

Defeating the Plaintiff's Automotive Products Case — *Daubert* Revisited

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INTRODUCTION

At the risk of stating the obvious: *Daubert*¹ considerations must inform litigation decisions from start to finish. This is especially true in automotive products liability litigation given its expert-intensive nature. In most jurisdictions, expert evidence is necessary in order to prove a products liability claim involving the design and manufacture of an automobile.² And, even where liability issues may not require expert evidence, injury and damages questions often do. It is the rare products liability claim against an automobile manufacturer that will not involve the proffer of some type of expert evidence by the plaintiff.

In an automotive products liability case, expert evidence weaves throughout the entire fabric of the case. The usual scenario is for the plaintiff to proffer expert testimony from several experts from distinct disciplines or fields of study. A plaintiff will offer expert evidence on purported inadequacies in the product's design, manufacturing, and warnings, accident reconstruction, and biomechanics/occupant kinematics. As a consequence, issues and strategies relating to the admissibility of expert evidence must be identified, considered, addressed, reexamined, and adjusted throughout the course of the litigation. For defense counsel developing and executing an expert strategy, the "focus, of course, must be on principles and methodology, not on the conclusions they generate." *Daubert*, 113 S.Ct. at 2797.

¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

² Under relatively rare circumstances, expert evidence may not be necessary, such as where a product failure occurs shortly after the vehicle is delivered to the consumer. In *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 357 N.E.2d 449, 452 (1976), the Illinois Supreme Court held that a plaintiff may establish that a product is unreasonably dangerous at the time it left the manufacturer's control by proof that, in the absence of abnormal use or reasonable secondary causes, the product fails to perform in the matter reasonably to be expected in light of its nature and intended function. In *Tweedy*, plaintiff sustained injuries when the brakes on his automobile failed and he collided with a tree. The evidence showed that the vehicle had been driven approximately 7,500 miles, that the brakes were inspected at 6,000 miles, but had never been repaired or serviced prior to the accident. *Id.* 357 N.E.2d at 450-51. See also *Doyle v. White Metal Rolling & Stamp. Corp.*, 249 Ill.App.3d 370, 618 N.E.2d 909, 914 (1st Dist. 1993) (no expert evidence required to establish a strict products liability claim where plaintiff was injured when a ladder collapsed two weeks after his employer purchased it).

This paper discusses strategies for excluding expert testimony proffered against automotive products manufacturers. Part One discusses the Supreme Court's decision in *Daubert*, recent developments regarding the courts' application of *Daubert*, and also focuses on cases involving expert testimony in automotive products litigation. Part Two discusses, from a practical perspective and in light of the case law discussed in Part One, how a defense attorney can develop a factual foundation and execute various strategies to exclude the plaintiff's expert.³

PART ONE — THE CASE LAW

I. *DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*

In *Daubert*, the Supreme Court of the United States held that the Federal Rules of Evidence, rather than the *Frye* "general acceptance" test, govern the admissibility of expert testimony in federal courts. In particular, the Court identified Rule 702 as defining the standard for the admission of expert testimony.⁴ 113 S.Ct. at 2794.

Rule 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Court held that Rule 702 requires a trial judge to conduct a two-part inquiry to ensure that any scientific testimony admitted is both relevant and reliable. *Id.* at 2795. To be reliable, proposed testimony must be "derived by the scientific method" and "supported by appropriate validation." *Id.* To be relevant, proposed testimony must have a "valid scientific connection" to the issues of the case. *Id.* at 2795-96.

To assist trial judges in performing their "gatekeeping" function, the Court provided a non-exhaustive list of factors relevant to the inquiry required under Rule 702. The "*Daubert* factors" are (1) whether the theory or technique underlying the proposed testimony can be or has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) whether the theory or technique has gained general acceptance in the field to which it belongs, and (4) the known or potential rate of

³ For purposes of this paper, it is assumed that the proffered expert has the requisite level of experience, education, or training. The question addressed is whether the expert has properly and sufficiently applied his expertise in developing the proffered opinions.

⁴ The Court also held that a trial judge considering the admissibility of expert testimony under Rule 702 "should also be mindful of other applicable rules," such as Rules 703, 706 and 403. *Id.* at 2797-98.

error of the theory or technique.⁵ *Id.* at 2796-97. The Court emphasized, however, that the inquiry envisioned by Rule 702 is “a flexible one” intended to assess the evidentiary relevance and reliability of the principles that underlie a proposed submission. *Id.* at 2797. “The focus,” the court held, “must be solely on principles and methodology, not on the conclusions that they generate.” *Id.*

Although Rule 702 applies to scientific, technical, and other specialized knowledge, the Court stated in a footnote that its discussion was “limited to the scientific context because that is the nature of the expertise offered here.”⁶ *Id.* at 2795 n. 8. However, the Court also held that Rule 702 is not limited to novel scientific techniques or unconventional evidence. *Id.* at 2796 n. 11.

II. RECENT DEVELOPMENTS

A. *Daubert* Rulings are Reviewed for Abuse of Discretion — *General Electric Company v. Joiner*

In *General Electric Company v. Joiner*, 118 S.Ct. 512 (1997), the Supreme Court held that an appellate court must apply the “abuse of discretion” standard when reviewing a trial court’s decision to admit *or* exclude expert testimony under *Daubert*.

