**2016 CLM Annual Conference**
**April 6-8, 2016**
**Orlando, FL**

# "Fairy Tales or Non-Fiction - Expert Witness Testimony"

## I. The Admissibility of Expert Testimony

Most cases in which experts are relied upon are in tort cases. The two fundamental cases which govern the admissibility of expert testimony are *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579, 597 (1993) (*see also Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999)). Most states have moved away from the *Frye* standard for determining expert witness admissibility and currently rely upon the *Daubert*/*Kumho* standard for assessing the admissibility of expert testimony. Florida statute section F.S. Sec. 90.702 follows the *Daubert* standard of expert testimony admissibility.
F.S. §90.702 requires and now reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

## II. The Reasonable Degree of Certainty

### A. Reasonable Degree of Certainty

Experts not only must meet the threshold admissibility standards of the *Daubert* standard but all opinions offered by an expert must be stated to a reasonable degree of certainty and/or probability. It is insufficient to present an expert opinion to a mere possibility or a mere chance. This threshold standard is beyond a mere preponderance, 50.01% and more closely approaches the statistical probability of 60%-75%. Too often, experts present

opinions based upon any iota of information which, when reviewed critically, fails to meet the level of certainty needed to have such an opinion presented to a reasonable degree of certainty. See *Andrews v. State*, 533 So. 2d 841- Fla. Dist. Court of Appeals, 5th Dist. 1988.

### B. Analyzing Expert's Opinion

To determine if the expert developed an opinion from more than mere fiction, it is essential that the expert's analysis and conclusions are critically reviewed. The critical review of the opinion requires that the expert develop the opinion based upon verified facts in the record. A common overstated approach by experts is to make compound assumptions, such as… "the plaintiff told me not only would he have become the manager of his department but then in another two years the plaintiff would have been promoted again to the position of Department Chair." This is the classic example of a mere possibility which lacks the factual predicate to become the basis of an opinion to a reasonable degree of certainty. What data did the expert rely upon? Often times an expert may provide a citation to an "official" looking source. All source quoted by an expert must be critically reviewed. There are many authoritative sources and publications. The question to be answered is the relevance of the source of the expert's opinion as applied to the case at hand. For example, the Bureau of Labor Statistics ("BLS") is a reliable and authoritative source for many pieces of information about the U.S. economy and wage information; however, relying on the BLS to support the assumption of 5% wage growth is not reliable if the plaintiff's wage history demonstrates flat to nominal growth of wages.

## III. Challenging the Opinion

### A. Expert Depositions

Is the expert report a fairy tale of unsupported facts and assumptions or is it grounded in verified facts and based upon relevant data? To test the expert's opinion, always make sure to request the expert's complete file of materials relied upon. In addition, in most cases, it is helpful to take the deposition of the expert. The deposition of the expert allows you to critically assess the expert's competence in the specific field of study, facts of the present case, jury appeal, and likeability. The deposition of the expert becomes the benchmark to determine if you have a basis to pursue a *Daubert* motion, a more limited Motion in Limine or simply strong testimony for impeachment of the witness at trial. While exploring the expert's opinion in deposition it is important to not let the witness gain control of the deposition. As such the deposition should be viewed as an investigation into the basis of the opinion and not a mental wrestling match. The record

is kept of the examining attorney's questions and statements on the record. Deposition transcript records follow the witness and the attorney.

### B. Impeach or Exclude

Once you have discovered the expert's opinion is based in Oz and is a work of fiction, do you proceed to *Daubert* or Motion in Limine or do you leverage the testimony for other aspects of your attack in the opposition's case? If a *Daubert* challenge will be successful and limiting or removing that expert's opinion will dramatically alter the claims of the plaintiff, one should fully proceed with excluding the expert's testimony at trial. If, however, exclusion of the expert's opinion will not materially alter the plaintiff's claim, it is worthwhile to save the strong points of attack for cross examination. If you can clearly taint one witness on the plaintiff's team, that has a ripple effect on the entire credibility of the plaintiff's claim. All cases are a house of cards, and without a solid foundation, all crumbles. If you can take out one leg of the house and weaken the others, the house will fall. The quality of an expert also directly impacts the quality of the plaintiff. If the plaintiff has to present a witness whose analysis is a work of fiction then that directly relates to totality of the plaintiff's case. The goal is to expose weaknesses in the plaintiff's case which devalues the plaintiff's case and when presented in summation it is shown that the plaintiff's case was crafted out of pure fiction.

