appeal

In their statement of appeal, the defendants aver that the trial court improperly admitted "speculative" testimony from medical experts for Tamraz and failed to exclude documents "completely unrelated" to the

claims raised by Tamraz. The trial court also failed to require Tamraz to prove that particular warnings on welding consumables were inadequate at a particular time.

The manufacturers have not designated all the relevant evidence in the record as required by Rule 10(b)(2), Tamraz says. They should be ordered to designate the result of the Daubert v. Merrell Dow Pharmaceuticals Inc. (509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 [1993]) analysis conducted by U.S. Judge Kathleen McDonald O'Malley of the District of Ohio.

"Prior to the commencement of the trial in the instant case, and prior to several previous trials within MDL 1535, Judge Kathleen O'Malley conducted extensive hearings on issues relating to causation which produced scientific testimony and other evidence from many plaintiff and defense experts," Tamraz says. "The experts who testified, and their supporting evidence, were subject to cross examination by counsel for both sides, as well as intensive examination by the court. The hearing continued for three weeks and the hearing transcript constitutes fourteen volumes. The result of the pre-trial hearings was a learned ruling concerning the neurological effects of manganese in welding fumes which contains an extensive analysis of available scientific evidence as well as descriptions of methodology."

Obligation To Designate

Lincoln Electric, Hobart Brothers and ESAB said Jan. 30 that Tamraz misunderstands their obligation to designate the trial court record on appeal.

"Specifically, appellants understood that the parties are to include the specific materials they believe to be relevant to this appeal in their Designation of Appendix Contents and Supplemental Designation of Appendix Contents, attached to their proof briefs. After the submission of proof briefs, and in consultation with appellees, appellants will compile and submit a Joint Appendix that includes those portions of the record on which the parties rely in their briefs," the defendants say.

"Appellee's concern is thus premature."

Second, the defendants say, "None of the material that appellees accuse appellants of failing to designate is relevant to this appeal because none of it addresses — or supports — Dr. Carlini's opinions." Walter Carlini, M.D., is the treating physician for Jeff Tamraz, and the defendants characterized his opinion as unreliable in pretrial motions.

The transcript Tamraz seeks to have designated involves the so-called core Daubert process several years before the instant trial, the defendants say.

'Not A ''Core'' Expert'

"Dr. Carlini was not a 'core' expert subject to that process, and he did not testify at any point in the fortnight of transcripts identified in the supplemental designation. Accordingly, the transcripts are not 'relevant to [the] . . . conclusion' that his opinion was admissible under [Federal Rule of Evidence] Rule 702," they say.

John H. Beisner, Jonathan D. Hacker, Stephen J. Harburg and Jessica D. Miller of O'Melveny & Myers in Washington, D.C., represent Lincoln Electric, Hobart Brothers and ESAB. Irene C. Keyse-Walker, Joseph J. Morford and Karen E. Ross of Tucker, Ellis & West in Cleveland represent TDY.

John R. Climaco, John A. Peca Jr., Patricia M. Ritzert, Lisa A. Gorsche and Dawn M. Chmielewski of Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co. in Cleveland, Eric C. Wiedemer of Kelly & Ferraro in Cleveland and Elizabeth J. Cabraser and Robert J. Nelson of Lieff, Cabraser, Heimann & Bernstein in San Francisco represent Tamraz. ■

Nonfungal Infection Expert Excluded In MoistureLoc MDL

CHARLESTON, S.C. — The sole nonfungal eye infection general causation expert in the MoistureLoc contact lens solution multidistrict litigation was excluded Aug. 26 when a South Carolina federal judge found that her opinion is "built on an unsupported hypothesis, and is thus fundamentally flawed and must be excluded" (In Re: Bausch & Lomb Contact Lens Solution Products Liability Litigation, MDL Docket No. 1785, No. 2:06-MN-77777-DCN, D. S.C., Charleston Div.; See July 2009, Page 28).

(**Opinion available.** Document #28-090903-028Z.)

The exclusion by Chief U.S. Judge David C. Norton of the District of South Carolina follows the July 14 exclusion by New York County Supreme Court Justice Shirley Werner Kornreich of that expert plus two others after a July 3-5 joint federal-state court hearing on expert testimony.

Plaintiffs allege that Bausch & Lomb's ReNu with MoistureLoc contact solution caused eye infections, both fungal —*Fusarium* keratitis — and non-*Fusarium*, leading to corneal damage, corneal transplant surgery or blindness. Federal cases were centralized in the District of South Carolina and New York state cases in the New York County Supreme Court. The courts coordinated discovery and motion practice.