The plaintiff in *Joiner* alleged that his exposure to polychlorinated biphenyls (PCB’s) contributed to his developing lung cancer. The District Court in *Joiner* entered summary judgment for the defendants on the grounds that the plaintiff’s experts’ testimony was inadmissible under *Daubert*. The Court of Appeals for the Eleventh Circuit acknowledged that a district court’s ruling on the admissibility of evidence generally is reviewed for abuse of discretion. *Joiner*, 78 F.3d 524, 529 (11th Cir. 1996). However, the Eleventh Circuit applied a “particularly stringent” standard of review to the District Court’s exclusion of the plaintiff’s experts’ testimony because “the Federal Rules of Evidence governing expert testimony display a preference for admissibility.” *Id.* The Supreme Court reversed, holding that a straightforward abuse of discretion standard applied to *all* district court rulings on the admissibility of expert testimony, regardless of whether the district court allowed *or* excluded such testimony. 118 S.Ct. at 517.

After defining the appropriate standard of review, the Supreme Court in *Joiner* also concluded that the District Court had not abused its discretion in excluding the plaintiff’s experts’ testimony. *Id.* The plaintiff argued that the District Court focused improperly on his experts’ conclusions, rather than on their principles and methodology. *Id.* at 519. In response, the Supreme Court held as follows:

⁵ The Court listed a fifth factor — the existence of standards controlling a scientific technique’s operation — which the courts generally do not discuss when applying *Daubert*.

⁶ The expert testimony at issue in *Daubert* concerned whether the prescription drug, Bendectin, caused the plaintiffs to be born with birth defects.

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a District Court to admit opinion evidence which is connected to existing data only by the *ipse dixit*⁷ of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. That is what the District Court did here, and we hold that it did not abuse its discretion in so doing. *Id.*

The Supreme Court's decision in *Joiner* is significant in two respects. First, by eliminating the "particularly stringent" standard of review, *Joiner* increases the likelihood that an appellate court will affirm a trial court's decision to exclude the testimony of a plaintiff's expert.⁸ Second — as discussed below in Section II.B. — by reinforcing the *Daubert* "message" that expert testimony is not admissible merely because it is spoken by a qualified expert, *Joiner* effectively refutes recent Federal Circuit Court decisions limiting the applicability of *Daubert*.

B. Narrowing the Applicability of *Daubert* — *Compton v. Subaru of America, Inc.*

As mentioned above, the Supreme Court in *Daubert* stated in a footnote that its discussion regarding the admissibility of expert testimony under Rule 702 was limited to the "scientific context." 113 S.Ct. at 2795 n. 8. Based on that portion of the *Daubert* opinion, a minority of the Federal Circuit Courts have held that *Daubert* applies only to cases involving "scientific" testimony, and therefore does not apply to cases involving testimony based on "technical or other specialized knowledge." See e.g., *Thomas v. Newton International Enterprises*, 42 F.3d 1266, 1270 n. 3 (9th Cir. 1994)(holding *Daubert* inapplicable to the expert testimony of an experienced longshoreman regarding the danger created by an uncovered deck opening); *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994)(holding *Daubert* inapplicable to the affidavits of a geotechnical consultant and an underground construction consultant).

More recently — and more troubling — the Tenth Circuit held in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518-19, *cert. denied*, 117 S.Ct. 611 (1996), that the four "*Daubert* factors" are not applicable to expert testimony based solely on an expert's experience and training, as opposed to a particular methodology or technique. The plaintiff's expert in *Compton* was an aerospace and mechanical engineer who testified at trial, over the defendants' objection, that a station wagon was defectively designed because it permitted excessive roof crush. *Id.* at 1516. The expert identified particular

⁷ A bare assertion resting on the authority of an individual.

⁸ Of course, the *Joiner* decision cuts both ways in that it also increases the likelihood that an appellate court will affirm a trial court's decision to exclude the testimony of a *defendant's* expert.

areas of the roof structure which, in his opinion, required additional support, and further testified that the station wagon should have been designed to allow only two to three inches of roof crush. *Id.* The jury entered a verdict against the defendants in excess of \$6 million. *Id.* at 1515. On appeal, the defendants in *Compton* argued that the plaintiff's expert's testimony was inadmissible under *Daubert* because (1) it was not grounded in any particular reasoning or methodology, (2) was not based on industry data nor any scientific principles or knowledge, and (3) was not subject to peer review nor supported by testing nor was it generally accepted. *Id.* at 1517.

The Tenth Circuit held that *Daubert* did not completely change the "traditional analysis under Rule 702," which "merely requires the trial court to make a preliminary finding that the proffered expert testimony is both relevant and reliable." *Id.* at 1519. Instead, *Daubert* sets out additional factors the trial court should consider under Rule 702 if an expert witness offers testimony based on a particular methodology or technique. *Id.* The court concluded that an "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training." *Id.* at 1518.

Turning to the plaintiff's expert's testimony, the court held that the expert's conclusions were not based on any particular methodology or technique, but rather were derived from general engineering principles and his twenty-two years of experience as an automotive engineer. *Id.* at 1519. Therefore, the court held that "*Daubert* simply has little bearing on [the expert's] testimony." *Id.* The Tenth Circuit concluded that the District Court properly admitted the expert's testimony on the grounds that it was "facially helpful and relevant" and the expert "possessed the basic qualifications to give such testimony." *Id.*

The Tenth Circuit's opinion in *Compton* is disturbing in several respects. First, the *Compton* decision turns *Daubert* on its head by permitting an expert witness to avoid any meaningful scrutiny of his opinions simply by denying that he relied on any methodology or technique. Second, although the Tenth Circuit in *Compton* stated that the "traditional Rule 702 analysis" requires an examination of the reliability of proffered expert testimony, the court made no mention whatsoever of the reliability (or lack thereof) of the expert's testimony in *that case*. Third, the expert's testimony in *Compton* addressed a design defect issue in a products liability case, and therefore sets a dangerous precedent having broad applicability. Finally, several courts have already cited *Compton* for the proposition that the *Daubert* factors are inapplicable in cases where expert testimony is based solely on experience and training. See e.g. *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997)(allowing mechanical engineer to testify that a forklift was defectively designed based on his engineering experience and his investigation of hundreds of forklift accidents); *Freeman v. Case Corp.*, 118 F.3d 1011, 1015 n. 6 (4th Cir. 1997), *cert. denied*, S.Ct., 1998 WL 6148 (1998)(allowing mechanical engineer to testify that a tractor/mower was defectively designed based on solely on his experience and training); *Carmichael v. Samyang Tire, Inc.*, ___ F.3d ___, 1997 WL 786208, *2-3 (11th Cir. 1997)(holding that district court erroneously applied *Daubert* criteria to experience-based testimony of mechanical engineer in tire failure

