The Eighth Circuit

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Arcoren v. United States[1]

IN this pre-*Daubert* case, the defendant had been convicted in the district court for several counts of sexual abuse. At the trial, the government called an expert witness to testify regarding "battered woman syndrome." After hearing the proffered testimony in chambers, the court admitted the evidence.

On appeal, the Eighth Circuit considered the admissibility of this testimony and ultimately held that the testimony met the requirements of Rule 702. In doing so, the court cited to a prior line of Eighth Circuit

[1] 929 F.2d 1235 (8th Cir. 1991).

cases for the proposition that "Rule 702 is one of admissibility rather than exclusion" and "Rule 702 was intended to function as a broad rule of admissibility."[2] Further, a "trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the fact-finder."[3]

Clearly, this case has been overruled by *Daubert* and the amendments to Rule 702. This case is important because the following line of post-*Daubert* Eight Circuit decisions have continued to cite to the *Arcoren* case and the "so fundamentally unsupported" standard for decades to follow.

Arkwright Mutual Insurance Co. v. Gwinner Oil, Inc.[4]

The plaintiffs in this case were property insurers who brought a subrogation action against oil and propane companies. The plaintiffs alleged that the companies were negligent in delivering liquid propane to their insured, a manufacturing plant. There was an explosion and fire at the insured's manufacturing plant, and the plaintiff sought to place blame on the defendants. The defendants called a mechanical engineer and a metallurgist to provide opinion testimony regarding propane storage and the proposed cause of the explosion and resulting fire.

The plaintiffs argued on appeal that the district court erroneously admitted the opinions of two of the defendants' expert witnesses. The court ultimately found that the district court did not abuse its discretion in admitting the expert testimony. However, the court followed the flawed analysis employed by the Eighth Circuit in the *Hose* and *Loudermill* decisions, discussed further in this section.

Citing to *Hose*, the court in *Arkwright* again applied the "so fundamentally unsupported as to be unhelpful" standard,[5] which is a highly permissive admissibility test that completely disregards the Rule 702 requirements. The "so fundamentally unsupported" standard allows admission unless an extreme deficiency exists in which it can offer "no assistance to the jury." This standard contradicts all of the requirements set forth in Rule 702 that the testimony must be (1) based on sufficient facts or data; (2) the product of reliable principles and methods; and (3) reflects a reliable application of the principles and methods to the facts of the case. This case is yet another example of the Eighth Circuit taking their gatekeeping guidance from prior cases that pre-date *Daubert*, rather

[2] *Id*. at 1239-1240.
[3] *Id.*
[4] 125 F.3d 1176 (8th Cir. 1997).
[5] *Id.* at 1183.

than simply applying the standards that Rule 702 commands.

Bonner v. ISP Technologies, Inc.[6]

In this case, a worker sued an organic solvent manufacturer for injuries allegedly caused by his exposure to the solvent. In the United States District Court for the Eastern District of Missouri, the jury awarded the worker over $2 million for his injuries. The manufacturer appealed, arguing among other things, that the court erred in admitting the testimony of Dr. Terry Martinez, a pharmacologist and toxicologist, and Dr. Raymond Singer, a neuropsychologist and neurotoxicologist.

The court again erroneously asserted that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion on cross-examination."[7] The Eighth Circuit further cited to its *Hose* analysis which provides that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[8] Ultimately, the Court of Appeals found that the district court conducted "a thoughtful and thorough inquiry" and found "nothing in the record to suggest that [the expert's testimony] was the result of methodology so unreliable as to render its admission an abuse of discretion."[9]

It is unclear whether this case would still be good law under the amendments to Rule 702. The Eighth Circuit again erroneously cited to the "so fundamentally unsupported" standard originating in *Hose.* Despite this, the court appeared to still give strong deference to the district court's decision and even properly noted the trial court's gatekeeping role.[10]

Children's Broadcasting Corporation v. Walt Disney Company[11]

This case involved claims by the Children's Broadcasting Corporation against Walt Disney for breach of contractual duties to sell advertising and to maintain confidentiality as well as claims for misappropriation of a trade secret. Children's Broadcasting presented evidence at trial that Disney had

[6] 259 F.3d 924 (8th Cir. 2001).
[7] *Id*. at 929.
[8] *Id.* at 929-930.
[9] *Id.* at 932.
[10] *See id.* at 932 ("Nor is it our task to duplicate the district court's analysis of the scientific validity of expert testimony, for the gatekeeping function is reserved to the district court.").
[11] 357 F.3d 860 (8th Cir. 2004).

"accelerated" their entry into the children's radio market by using information about advertising and marketing they obtained from Children's. The plaintiff presented evidence on damages from a proposed expert witness on these issues that was questioned by the defendants.