General Causation Expert

MDL plaintiffs submitted the general causation opinion of Dr. Elisabeth Cohen, a board-certified ophthalmologist at Wills Eye Hospital and a professor at Thomas Jefferson Medical College, both in Philadelphia. Cohen testified that MoistureLoc can cause non-*Fusarium* infections, including bacterial ones. Her theory is that MoistureLoc loses its disinfectant efficacy.

The plaintiffs submitted Cohen's original report, a supplemental report and an affidavit. Bausch & Lomb challenged the admissibility of her testimony under Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579 [1993]).

Chief Judge Norton said Cohen's general causation theories have not been tested, "despite the opportunity to do so and the availability of the product for testing." Instead, he said, she relies on Bausch & Lomb's internal tests, which he said never demonstrated that reduced biocidal efficacy led to an increased rate of non-*Fusarium* infections. "That is the crux of Dr. Cohen's opinion, and it remains untested," the judge said.

No Peer Review

Cohen's theories have also not been subject to peer review and published, the judge said, a "pertinent consideration." "The courtroom is not the forum to advance new scientific theories," he said.

Cohen's methodology also cannot be analyzed for any rate of error, Judge Norton said. It failed to meet Daubert's general acceptance standard for reliability. "In sum," he said, "plaintiffs' theory is an educated guess."

The judge said one concern is Cohen's reliance on *in vitro* tests, which he said are just a first step to test a hypothesis. "These tests' suggestion of biological plausibility is insufficient to demonstrate causation, and unreliable under Daubert, absent evidence establishing an association between MoistureLoc and non-Fusarium infections," he wrote.

'Moving Target'

Chief Judge Norton also was concerned that Cohen's opinion was a "moving target." He noted that her affidavit contained new opinions that were unsupported by medical literature. At the hearing, he said, Cohen "retreated" from several of her opinions when challenged.

"Dr. Cohen's changing opinions, and willingness to abandon or qualify her opinions when faced with further facts, undermines the reliability of her opinion," the judge said.

Cohen also failed to address contradictory data, Judge Norton said.

"Dr. Cohen never articulated what her hypothesis was, what evidence she considered, and why that evidence led her to either accept or reject her hypothesis," the judge said. "Dr. Cohen failed to clearly articulate her method is particularly concerning here, where her opinions contain numerous analytical leaps and extrapolations."

Daubert Not Met

"In combination," the judge concluded, "these considerations demonstrate that the general causation opinions of plaintiffs' expert and the methodology behind those opinions do not meet the Daubert standard for scientific reliability, and accordingly must be excluded."

Last year, Bausch & Lomb began settling *Fusarium* cases.

Bausch & Lomb is represented by Michael T. Cole and Eli A. Poliakoff of Nelson, Mullins, Riley and

Scarborough in Charleston and Harvey Kaplan, Marie Woodbury and Eric Anielak of Shook, Hardy & Bacon in Kansas City, Mo.

The plaintiffs are represented by H. Blair Hahn and James L. Ward Jr. of Richardson, Patrick, Westbrook & Brickman in Mount Pleasant, S.C.; Mitchell M. Breit of Whatley, Drake & Kallas in Birmingham, Ala.; Wendy R. Fleishman of Lieff, Cabraser, Heimann & Bernstein in New York; and Daniel E. Becnel Jr. of the Becnel Law Firm in Reserve, La. ■

Summary Judgment Denied In Ethicon Stapler Case

LITTLE ROCK, Ark. — An Arkansas federal judge on Aug. 27 denied summary judgment in an Ethicon Endo-Surgery stapler case, finding a question of fact about whether the device was used and allowing a plaintiff expert's testimony about causation (Sharon Chism, et al. v. Ethicon Endo-Surgery Inc., et al., No. 08-341, E.D. Ark.).

(**Order available.** Document #28-090903-048R.)

In 2002, Sharon Chism underwent gastric bypass during which Dr. Rex Luttrell used a surgical stapler to close incisions between the stomach and intestine. A day later, Chism experienced an accelerated heart rate and was diagnosed with a leak at the surgical site.

Luttrell performed a second surgery and found dehiscence at the staple line at the efferent ileum, which allowed gastric contents to leak inside Chism.

In 2008, Chism sued Ethicon Endo-Surgery Inc. in the Pulaski County Circuit Court for negligence, strict liability design defect and breach of warranty, alleging that the defendant's TLC-55 cutter/stapler malfunctioned and caused a failed staple line and open bowel.

Product ID

Ethicon removed the case to the U.S. District Court for the Eastern District of Arkansas, where the defendant moved for summary judgment. It argued that Chism failed to establish that an Ethicon device was used and failed to negate other possible causes.