case); *Gust v. Jones*, 1996 WL 635703 (D.Kan. 1996)(unpublished decision allowing expert testimony regarding speed of vehicle); and *Liriano v. Hobart Corp.*, 1996 WL 304337 and 1996 WL 660904 (S.D.N.Y. 1996)(two unpublished decisions allowing expert testimony regarding allegedly defective meat grinder).

C. The Response to *Compton* — Advocating a Flexible Approach

At least one court has explicitly rejected the Tenth Circuit's holding in *Compton*. In *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997), the Fifth Circuit affirmed the District Court's exclusion of the plaintiff's expert's testimony that a conveyor was unsafe and that alternative designs were feasible. *Id.* at 985-86. The plaintiff argued that the *Daubert* factors were inapplicable because her expert based his testimony solely on his experience and common engineering principles in order to "envision alternative designs." *Id.* at 988. The Fifth Circuit noted that the *Compton* decision supported the plaintiff's argument, but explicitly rejected the reasoning of the Tenth Circuit in that case, holding as follows:

Alternative designs by definition include elements of science, technology, and methodology. Further, it seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the District Court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert opinion, the better. ***Compton's* view of the admissibility of expert evidence is untenable.** *Id.* at 991 (emphasis added).⁹

The Fifth Circuit recognized that the applicability of *Daubert* is not an "all or nothing" question, and advocated a flexible, balanced approach for determining the admissibility of expert testimony. The court held as follows:

Not every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience, but the district court's "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue" is no less important And while *Daubert* dealt with expert scientific evidence, the decision's focus on a standard of evidentiary reliability and the requirement that proposed expert testimony must be appropriately validated are criteria equally applicable to "technical, or other

⁹ See also, *Tyus v. Urban Search Management*, 102 F.3d 256, 262 (7th Cir. 1996)(in a case involving the exclusion of the plaintiff's expert witnesses, a professor of sociology and a psychologist/statistician, the Seventh Circuit stated that "we do not agree with" *Compton* that *Daubert* is limited to cases of novel scientific theories or methodologies). *Id.*

specialized knowledge.” Moreover, the non-exclusive list of factors relevant under *Daubert* to assessing scientific methodology—testing, peer review, and general acceptance—are also relevant to assessing other types of expert evidence.

* * *

We conclude that whether an expert’s testimony is based on “scientific, technical or other specialized knowledge,” *Daubert* and Rule 702 demand that the District Court evaluate the methods, analysis, and principles relied upon in reaching the opinion. **The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of the discipline.** *Id.* at 991 (emphasis added).

With regard to the admissibility of the expert’s testimony regarding design alternatives, the Fifth Circuit observed that “the proper methodology for proposing alternative designs includes more than just conceptualizing possibilities.” *Id.* at 992. Therefore, the court held that the District Court properly excluded the expert’s testimony based on the expert’s failure to (1) perform any testing of his proposed design alternatives, or (2) make any drawings or perform any calculations that would allow a trier of fact to infer that his opinions and proposed alternative designs were supported by valid engineering principles.¹⁰ *Id.*

Additional Federal Circuit Courts, although not expressly addressing *Compton*, have employed a flexible application of the *Daubert* factors similar to the Fifth Circuit’s decision in *Watkins*. In *Cummins v. Lyle Industries*, 93 F. 3d 362 (7th Cir. 1996), the Seventh Circuit reviewed the exclusion of a plaintiff’s expert who intended to testify regarding the feasibility of alternative designs for an industrial trim press. The plaintiff contended that *Daubert* was not applicable to her expert’s testimony since it did not involve “pure scientific theory, but rather the application of well-known instruments of the engineering profession to a particular and not-out-of-the-ordinary application.” *Id.* at 367 n.2.

While acknowledging that the Supreme Court in *Daubert* limited its discussion to the “scientific context,” the Seventh Circuit further held that the *Daubert* analysis should not be abandoned in cases involving the application of science to a concrete and practical problem. *Id.*

The Seventh Circuit elaborated as follows:

¹⁰ In fact, the plaintiff’s expert admitted the importance of testing in formulating product designs. *Id.*

The basic task of the District Court remains essentially the same—to ensure the evidentiary submission is of an acceptable level of evidentiary reliability. . . . It may be that, in some “as applied” situations, some of the non-exhaustive factors noted by the Supreme Court in *Daubert* are worthy of less emphasis than in situations involving more abstract or novel scientific theory. . . . We do not believe, however, that [the plaintiff] has established here that the District Court exceeded the bounds of permissible judgment in placing significant emphasis on the lack of any testing of [her expert’s] view. *Id.*

As indicated by the language quoted above, the District Court in *Cummins* excluded the expert’s testimony based, in part, on the expert’s failure to conduct any tests regarding his proposed alternative designs. *Id.* at 366. The Seventh Circuit explained that “hands-on testing” is not an absolute prerequisite for the admission of expert testimony. *Id.* at 369. However, the court also emphasized that **“Rule 702 is designed to ensure that, when experts testify in court, they adhere to the same standards of intellectual rigor that are demanded in their professional work”**. *Id.* (emphasis added). In that regard, the court noted that the plaintiff’s expert had admitted that testing is a necessary part of the design process. *Id.*

The Seventh Circuit in *Cummins* also expounded on additional considerations which experts should take into account when forming opinions on alternative designs:

These include, but are not limited to, the degree to which the alternative design is compatible with existing systems and circuits; the relative efficiency of the two designs; the short- and long-term maintenance costs associated with the alternative design; the ability of the purchaser to service and to maintain the alternative design; the relative cost of installing the two designs; and the effect, if any, that the alternative design would have on the price of the machine. Many of these considerations are product- and manufacturer-specific, and most cannot be determined reliably without testing. *Id.*

Based on the plaintiff’s expert’s failure to establish a reliable basis for his conclusions, the Seventh Circuit held that the District Court properly excluded his proffered testimony. *Id.* at 370.