## IV. Responding to Opposing Expert's Opinions

How does the defense respond to a plaintiff's expert work of fiction? Should the defense develop an affirmative rebuttal analysis or simply have the plaintiff's analysis critically analyzed? By responding with only criticism of the plaintiff's analysis, the defense does not have an affirmative position on the relevant issue. Additionally, relying only on cross examination leaves the jury open to an unlimited number of possibilities. While the cross-examination can be effective at impeaching the expert, cross-examination alone does not educate the jury on an opposing outcome or analysis, just the shortcomings of the plaintiff's exert.

## V. Providing a Damages Floor

An age old dilemma for the defense team is to present their own economic damages figures or simply rely on cross-examination of the plaintiff's damage expert in fear of creating a "floor." Also, the thought is that by presenting an alternative damages analysis, the defense is tacitly admitting to liability in the case. The presentation of a defense economic damages analysis is not a "floor" but is a "safety net." The affirmative presentation of a defense damage's expert allows the defense the opportunity, through its own witness to explain away the fiction of plaintiff's assumptions. It also provides decision makers with a narrative to another conclusion of damages. One big reason why the defense should present a clear alternative to the plaintiff's damages claim has to do

with a psychological phenomenon known as anchoring. Anchoring is a cognitive bias which explains the human tendency to subconsciously apply a recently observed number or value to a possibly unrelated question. Nobel Prize winning psychologist Daniel Kahneman and his partner Amos Tversky designed a famous experiment demonstrating this tendency.

### A. Empirical Data Supports Presentation of Damages Analysis

The importance of a strong defense argument on damages was reflected in a study of 1,000 cases reported in the May 1991 issue of the Journal of Legal Economics. The study showed that the defense benefits overwhelmingly by retaining an economic expert. The absence of testimony from a defense economist when the plaintiff put on a damages expert resulted in awards that were, on average, four times higher than where there was testimony from both sides.

### B. Legal Decisions On How Cross-Examination is Insufficient

In *Schroth v. Karounos,* No. 1012 EDA 20210, Pa. Superior Court, Nov. 10, 2010 (a memorandum opinion), the defendant neglected to dispute the plaintiff's claim for $695,000 in lost household services, paving the way for a new trial on damages. At the original trial, the plaintiff's economist valued the decedent's lost earning capacity at $509,000, but also offered an alternative scenario that assumed the decedent would not work and would remain at home. Under the alternative scenario, the plaintiff economist testified that the damages for the loss of her household services would be $695,000. The defendant did not offer counter testimony nor did the defense counsel cross-examine the plaintiff's economist on the issue of household services. The defense's cross examination of the economist focused on the probability of the decedent completing college – a peripheral issue that did not adequately challenge the plaintiff's evidence. The jury awarded $75,000 for past medical expenses under the survival claim, and nothing to the decedent's husband for lost household services under the wrongful-death claim.

Plaintiffs objected, arguing that the verdict was inadequate, and requested a new trial on damages. The trial court refused to order the new trial, and the plaintiff appealed. The Superior Court held that the verdict was inadequate. "[T]he jury is not free to disregard proven damages," the court held in ordering the new trial on damages.

In a similar case, *Kiser v. Schulte,* 648 A.2d 1 (Pa. 1994), the Pennsylvania Supreme Court held that a jury verdict of $25,000 for wrongful-death and survival claims was so low as to be "shocking" and upheld an order for a new trial on damages because the defense had not offered any contrary testimony or opposing argument.

In yet another case, *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super. 2010), the court held that, while cross examination of the plaintiff's economist may have placed some of the economist's assumptions in doubt, the cross examination did not adequately address the issues of the decedent's worklife expectancy or earning capacity, and

therefore the award of no damages was contradictory to the evidence. The plaintiff's claims were based on economic testimony assuming the decedent would become an accountant. The only contrary testimony was cross examination by the defense and focused on the fact that the decedent's eyesight was poor, an issue that, the Superior Court noted, would have little impact on his earning capacity as an accountant. Cross examination on peripheral damages issues left the plaintiff's main claims "uncontroverted," and the jury award must reflect the plaintiff's damages evidence or be deemed inadequate. *Rettger* was retried on the issue of damages. At the second trial, the defense did not put on testimony from an economist, nor did it offer other witnesses on damages. The retrial resulted in a $10,000,000 verdict.

## VI. Tools for Attacking the Expert's Credibility

There are currently more tools available to attorneys for attacking an expert's credibility than ever before. Many experts are active on social media, blogs, webpages, and other internet sources. Moreover, through tools such as Westlaw and Lexis and PACER, there is often a lot of access to an expert's prior publications, including reports from prior cases. An effective advocate can use these tools to challenge opinions of an expert, either at a deposition or at trial. This is a tactic that is currently in its infancy, and is often ignored by counsel and parties, but can be a complete game-changer in many cases.