(**Motion brief available.** Document #28-090903-049R. **Supplemental brief available.** Document #28-090903-050B. **Opposition available.** Document #28-090903-051B. **Reply available.** Document #28-090903-052B.)

"Based on the evidence before me," Judge William R. Wilson Jr. wrote, "clearly, there are facts in dispute as to whether Defendant's device was used in the surgery."

Ethicon argued that Luttrell's notes don't mention the Ethicon stapler but three others. Judge Wilson said Luttrell testified, however, that he used the other terms "generically" and that he used an Ethicon TLC 55 stapler.

In addition, the judge said Luttrell testified that after Chism's surgery, he talked to an Ethicon sales representative and discussed the failure rate of the staplers. "Considering these few examples, there are material facts in dispute as to whether Defendant's cutter/stapler was used during Ms. Chism's surgery," the judge wrote. "This fact must be resolved by a jury."

Cross-Examine Expert

Judge Wilson said Ethicon's attacks on the causation testimony of plaintiff expert Dr. William Hyman "are better suited for cross-examination, rather than summary judgment."

Trial is set for Oct. 6.

Chism is represented by Donald S. Ryan of Dodds, Kidd & Ryan and Thomas L. Barron of Barron, Barron & Tucker, both in Little Rock, Ark. Ethicon is represented by G. Spence Fricke and Rick A. Behring Jr. of Barber, McCaskill, Jones & Hale in Little Rock. ■

2 Suicide Causation Experts Stay In MDL Case

BOSTON — Two plaintiff experts can testify about Neurontin's alleged role in a man's suicide — including admission of a "psychological autopsy," the judge in the federal Neurontin multidistrict litigation ruled Aug. 14 in denying exclusion and across-the-board

summary judgment (In Re: Neurontin Marketing, Sales Practices, and Products Liability Litigation, MDL Docket No. 1629, No. 04-10981, Ruth Smith, et al. v. Pfizer, Inc., No. 05-11515, D. Mass.).

(**Opinion on experts available.** Document #28-090903-015Z.)

Ruth Smith alleged that her husband, Richard Smith, 79, shot himself to death shortly after he began taking Neurontin for pain. She sued Pfizer Inc. in the U.S. District Court for the Middle District of Tennessee, and the case was transferred into the MDL court in the District of Massachusetts.

Judge Patti Saris previously denied a motion to exclude general causation expert witnesses in the litigation (See May 2009, Page 8). Pfizer then moved to exclude Smith's two specific causation experts for using unreliable and inadmissible methodology and analyses under Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579 [1993]).

(**Motion available.** Document #28-090903-017B. **Opposition available.** Document #28-090903-018B. **Reply available.** Document #28-090903-019B. **Surreply available.** Document #28-090903-020B.)

Methodologies OK

The experts are Roger W. Maris, Ph.D., a suicidologist, professor emeritus at the University of South Carolina and founder of the Suicide Center at the University of South Carolina and Michael Trimble, M.D., a neuropsychiatrist and professor of behavioral neurology.

Judge Saris found that the experts' methodologies — a psychological autopsy and a differential diagnosis — "are generally accepted in the field, that the two experts reliably applied these methodologies to the facts of the case, and that their testimony is relevant to the task at hand."

Maris considered medical records, Smith's suicide note, police and medical examiner reports, interviews with family members and doctors and a literature review for Neurontin. He used a psychological autopsy diagnostic technique he developed to evaluate the cause of individual suicides.

Maris concluded that Smith was only moderately suicidal before taking Neurontin, did not kill himself because of chronic back pain and more likely than not would not have killed himself if he had not taken the drug.

Substantial Factor

Responding to Pfizer's objections to Maris' findings, Judge Saris said the expert is not required to rule out every possible cause before offering his own causation opinion. Under Tennessee law, she said, Smith must prove only that Neurontin was a "substantial factor in causing the harm."

Maris does not conclude that Neurontin was the sole cause of the suicide, just a "noticeable difference-maker" that pushed Richard Smith "over the edge," she said.

The judge said Maris accounted for two risk factors — hopelessness and chronic pain — and ruled them out.

Differential Diagnosis

Trimble's testimony is not inadmissible just because he does not specialize in suicidology or practice in the United States, Judge Saris said. She said differential diagnoses, such as the one Trimble used, are accepted by courts.

Applying standards found in case law, Judge Saris concluded that Trimble's differential diagnosis meets the threshold level of admissibility under Daubert.

Noting that Maris' testimony is more thorough than Trimble's, Judge Saris said a determination of whether Trimble's testimony should be limited to general rather than specific causation should be determined by a Tennessee trial court on remand.

In a one-sentence ruling in the opinion, Judge Saris denied Pfizer's motion to strike supplemental declarations of Maris and plaintiff general causation expert Stefan P. Kruzewski as untimely.