In *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679 (5th Cir. 1997), a decision entered shortly after *Watkins*, a different panel of the Fifth Circuit also advocated a flexible application of *Daubert* to ensure that *all* types of expert testimony are sufficiently reliable. The court in *Moore* concluded that the four *Daubert* factors should not be rigidly applied to determine the admissibility of expert clinical medical testimony. *Id.* at 689-90. However, the court’s fundamental holding regarding the admissibility of expert testimony under *Daubert* mirrors the decisions in *Watkins* and *Cummins*, and implicitly rejects the Tenth Circuit’s holding in *Compton*. The court in *Moore* held as follows:

Every discipline employs a body of methods, rules, and postulates, i.e., methodology, both in its ordinary functions and in developing and adopting new concepts, techniques, and analogues. Therefore, the “knowledge” of each discipline, under Rule 702, is both its principles and methodology and the theories, techniques or inferences produced through its methodology. Thus, the proffered opinion of any expert in a field of knowledge, in order to be evidentiary reliable, must either be based sound on the current knowledge, principles and methodology of the expert’s discipline or be soundly inferred or derived therefrom. *Id.* at 687.

The decisions in *Watkins*, *Cummins* and *Moore* should enable a defense attorney to mount a formidable response to a plaintiff seeking to admit questionable expert testimony pursuant to the *Compton* holding.¹¹ Together, those decisions represent a reasonable, practical approach for determining the admissibility of *all* kinds of expert testimony. To ensure that expert testimony is sufficiently reliable, the trial court need not subject the proposed testimony to each of the four *Daubert* factors. However, the trial court must ensure that the proffered expert, in forming his opinions, has “adhered to the same standards of intellectual rigor that are demanded in his professional work”. Although the specific “factors” relevant to that inquiry will vary depending on the nature of the proffered testimony and the field of expertise from which it stems, the objective in all cases is the same: to ensure that any expert testimony admitted is both relevant and reliable.

The Supreme Court’s decision in *General Electric Company v. Joiner* also provides useful “ammunition” to be used against a *Compton*-based proffer of expert testimony. In holding that the District Court had not abused its discretion by excluding the plaintiff’s experts’ testimony, the Court held as follows:

[N]othing in either *Daubert* or the Federal Rules of Evidence requires a District Court to admit opinion evidence which is connected to existing data only by the *ipse dixit*¹² of the expert.

The foregoing language restates the fundamental holding in *Daubert* that expert testimony must be validated by more than just the expert’s qualifications. In that regard, the Supreme Court’s decision in *Joiner* directly counters the *Compton* holding that expert testimony may be admitted when it is based *solely* on an expert’s experience and training.

¹¹ See also, *Diviero v. Uniroyal Goodrich Tire Company*, 919 F. Supp. 1353, 1356-60 (D.Ariz. 1996), *aff’d*, 114 F.3d 851, 853 (9th Cir. 1997)(without explicitly rejecting *Compton*, the Ninth Circuit affirmed the District Court’s exclusion of an expert witness in a tire blow-out case who based his opinions solely on his inspection of the subject tire and his many years of experience).

¹² A bare assertion resting on the authority of an individual.

Finally, the Tenth Circuit's post-*Compton* decision in *Thornton v. Murray Ohio Manufacturing Co.*, 91 F.3d 1410 (10th Cir. 1996), provides effective grounds for opposing the admission of expert testimony based solely on the expert's experience and training. In *Thornton*, the Tenth Circuit "adopt[ed] the analysis" of the District Court which had excluded the testimony of a "qualified mechanical and metallurgical engineer"¹³ who testified that the plaintiff's bicycle was unreasonably dangerous because it lacked a caliper braking system. 91 F.3d at 1410. The District Court in *Thornton* had held that the expert's testimony was not supported by "appropriate validation" because he relied on an inadequate factual basis and failed to employ any of the recognized methods or "grounds" for evaluating the conduct of a product manufacturer. See *Thornton*, 879 F. Supp. at 1087. The Tenth Circuit in *Thornton* did not discuss or distinguish its earlier decision in *Compton*.¹⁴ And other than adopting the District Court's analysis, the Tenth Circuit in *Thornton* did not discuss its grounds for finding the expert's testimony inadmissible. Nonetheless, the *Thornton* decision raises a legitimate question as to whether, even under the Tenth Circuit's view, expert testimony may be admitted if supported only by the expert's experience and training.

III. EXPERT TESTIMONY IN AUTOMOBILE CASES

Summarized below are several cases, most of them recent and most of them involving automobile products liability claims, where the testimony of the plaintiff's expert was excluded. Some non-automobile cases have been included based on the overall usefulness of the courts' opinions. The cases are categorized based on the grounds for which the proffered testimony was excluded. Certain cases appear under more than one category where the proposed expert testimony was excluded on multiple grounds.

The cases in the first category are those in which the proffered testimony was excluded based on the expert's failure to provide adequate validation of his opinions. Those cases are related to the preceding discussion regarding *Daubert's* mandate that proposed expert testimony must be supported by adequate methods, analysis, and principles. The remaining categories of cases are intended to illustrate the availability of other avenues by which a proposed expert's opinions may be challenged, and, hopefully, excluded.