Summary Judgment Ruling

In a separate opinion, Judge Saris denied in part and granted in part Pfizer's motion for summary judgment for all of Ruth Smith's claims.

(**Opinion available.** Document #28-090903-016Z. **Motion available.** Document #28-090903-021B.

Opposition available. Document #28-090903-022B. **Reply available.** Document #28-090903-023B. **Surreply available.** Document #28-090903-024B.)

Pfizer argued that Smith could not demonstrate that Richard Smith took Neurontin at any time temporally related to his suicide and could not demonstrate that inadequate warnings were a proximate cause of his suicide. Judge Saris that those are "fact-specific inquiries involving questions of Tennessee law and are therefore best left for the transferor court in Tennessee to resolve."

The judge also ruled that Smith's claims of breach of implied warranty and fraud involve questions of Tennessee law and are reserved for the transferor court.

2 Challenges Unopposed

Smith did not oppose Pfizer's motion for summary judgment on breach of express warranty and violation of the Tennessee Consumer Protection Act.

Smith is represented by Charles F. Barrett of Barrett & Associates in Nashville. Pfizer is represented by James P. Rouhandeh of Davis, Polk & Wardwell in New York, Scott W. Sayler of Shook, Hardy & Bacon in Kansas City, Mo., and David B. Chaffin of Hare & Chaffin in Boston. ■

Fosamax Jaw Injury Claims For Short-Term Use Survive As MDL Allows 2 Experts

NEW YORK — Twenty-four plaintiffs who claim to have developed osteonecrosis of the jaw (ONJ) after using Fosamax for less than three years can go forward with their cases because the federal multidistrict litigation court on Sept. 9 allowed the general causation testimony of two of three plaintiff experts (In Re: Fosamax Products Liability Litigation, MDL Docket No. 1789, No. 06-md-1789, S.D. N.Y.; See August 2009, Page 14).

(**Opinion available.** Document #28-090917-009Z.)

Manufacturing defendant Merck & Co. Inc. argues that Fosamax, a bisphosphonate drug prescribed to treat osteoporosis, carries no risk of ONJ if used for less than three years. It sought to exclude plaintiff expert testimony to the contrary through summary judgment in 24 cases in the MDL in the U.S. District Court for the Southern District of New York.

Judge John F. Keenan granted Merck's motion to exclude the general causation testimony of Dr. Robert E. Marx, an oral surgeon at the University of Miami School of Medicine, who originally testified that ONJ does not occur until after three years' use of Fosamax. He said Marx's change of opinion did not meet reliability factors.

The judge said that Marx has not published his revised opinion about causation with less than three years' use, which he said "suggests that he does not hold it to the same degree of scientific certainty" as his first published theory.

Litigation Influence?

"Furthermore," Judge Keenan wrote, "the timing of Dr. Marx's change of opinion raises a question as to whether it was made independent of litigation concerns." The judge was also concerned that Marx "seeks to offer a stronger opinion that is inconsistent with the one he presented to the medical and dental community for several years."

"On balance," the judge wrote, "the Court finds that the PSC [Plaintiffs' Steering Committee] has failed to show that Dr. Marx's new opinion on the three-year issue is sufficiently reliable to be admitted under Rule 703 [of the Federal Rules of Evidence]."

Judge Keenan found "no basis to restrict" the general causation testimony of two remaining plaintiff experts, Dr. John W. Hellstein, a dental professor at the University of Iowa School of Dentistry, and Dr. Alastair N. Goss, an oral surgeon at the University of Adelaide in Australia.

2 See Short-Term Risk

"Nothing in the record suggests that either expert previously endorsed the view that the risk of ONJ is minimal or insignificant before three years of oral bisphosphonate use," the judge wrote. "Their opinion that there is risk before three years is specifically supported by Dr. Goss's Australian study, the USC [University of Southern California] study,

A free LexisNexis® service from the pages of Mealey's™...

Stay abreast of all the hottest litigation with *daily* Legal News Podcasts!

Stay on top of how the courts are deciding discovery disputes in your jurisdictions ... find out the latest settlements awarded in class action cases ... and ascertain the emerging trends in key litigation involving securities, product liability, construction defects, antitrust law *and a whole lot more*.

Now you can do all this ... anytime ... anywhere ... thanks to **LexisNexis Legal News Podcasts**. It's free and easy to listen to today's headlines, or catch up if you've been out of the office ...

- Listen to all the day's top stories on your computer or MP3 player
- For previous day's Podcasts, download and install either the RSS reader or Podcasting software *free* at www.mealeys.com
- It's fast... it's easy... and it doesn't cost a dime.

Visit **www.lexisnexis.com/mealeys/podcasts.aspx** to listen to your free, daily Podcast!

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Mealey's is a trademark of Lexis-Nexis, a division of Reed Elsevier Inc. © 2009, LexisNexis, a division of Reed Elsevier Inc. All rights reserved. 0109

TOTAL PRACTICE SOLUTIONS

Client Development | Research Solutions | Practice Management | Litigation Services

and Merck's internal analysis of adjudicated adverse event reports."

"Viewing the evidence in a light most favorable to plaintiffs," Judge Keenan concluded, "a rational jury could conclude on the basis of the testimony of Dr. Goss and Dr. Hellstein, and the evidence upon which they rely, that Fosamax can cause ONJ before three years of use. In addition, once case-specific discovery begins, each plaintiff will have an opportunity to designate a specific causation expert to testify that Fosamax caused him or her to develop ONJ. Such testimony, if admissible, may be sufficient by itself to make causation a genuine issue of fact for trial."

In July, Judge Keenan issued a separate opinion allowing the general causation opinions of Marx, Goss and Hellstein but reserved his ruling on the three-year issue.

The plaintiffs are represented by Timothy M. O'Brien, Megan Tans and Ned McWilliams of Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor in Pensacola, Fla., and Michelle Parfitt and James Green of Ashcraft & Gerel in Washington, D.C. Merck is represented by Norman C. Kleinberg and William J. Beausoleil of Hughes, Hubbard & Reed in New York, Paul F. Strain, David Heubeck and Stephen Marshall of Venable in Baltimore and Christy D. Jones of Butler, Snow, O'Mara, Stevens & Cannada in Jackson, Miss. ■

Zyprexa Expert, Doctor Admissible In MDL Death Case, But Lilly Alleges 'Sham'

BROOKLYN, N.Y. — Eli Lilly and Co. on Sept. 11 asked the judge overseeing the Zyprexa multidistrict litigation to reconsider his Aug. 28 ruling admitting a plaintiff's causation expert in a diabetes death case, saying a post-deposition affidavit is a contradictory "sham" (In Re: Zyprexa Products Liability Litigation, MDL Docket No. 1596, No. 04-md-1596, Arlene Earl, et al. v. Eli Lilly & Company, No. 07-3912, E.D. N.Y.; 2009 U.S. Dist. LEXIS 78567).

In its motion to reconsider, Lilly says that the affidavit of treating physician Dr. Timothy Stone's that he would have considered other treatment options is a "sham" because it contradicts his deposition testimony.

(**Lilly motion available.** Document #28-090917-021B.)

However, Judge Weinstein addressed Stone's affidavit in his opinion, saying that Stone did not contradict his deposition testimony and that the affidavit "reinforces the statements he had already made in responding to Lilly's counsel's hostile direct examination."

Weight Gain

Kefrey D. Earl was diagnosed with paranoid schizophrenia in 1996 and was treated sporadically from then until 2005 with Zyprexa, an atypical antipsychotic made by Lilly, as well as other psychiatric drugs. In 1997, his blood sugar was 104 milligrams per deciliter (mg/dL), which was within normal range. Also in 1997, he was diagnosed as obese, weighing 183 pounds compared to an estimated ideal body weight of 142-154 pounds.

In 1999, Earl weighed 171 pounds. In June 2003, he weighed 226 pounds and in March 2005, 251 pounds. His fasting blood glucose was 163 mg/dL in March 2005. In July 2005, Earl was found dead with a blood glucose of 1,150 mg/dL, and his cause of death was listed as diabetic ketoacidosis.

In 2007, Arlene Earl, administrator of Kefrey's estate, sued Lilly in the Jefferson County, Ala., Circuit Court. Lilly removed to case to federal court, and it was transferred into the Zyprexa MDL in the U.S. District Court for the Eastern District of New York. Arlene Earl alleged that Zyprexa caused Kefrey Earl's diabetes, that Lilly failed to warn about the risk of weight gain and diabetes and that had proper warnings been given, Zyprexa would not have been prescribed.

Lilly Challenges

Lilly moved to exclude the testimony of plaintiff expert Dr. David S.H. Bell, an internist and endocrinologist, arguing that his conclusion is impermissible *ipse dixit* and that his causation opinion lacks a reliable basis of generally accepted scientific principles and methodology and fails to account for alternative causes. In addition, Lilly argued that the learned intermediary doctrine barred Earl's claims.

Senior Judge Jack B. Weinstein said there is no evidence on the record about whether Kefrey's treating physicians knew about Zyprexa's metabolic side effects before 2005. He said there is an issue of material fact about whether Stone was aware of the scope of the side effects during six years of treatment.

(**Opinion available.** Document #28-090917-020Z.)