A. Excluded Based on Absence of Adequate Validation

In *Smelser v. Norfolk Southern Railway Company*, 105 F.3d 299 (6th Cir. 1997), the plaintiff sued his employer under the Federal Employers' Liability Act after he was hit from behind by another motorist while driving the company's pick-up truck. *Id.* at 301. The plaintiff's expert was a biomechanical engineer who testified that the shoulder belt,

¹³ See *Thornton*, 879 F.Supp. at 1080.

¹⁴ Interestingly, one Justice (McWilliams) participated in both decisions.

but not the lap belt, in the company truck failed to operate correctly. *Id.* at 302. As a result, the plaintiff's body jack-knifed at the waist, causing the plaintiff's back injury and aggravating the neck injuries which were initially caused by the impact of the rear-end collision. *Id.* The Sixth Circuit held that the District Court should have excluded the expert's testimony under *Daubert* because the expert (1) failed to perform any tests on the lap belt, yet concluded it was in proper working condition; (2) conducted no testing to verify his conclusion that the shoulder belt was damaged in a previous accident involving the truck; (3) failed to adequately document testing conditions and the rate of error so the test could be repeated and its results verified; and (4) failed to determine or at least consider the angle at which the restraint system was mounted in the subject vehicle. *Id.* at 304.

In *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027 (7th Cir. 1997), the plaintiff was a passenger in an automobile that rolled over several times after its rear suspension gave way as a result of rust. *Id.* at 1028. The plaintiff alleged that the defendant negligently designed the vehicle's rear suspension in a manner that allowed it to rust without being visually detected. *Id.* at 1029. In response to the defendant's summary judgment motion, the plaintiff submitted the affidavit of an expert in failure analysis, mechanical safety and accident reconstruction. *Id.* at 1030-31. In his affidavit, the expert stated that the defendant knew of the corrosive effects of road salt on vehicle suspensions prior to 1981 (the year the vehicle was manufactured), and that the design and manufacture of the vehicle's suspension in 1981 was negligent. *Id.* at 1031. The Seventh Circuit held that the District Court correctly excluded the affidavit on the grounds that it provided merely an unsupported conclusion. *Id.* The court held as follows:

The affidavit contains no support for [its] conclusion, and a conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence. Thus, at most the affidavit is evidence that Fuji should have known back in 1981 that its rear suspension might rust through in highly corrosive driving environments. There is no indication that responsible engineers at the time thought the hazard considerable because undetectable, and therefore worth guarding against and if so by what means, or that Fuji could have redesigned the suspension to avoid the hazard at a cost commensurate with the expected accident cost. . . . The affidavit is silent on what other automobile manufacturers were doing about corrosion in 1981. *Id.*

Although the Seventh Circuit did not strictly apply each of the four *Daubert* factors, the court held that the expert's affidavit was inadmissible under *Daubert* because the expert failed to show how his conclusion was "grounded in—follows from— an expert's study of the problem." *Id.* at 1032.

In *Rogers v. Ford Motor Company*, 952 F. Supp. 602 (N.D. Ind. 1997), the plaintiff was injured when the vehicle in which she was riding was hit on the driver's side by another

vehicle. *Id.* at 609. The plaintiff alleged that the vehicle's seat belt assembly was vulnerable to "inertial actuation,"¹⁵ and that she sustained "enhanced bodily injuries" when the vehicle's seat belt inadvertently released during the accident. *Id.* The plaintiff's expert was a mechanical engineer who conducted several tests on the seat belt assembly which led him to conclude that the plaintiff's seat belt had opened during the accident due to inertial actuation. *Id.* at 613-14. The expert also opined that a differently designed seat belt buckle would have provided better protection in the circumstances of the plaintiff's accident. *Id.* The District Court emphasized that the plaintiff's expert conducted no testing to support his opinion regarding the superiority of an alternative design; nor did he rely on statistical evidence to show that his proposed design would provide better protection. *Id.* At 614-15. Therefore, the District Court concluded that the expert's testimony "lacks scientific rigor and offers nothing more than a bottom line conclusion." *Id.* The court also found that the expert's testimony would not assist the trier of fact, holding as follows:

Here, the expert witness cannot relate his theory to the specific factual situation at hand — he has not attempted to quantify the forces involved in the accident, to analyze their duration, to determine the relative forces between the occupant and the restraint, or to compare the actual forces to those achieved in his experiments. *Id.* at 616.

In *Peitzmeier v. Hennessy Industries, Inc.*, 97 F. 3d 293 (8th Cir. 1996), the Eighth Circuit affirmed the exclusion of expert testimony regarding design defects in, and alternative designs to, a tire-changing machine. 97 F.3d at 297. The court rejected the plaintiff's argument that *Daubert* was inapplicable since the expert's testimony was based on basic engineering principles rather than novel scientific testimony. 97 F.3d at 297. The court applied each of the four *Daubert* factors to the expert's opinions and concluded that the District Court properly excluded the testimony. *Id.* at 297-98.