The judge said Stone was uncertain if he was completely aware of Zyprexa's benefits versus risks. "The medical documentation supports the claim that this responsible physician did not have sufficient knowledge of the specific risks that plaintiff argues should have been included in an alternative warning," the judge wrote. He said the doctor's knowledge of the risks coincided with Lilly's 2004 "dear doctor" letter about those risks.

Heeding

In addition, Judge Weinstein said the doctor reiterated his belief that he would have pursued a different treatment if there had been an alternative warning.

"The evidence demonstrates that a reasonable juror could find that, given an earlier alternative warning from Lilly, Dr. Stone would have made different treatment decisions with respect to Earl, including an altered prescription choice or additional monitoring," Judge Weinstein wrote. "The alleged inadequacy of the Zyprexa warning related to metabolic risks, a jury might conclude, may have led to treatment decisions that contributed to Earl's subsequent injuries, including diabetes and death."

Judge Weinstein said Bell is qualified to offer expert testimony on causation. "Dr. Bell meets the necessary educational and experiential qualification warranting admissibility of his expert testimony on the relevant principles of endocrinology and the causal relationship between Earl's Zyprexa use and the onset of diabetes," the judge wrote.

"[T]he court finds that Dr. Bell has demonstrated a sufficient 'precision with respect to the relevant scientific knowledge and its application to the facts' of the individual case," the judge wrote, citing Daubert. "His conclusions on general causation are based considerably on peer-reviewed, well-known epidemiological studies and other permissible sources of information."

Daubert Satisfied

"Lilly's argument against the validity of Dr. Bell's thesis on Zyprexa's direct damage to the pancreas and beta cells is compelling," Judge Weinstein continued, "but it is not decisive and need not be evaluated on the present motion. . . . Dr. Bell's opinion on whether Earl's diabetes with respect to weight gain — a generally accepted causation relationship — satisfies Daubert requirements [Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)]: it may be helpful to a jury . . . and possesses sufficient indicia of reliability and scientific validity."

Judge Weinstein denied Arlene Earl's motion to remand as premature pending conclusion of discovery and pretrial motion practice.

Earl is represented by Michael D. Ermert of Hare, Wynn, Newell & Newman in Birmingham. Lilly is represented by Alan D. Mathis and James C. Barton Jr. of Johnston, Barton, Proctor & Powell in Birmingham and Andrew R. Rogoff, Matthew J. Hamilton and Nina M. Gussack of Pepper Hamilton in Philadelphia. ■

Benzene Plaintiff: Experts Used Same Methodology As Defense Experts

LUFKIN, Texas — A former plumber/pipe fitter, who is alleging before a Texas federal court that exposure to benzene in the defendants' chemical products caused him to suffer injury, argues in an Aug. 27 sur-reply that the opinions of his medical experts are reliable and that the experts relied on the same literature and methodology that the defendants' experts used (Lewis E. Knapper, et al. v. Safety Kleen Systems, Inc., et al., No. 9:08-cv-00084-TH, E.D. Texas; See August 2009, Page 22).

(**Sur-reply to motion to exclude testimony of Levy and Mehlman available.** Document #83-090910-031B. **Reply to response available.** Document #83-090910-034B.)

Lewis E. Knapper sued Safety-Kleen Systems Inc., Aristech Chemical Corp., Radiator Specialty Co. (RSC), Sunoco Inc., US Steel Corp. and USX Corp. in the U.S. District Court for the Eastern District of Texas, Lufkin Division.

Knapper worked as a plumber/pipe fitter for various companies in Texas, New York and Florida from 1968 to 2006 and was exposed to benzene, which he claims caused his acute myelogenous leukemia (AML).

Dermal, Inhalation Exposure

U.S. Steel and Radiator Specialty moved to strike Knapper's experts Drs. Barry S. Levy and Myron Mehlman on July 23, arguing that their testimony regarding the plaintiff's cumulative dermal and inhalation exposure to benzene is unreliable under Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579 [1993]).

Knapper replied Aug. 7, arguing that Levy, who has more than 30 years of experience in the field of occupational medicine, and Mehlman, who has more than 50 years of experience in the fields of toxicology and environmental health and safety, are "exceedingly qualified" to offer their opinions. He also argues that their methodology is sound and is the same as that used by the defendants' experts.

The defendants filed a reply on Aug. 17 in which they argue that the scientific literature that shows an increased risk of AML with benzene exposure at a certain level is based on inhalation exposure only — not a cumulative exposure level of both inhalation and dermal exposure.