In *Dancy v. Hyster Co.*, 127 F.3d 649, 651-52 (8th Cir. 1997), the Eighth Circuit excluded the testimony of a mechanical engineer who opined that a lift truck should have included a guard. The expert never tested or even attempted to design the guard he claimed should have been used. Without citing *Compton*, the court rejected the argument that *Daubert* only applies if the expert bases his opinions on scientific principles or methods. *Id.*

In *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1995), the plaintiff was a surgical nurse who was injured while moving a Blanketroll hypo-hyperthermia machine. As the plaintiff was pushing the machine, she tripped on its cord and fell to the floor, causing the machine to fall on her knee. *Id.* at 342. The plaintiff alleged that

¹⁵ An engineering phenomenon which theoretically can occur when the housing of the seat belt buckle is abruptly accelerated from the backside while the spring-loaded seat belt button and attached portions of the latching mechanism remain momentarily at rest relative to the housing of the buckle, thereby simulating the ordinary depression of the button.

the machine was unstable and had an inadequate cord wrap. *Id.* at 342-43. After the plaintiff rested at trial, the District Court granted the defendant's motion to strike the plaintiff's expert's testimony, and then granted the defendant's motion for a directed verdict. *Id.* at 343. The Seventh Circuit affirmed, noting that the plaintiff's expert witness did not conduct any studies or analysis to substantiate his opinions. *Id.* at 344. The court added:

The witness proffered unverified statements that were unsupported by any scientific method. This type of unsubstantiated testimony plainly provides no basis for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence on the ground that the expert's opinion has a reliable basis in the knowledge and experience of his discipline. *Id.* at 345.

B. Excluded Based on Insufficient Qualifications

Although not discussed in *Daubert*, an expert witness may be excluded if he does not possess sufficient qualifications to render expert opinions in his proposed area of testimony. The case law and strategic considerations relevant to excluding an expert based on those grounds will be discussed in a separate paper and presentation given at this seminar.

C. Excluded Based on Insufficient Factual Foundation

In the first category of cases discussed above, the focus is on the expert's *analysis*, i.e., what the expert did, or did not do, to connect the facts of the case to his conclusions. In the following cases, the focus is not on the expert's analysis, but rather on the specific facts underlying that analysis. The proffered expert testimony is excluded where the expert's analysis is based on incomplete or inaccurate facts.

In *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1997), the plaintiff claimed she parked her car, placed the gear shift in the park position, and exited the vehicle. She walked to her mail box at the end of the driveway and was struck by her car which had rolled from its parked position. *Id.* at 474-75. The plaintiff's expert intended to testify that the vehicle was defective due to the existence of a "false park detente" which caused the plaintiff to believe that the gear shift was in the park position when it was not fully engaged in that position. *Id.* at 475. The court assumed *arguendo* that the expert's testimony did not involve "scientific law" and therefore, in the First Circuit's view, was not subject to the *Daubert* factors. *Id.* at 479. Nonetheless, the court found that the admissibility of the proposed testimony was still controlled by the requirement of factual relevance and foundational reliability. *Id.* In that regard, the court found the expert's proposed testimony inadmissible because (1) the expert failed to replicate the known facts surrounding the accident, and (2) the expert based his

testimony on facts directly contrary to the plaintiff's unequivocal testimony.¹⁶ *Id.*

In *Smelser v. Norfolk Southern Railway Company*, 105 F.3d 299 (6th Cir. 1997), the District Court permitted the plaintiff's expert to testify that the plaintiff's claimed injuries resulted from the improper operation of a pick-up truck's seat belt assembly. The expert admitted that each individual has his own injury tolerance level, and pre-existing medical conditions may effect what injuries result from an accident. *Id.* at 305. However, the expert (1) failed to examine the plaintiff's complete medical history, (2) failed to consider that the plaintiff had been hospitalized for back injuries as early as 1968, and (3) failed to consider that x-rays taken after the accident showed degenerative conditions that could not have been related to the rear-end collision. *Id.* Therefore, the Sixth Circuit held that the expert's testimony should have been excluded based on the lack of an adequate factual foundation. *Id.*

In *Habecker v. Clark Equipment Company*, 36 Fed. 3d 278 (3d Cir. 1994), the plaintiffs alleged that a forklift was defective based on its lack of an operator restraint system. *Id.* at 280. The Third Circuit affirmed the exclusion of one of the plaintiffs' experts who conducted an investigation and attempted to simulate the accident. *Id.* at 289. The court held that the proposed expert's accident simulation was not reliable because it did not adequately replicate the forces involved in the accident. *Id.* at 190. The court further held that the proposed expert's simulation did not "fit" the facts of the case and therefore would not assist the trier of fact. *Id.*

C. Excluded Based on Other Grounds

In *Roback v. V.I.P. Transport Inc.*, 90 F.3d 1207 (7th Cir. 1996), the plaintiffs sued the driver of a tractor-trailer that rear-ended the automobile in which the plaintiffs were driving. *Id.* at 1209. The defendant argued that the accident occurred because he was distracted by a malfunction in the cruise control system of the tractor-trailer, and in support of that argument the defendant offered expert testimony concerning the visual perception of vehicle drivers. *Id.* at 1215. The defendant's expert, who formerly worked for the University of Michigan Transportation Research Institute, testified at his deposition that "distraction" impairs a vehicle driver's capacity to assess his own speed in relation to that of other vehicles. *Id.* After a Rule 104(a) hearing, the District Court struck this human factors expert's proffered testimony. *Id.* at 1214. On appeal, the Seventh Circuit held that the District Court properly excluded the proposed testimony, holding that "any juror who drives would have readily have understood without the benefit of [the expert's] testimony that a driver needs to watch a vehicle in front of her in order to assess how quickly she is approaching it, and that if the driver is distracted she may not realize until too late that she needs to slow down." *Id.* at 1215.

¹⁶ The First Circuit also agreed with the District Court that the plaintiff's expert — a well-qualified master mechanic — was not qualified to testify about automotive design issues. *Id.* at 477.