Fundamental Point

"This fundamental point — that the published scientific literature showing an increased risk of AML associated with benzene exposure has been based on measurements of inhalation exposures — continues to escape Plaintiffs and their experts . . . who inexplicably contend that their methodology of comparing Mr. Knapper's dermal — inhalation exposure assessment . . . to such scientific literature is appropriate and consistent with Defendants' experts," the defendants say.

Knapper says in his sur-reply that "Dr. Levy and Dr. Mehlman rely upon the same body of literature and use the same methodology as that of Defendants' experts in rendering their opinions. In fact, Defendants concede that Defendants' expert, Dr. [David] Pyatt, uses the same methodology as Plaintiffs' experts in Defendants' response to Plaintiffs' motion to exclude the testimony of Dr. Pyatt."

Knapper is represented by John M. Black and J. Robert Black of Heard, Robins, Cloud & Lubel in Houston. Safety-Kleen is represented by Christopher W. Carr and John W. Petereit of Jones, Carr, McGoldrick in Dallas. Patrice Pujol of Forman Perry Watkins Krutz & Tardy in Houston represents Aristech, USX and US Steel. Russell J. Ramsey of Ramsey & Murray in Houston represents Oatey. James M. Riley Jr. of Coats Rose in Houston represents RSC.

(Additional documents available: **Reply to response (Drivas).** Document #83-090910-032B. **Reply to response (Pyatt).** Document #83-090910-033B. **Reply to response (Petty).** Document #83-090910-035B. **Response to motion to exclude Spencer.** Document #83-090910-036B.) ■

Shell Oil Defends Industrial Hygienist's Opinion On Dermal Exposure

HOUSTON — Shell Oil Co. is arguing before a Texas federal court in a Sept. 3 sur-reply that its industrial hygienist expert in a benzene exposure case cannot be excluded because he did not employ the same methodology as the plaintiff's expert (Ben N. Brown, Sr. v. Shell Oil Company, et al., No. 08-CV-413, S.D. Texas; See August 2009, Page 23).

(**Defendant's sur-reply available.** Document #83-090910-053B.)

Ben N. Brown Sr. sued Shell Oil Co., Shell Chemical LP, Shell Offshore Inc., Radiator Specialty Co. and Doe defendants in the U.S. District Court for the Southern District of Texas. He worked for Shell Oil Offshore from 1968 to 1992 on oil platforms off the coast of Southern Louisiana.

He says that during his employment, he was exposed to benzene-containing solvents, paints, hydrocarbons,

"cutters" and chemicals, which caused his cancer. Brown alleges that Shell failed to warn him of the potential dangers of the products and failed to provide him with adequate safety instructions.

Industrial Hygienist

On Aug. 3, Brown moved to exclude portions of the testimony of industrial hygienist John Spencer regarding Brown's dermal exposure to benzene under Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579 [1993]).

"Mr. Spencer is not qualified by education, training or experience to perform dermal exposure analysis or any other measurement of dermally absorbed benzene. His education is limited to a Bachelor of Science degree in Biological Sciences," Brown says.

Brown argues that Spencer did not attempt to construct or use a dermal model in his case. He also says Spencer admitted in another federal benzene case that he does not know how to perform mathematical monitoring and has never performed a dermal absorption calculation in his 30 years of employment.

Well-Qualified

Shell filed its opposition to the plaintiffs' motion on Aug. 24, arguing that "Spencer is well qualified to address industrial hygiene and exposure assessments, and his opinions are based on reliable, relevant and comprehensive methodology."

(**Opposition to plaintiff's motion to exclude available.** Document #83-090910-054B.)

It argues that Brown's expert, Dr. Mark Nicas, "also testified that during his (much more limited) career as a practicing industrial hygienist, he also never calculated a dermal exposure."

"The fact that neither side's expert has actually done this kind of guesswork in the field casts a long shadow on the reliability of Nicas' methodology. Plaintiff cannot use this fact offensively against Spencer, for it is the Plaintiff that has the exclusive burden to defend his own expert's dose modeling methodology," Shell says.

Same Dermal Model

It also says that Brown fails to mention that Nicas was excluded under Daubert for using the same dermal model in Andrews v. Untied States Steel Corp. (No. D-504-CV-200601258, 5th Jud. Dist., Chaves Co., N.M.).

"As Spencer explains, the Occupational Safety and Health Administration (OSHA), National Institute for Occupational Safety and Health (NIOSH), and American Conference of Governmental Industrial Hygienists (ACGIH) neither require nor recommend quantifying dermal exposures," Shell says.

Standardized Methods

Brown filed a reply on Aug. 28 in which he argues that Spencer's "[f]irst gaffe is opining there are no reliable methods used by industrial hygienists to model dermal absorption of benzene or other chemicals. As Mr. Brown explained in his motion, there are standardized methods for calculating a person's past dermal absorption of benzene."