PART TWO — PRACTICAL CONSIDERATIONS

I. Identify and Understand the Expert's Discipline.

The first step in developing a strategy to exclude an expert is to determine the discipline to which he belongs. The next step is to gain an understanding of the goals, principles, methods, and procedures of the expert's discipline. *Daubert* recognizes that even though Rules 702 and 703, "relax" the traditional barriers to the admission of opinion testimony, they "clearly contemplate some degree of regulation of the subjects and theories about which an expert may testify." *Daubert* 113 S.Ct. at 2794-95. The limits applicable to a particular expert's testimony are established by the "knowledge and experience of his discipline." *Id.* at 2796 ("Presumably, [Rules 702's and 703's] relaxation of the usual requirement of first-hand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.") It is the task of the trial judge to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 113 S.Ct. at 2795.

Expert opinion evidence is relevant where it will assist the trier of fact to understand the evidence or determine a fact in issue. Rule 702, Fed. R. Evid.; *Daubert*, 113 S.Ct. at 2795. To establish the evidentiary reliability of the proffered expert opinion testimony, the proponent must satisfy the trial court that the witness applied the same principles, methodology, and standards of quality he would have applied had he formulated the opinions for professional rather than courtroom purposes:

When the Supreme Court in *Daubert* told judges to distinguish between real and courtroom science, it was not with the object of discovering the essence of "science," if there is such an essence. The object, we think, . . . was to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. . . . If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community. If they do not, their evidence is inadmissible no matter how imposing their credentials.

Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318-19 (7th Cir. 1996); see also *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679, 687 (5th Cir. 1997) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation, or other non-scientific subjects, it should be evaluated by reference to the internal "knowledge and experience" of that particular field. To that extent, *Daubert* ought to be regarded as universally applicable to expert evidence," quoting American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Evidence After Daubert*, 157 F.R.D. 571, 579 (1994)).

At an early juncture in the litigation, defense counsel should attempt to determine (or forecast) the nature and type of expert evidence the plaintiff will likely offer in light of the issues of a particular case. Working with in-house engineers and outside consultants, defense counsel should identify the issues or elements of plaintiff's claim that will most likely be the subject of expert opinion evidence, and "formulate" the opinions likely to be offered. The next step is to evaluate whether the opinions can be supported under the applicable principles and methodology; or whether plaintiff's experts will have to venture into unknown territories. Under *Daubert*, an expert must adhere to the standards of his discipline in order for his opinions, if relevant, to be admissible. If the expert fails to do this, his opinions are inadmissible no matter how imposing his credentials. If plaintiff's expert must stray from the accepted or prevailing principles and methodologies to find support for his opinions, or if the plaintiff's expert is likely to give a subjective, non-validated opinion—the most common strategy of plaintiff's experts in automotive products liability cases—a *Daubert* challenge is warranted.

II. Expert Discovery.

The initial groundwork for mounting a *Daubert* challenge should be constructed long before the litigation reaches the expert discovery stage. Once this stage is entered, the plan of attack should be ready for execution. The first step is to have your defense consultants, experts, and in-house technical specialists review the plaintiff's expert witness disclosures and reports, if available, to assess, to the extent possible, the degree of compliance with or faithfulness to the principles and methodologies of the expert's discipline. The next step is to obtain confirmation and concessions from the plaintiff's expert at deposition that he has departed from the practices and procedures he follows in his professional, non-litigation related work, or that he has deviated from those generally accepted and applied by others in his discipline.

III. Summary Judgment.

A. Expert Affidavits.

Under Rule 56(c), FED. R. CIV. PROC., summary judgment is appropriate where, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corporation v. Catarrret*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). A defendant is not required to submit evidence in support of a summary judgment motion; instead, it may put the plaintiff to her proof. *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1030 (7th Cir.1997). Generally, in order to establish a *prima facie* case of design negligence or strict products liability, the plaintiff will be required to bring forth admissible expert evidence—to withstand summary judgment. *Id.* at 1030-31.

An expert affidavit submitted in opposition to a summary judgment motion must satisfy *Daubert's* reliability and relevance requirements. *Id.* at 1032. It must include support

for the conclusions expressed—“a conclusion without any support is not based on expert knowledge and entitled to the dignity of evidence.” *Id.*, citing *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795, *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344-45 (7th Cir.1995), and *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 892, 901 (7th Cir.1994). See also *Cortés—Irizarry v. Corporación Insular*, 111 F.3d 184, 188 (1st Cir.1997) (“The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert*’s threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment.” (Citations omitted)).¹⁷

As noted above, the plaintiff in *Navarro* was seriously injured when the 10-year old automobile in which she was a passenger left the roadway, rolled-over, and landed on top of her. Plaintiff brought a design negligence claim against the manufacturer. The manufacturer moved for summary judgment on the grounds that the car simply “wore out.” *Id.* 117 F.3d at 1030. Plaintiff responded with an affidavit from a mechanical engineer experienced in failure analysis, automotive design, and accident reconstruction, who had, among other things, examined the automobile wreckage and accident site. *Id.* at 1031. The Seventh Circuit affirmed exclusion of the affidavit and held that the manufacturer was properly awarded summary judgment finding that “[w]hen the inadmissible, because nakedly conclusional, portions of the expert’s affidavit are stricken, there just is no evidence, though there may be a common-sense suspicion, that [the car’s] rear suspension was defective.” *Id.* at 1032.

Navarro is intriguing for another reason. There, defense counsel chose not to depose the plaintiff’s expert even after the expert’s affidavit was submitted in response to defendant’s summary judgment motion. At the time defendant moved for summary judgment in *Navarro*, plaintiff’s expert had not yet been deposed. Plaintiff argued that “the gaps in the expert’s affidavit would have been filled if only the defendant, before moving for summary judgment, had deposed the expert.” *Navarro*, 117 F.3d at 1031-32. The court rejected this argument, pointing out that

there is no duty to cross-examine or depose your opponent’s witnesses so they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert’s affidavit must be sufficiently complete to satisfy the criteria of the *Daubert* decision, and one of those criteria, . . . , is that the expert show how his conclusion, . . . is grounded in—follows from—an expert study of the problem.

¹⁷ In *Cortés—Irizarry*, however, the court went on to warn “that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious—except when defects are obvious on the face of a proffer—not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility. 111 F.3d at 188 (footnote and citations omitted).

Id. at 1032. The court further pointed out that “[i]f plaintiff needed more time to obtain a decent affidavit, she could have asked the district court for more time, (*citing* Rule 56(f), FED. R. CIV. PROC., *Celotex, supra*, 106 S.Ct. at 2554), and she did not. *Id.* 117 F.3d at 1032. Also, there is nothing in the Federal Rules of Civil Procedure which would have prevented the plaintiff from deposing her expert herself.

B. Rule 104(a) Hearing.

1. Procedure.

Another available procedural tool which the plaintiff in *Navarro* did not attempt to utilize is found in Rule 104(a), FED. R. EVID. (“Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court.”) The rule authorizes a district court to hold a hearing to address the admissibility of evidence prior to trial. At a Rule 104(a) hearing, the proponent of the testimony will be allowed to examine his expert, and submit other evidence, in order to establish that the expert’s testimony satisfies the *Daubert* criteria; and the opponent may cross-examine the expert and submit opposing evidence, including contrary expert testimony.¹⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319, n. 10 (9th Cir.1995) (on remand from the Supreme Court).

2. Risks and Benefits.

There are several benefits to a Rule 104(a) hearing. The first is a pre-trial determination of the admissibility of expert evidence. The hearing also provides an additional opportunity to hear, assess, analyze, and examine your opponent’s expert and his qualifications, opinions, and the bases for the opinions. It also provides an opportunity to see your opponent’s expert, and your opponent in action in a courtroom setting, offering insights into your opponent’s trial strategy. Of course, your opponent may also receive benefits from a Rule 104(a) hearing. He will gain insight into defense counsel’s strategies, see defense counsel in action and may gain an additional opportunity to examine and analyze defense experts.

Cost is also an important consideration in deciding whether to seek a Rule 104(a) hearing since it requires a considerable expenditure of time and effort by the parties to prepare and participate. Further, given the crowded nature of most trial judge’s dockets, your judge may be reluctant to expend the time (which may range from a couple of hours to a couple of days) necessary to hold the hearing. Most judges felt overwhelmed with work before *Daubert* and most assuredly do not look with favor toward acquiring more. Thus, assure you have substantial grounds before seeking a 104(a) hearing.

¹⁸ In *Diviero v. Uniroyal Goodrich Tire Company*, 919 F. Supp. 1353, 1356-60 (D.Ariz. 1996), *aff’d*, 114 F.3d 851, 853 (9th Cir. 1997), the District Court’s opinion reveals that the defendant effectively used its own experts at a Rule 104(a) hearing to establish the inadmissibility of the plaintiff’s expert’s testimony.

Your credibility with the court is also being tested—not just plaintiff’s expert’s.

3. Timing.

Once the decision to seek a Rule 104(a) hearing is made, counsel should also consider when the motion should be brought. The rule does not specify when, in the course of the litigation, the hearing should be held. If the hearing is held in conjunction with summary judgment proceedings, well in advance of trial, and plaintiff’s expert is excluded, he may be afforded an opportunity to procure a replacement expert. Not only will this benefit your opponent, but it will increase the cost of the litigation and likely delay trial.

On the other hand, if a Rule 104(a) hearing is held in conjunction with pre-trial motions in *limine*, the judge may be less likely to exclude an expert in close cases where it will effectively leave the proponent’s case devoid of evidentiary support. The court’s inclination may be to proceed to trial and revisit the issue in conjunction with a motion for judgment as a matter of law under Rule 50, FED. R. CIV. PROC.¹⁹ As a result of “being educated” during the Rule 104(a) hearing, at trial the proponent of the expert testimony may be able to “fill gaps” in the expert’s testimony sufficient to defeat a Rule 50 motion.

CONCLUSION

In virtually every products liability case brought against an automotive products manufacturer, the plaintiff’s claim, or substantial portions of it, will rise and fall on the testimony of the plaintiff’s proffered experts. From the moment the case is assigned, defense counsel must begin considering: What issues will be the subject of expert testimony? What will be the areas of expertise (accident reconstruction, design adequacy, occupant kinematics, trauma medicine, neurology, etc.) of the plaintiff’s expert witnesses? Are there published data, standards, regulations or industry standards that plaintiff’s expert must rely upon or consider? Are there particular experts whom the plaintiff is likely retain? After their identities and opinions are first disclosed, can it be said that the plaintiff’s experts are qualified to express those opinions? Have the plaintiff’s experts developed their opinions based on a study of the issue which others in their discipline would have employed? Are the plaintiff’s expert’s opinions generally accepted in their scientific community or based on accepted principles and methodologies?

In considering these questions during the course of the litigation, defense counsel must

¹⁹ In *Deimer, supra*, the Seventh Circuit held that in diversity cases a federal rather than state standard governs the adjudication of a Rule 50 motion for judgment as a matter of law. 58 F.3d at 343. In a prior appeal in that case, the same appellate panel held that the state standard should be applied. *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 990 F.2d 342 (1993).

remain cognizant of *Daubert's* directive to judges that they must focus on the principles and methodologies the expert employs, not on the conclusions and opinions offered, no matter how novel, absurd, or implausible they may appear. In other words, defense counsel must develop a record in discovery and other pre-trial proceedings which establishes that the expert has deviated from the standards, and the accepted practices, procedures, and methods of his discipline. Defense counsel will then be in a position to challenge the reliability of the proffered expert evidence. Ultimately, this focus will enable defense counsel to develop and execute a strategy for excluding, or in some cases limiting the scope of, the expert's testimony, and thereby produce a favorable result for the client.