(**Reply available.** Document #83-090910-055B.)

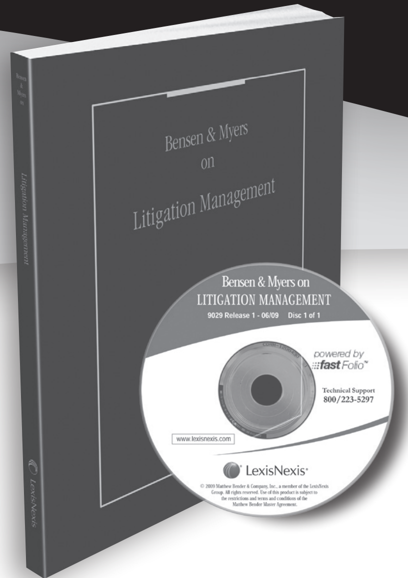
"Mr. John Spencer did not make a personal exposure assessment for Mr. Ben Brown, so his proposed testimony is not based on any dermal or respiratory intake assessment of Mr. Brown's benzene exposure. Contrary to the assertions in Shell Defendants' opposition, Dr. Nicas has made a dermal benzene exposure assessment that conforms to the standards of his profession. Dr. Nicas has described and calculated the exposure and noted that it posed a serious risk of harm, serious route of toxic exposure," Brown says.

Brown is represented by S. Reed Morgan of Comfort, Texas, and Jeffrey Nadrich of Nadrich & Cohen in Los Angeles. The Shell defendants are represented by Stan Perry and Heidi K. Thomas of Haynes and Boone in Houston and Jeffrey I. Mandel of Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley in Metairie, La.

(Additional documents available: **Motion to strike Nicas' expert report.** Document #83-090910-056M. **Opposition.** Document #83-090910-057B. **Opposition to partial summary judgment, workers' compensation.** Document #83-090910-058B. **Opposition to partial summary judgment, Jones Act.** Document #83-090910-059B. **Opposi-**

tion to motion to strike Alexanian. Document #83-090910-060B. **Opposition to supplemental causal summary judgment motion.** Document #83-090910-061B. **Reply to opposition, Jones Act.** Document #83-090910-062B. **Reply, workers' compensation.** Document #83-090910-063B.) ■

Reduce legal spend
with litigation management
techniques you can implement
immediately.



Bensen & Myers on Litigation Management

Eric E. Bensen and Rebecca Kelder Myers

One-of-a-kind, systematic approach to cutting litigation costs without sacrificing quality.

- Identify cost-saving opportunities throughout the litigation lifecycle
- Accurately estimate the cost of pursuing litigation with a budget template on CD that runs over 750 calculations
- Evaluate performance of outside counsel at every stage of litigation—from document collection to trial preparedness
- Make faster, more informed decisions on whether to file suit or settle
- And much more

$199

1 volume, softbound, with CD-ROM,
Pub. #01491, ISBN 9781422423820
Price does not reflect sales tax, shipping or handling. Price subject to change.

Forms and templates include:

- Employee Interview Form
- Defensive Discovery Document Tracking Log
- Factual Development Summary
- Legal Research Summary
- Coding Instructions
- Privilege Review Instructions
- Core Team Assignments
- Preparing a Motion
- Settlement Worksheet
- Budget Worksheet
- And much more—***over 40 in all!***

PLUS step-by-step procedures and reporting tools to help you evaluate and verify outside counsel's work product.

To Order, or for more information:

CALL toll-free
800.223.1940
Reference code JCM129973

GO TO the
LexisNexis® Store
www.lexisnexis.com/Bensen_Myers2009

CONTACT your
LexisNexis sales
representative

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties, Inc., used under license.
© 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved. OFF00418-0 0709

Martindale-Hubbell® Connected

People You May Know

See links to former colleagues and classmates immediately— just click and invite them into your network.

Groups

Create or join a group with your co-workers, alumni from law school or past firms, current practice areas or other professional interests.

Blogs

Learn from subject matter experts in your specific areas of practice, engage in the conversations.

Forums

Discuss legal issues and questions of the day, and help inform your colleagues in community conversations.

Martindale-Hubbell® Connected is the premier online global community for legal professionals. It helps you expand your professional referral network, demonstrate your expertise, share knowledge and collaborate globally. It's powered by *martindale.com*®, with a database of over 1 million lawyer profiles and a brand you trust. Are you ***Connected***?

Join today at ***martindale.com/connected***

LexisNexis, the Knowledge Burst logo, *martindale.com* and Martindale-Hubbell are registered trademarks of Reed Elsevier Properties Inc., used under license. © 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved. NXC02107-0 0409