The Eighth Circuit upheld the District Court's admission of the expert's testimony indicating that the District Court was satisfied with the expert's credentials for valuing trade secrets and that he used an accepted academic methodology. The Eighth Circuit stated that the objections to the expert's opinions were better directed to the weight of the testimony, rather than admissibility, and that the defendants had a full opportunity to cross examine the expert.

The Eighth Circuit improperly relied on prior Eighth Circuit decisions stating that the factual basis of an expert opinion goes to the credibility of the testimony and not the admissibility. The Eighth Circuit again improperly stated its standard for admissibility at variance to Rule 702 and stated "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[12]

This decision is yet another Eighth Circuit opinion that applies a flawed analysis as to the admissibility of expert opinion testimony and fails to properly apply the requirements of Rule 702. It is difficult to know from the factual discussion in this case whether a proper application of the current language of Rule 702 would lead to the exclusion of this expert's proposed testimony, but the analysis of the Eighth Circuit regarding this admissibility question is likely to no longer be good law under the current language of Rule 702.

Hartley v. Dillards, Inc.[13]

Plaintiff, a former employee, sued Dillard's, Inc. alleging age discrimination following his termination. A jury found for the plaintiff. Dillard's appealed arguing that the testimony of plaintiff's economist expert should have been excluded because it was not based on sufficient facts, data, scientific principles, and reliable methods. The economist testified on the computation of damages and the economics of employability and external factors affecting mall and retail store sales. Plaintiff presented the testimony to support his position that the defendant used declining profits to justify plaintiff's termination. The economist testified that the financial problems of the store were consistent with what was happening to department stores around the country. Defendant argued that the testimony was not

[12] *Id.* at 865.

[13] 310 F.3d 1054 (8th Cir. 2002).

based on sufficient facts or data because the materials he relied on did not support his testimony, and he failed to consider the economic realities specifically applicable to the store at issue.

The *Hartley* court cited to Rule 702 and the *Kumho Tire* decision in its analysis, noting that "a trial judge, in admitting expert testimony, has a gatekeeping responsibility to ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[14] The court went on to quote *Hose* stating that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination . . . only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[15]

However, it is unclear whether the court actually used the "so fundamentally unsupported" standard or the Rule 702 standard when analyzing the district court's decision. The court simply reasoned that while the expert's testimony may not have addressed the specific financial conditions it needed to, the jury could consider this evidence on the profit questions relating to discharge. Thus, the court found "the district court did not abuse its discretion under *Kumho Tire* in admitting [the expert] testimony."

It is unclear whether this case would still be good law because the court's analysis of the testimony was very short and ambiguous. The court never directly discussed the Rule 702 standards, but it did discuss the district court's gatekeeping responsibility when citing to *Kumho Tire*. The court then went on to quote its framework employed in *Bonner* and *Hose* before affirming the district court's decision in just a few short sentences. Because *Bonner* and *Hose* reflect incorrect application of Rule 702, and this case cites to that framework, it is likely this case should not be relied on for analysis of expert testimony under Rule 702.

Hose v. Chicago Northwestern Transportation Co.[16]

This appeal arose out of a jury verdict for personal injuries in favor of the plaintiff-employee against the plaintiff's employer under the Federal Employers' Liability Act (FELA). Plaintiff was a welder who claimed that he was exposed to substantial fumes and dust containing manganese and subsequently developed manganese encephalopathy.

Plaintiff called three different physicians to provide proposed expert testimony to support his

[14] *Id.* at 1061.
[15] *Id*.
[16] 70 F.3d 968, 974 (8th Cir. 1995).

claims. One doctor offered testimony based on a PET scan to rule out other causes of plaintiff's brain injury and testified that the scan was consistent with manganese encephalopathy. The court provided very little analysis of the reliability of the opinion testimony based on the PET scan.

Next, plaintiff offered testimony from another physician regarding a polysomnogram to support that doctor's testimony that the plaintiff had a sleep disorder consistent with exposure to a toxic substance. Again, the court did not do much analysis regarding the reliability of this opinion testimony or whether the physician applied any methodology in a reliable manner. The court simply admitted the testimony and indicated that the defendant was free to argue to the jury that this testimony should carry little weight.

Finally, the plaintiff also offered testimony from another physician regarding her opinion that the diagnosis of the plaintiff at the time of trial was manganese encephalopathy caused by inhalation of manganese fumes. The defendant also challenged this opinion testimony, but the district court allowed it at trial and the Eighth Circuit upheld the decision without much analysis about the actual reliability of the testimony under Rule 702.

Citing to the pre-*Daubert* opinion in *Loudermill*, the court stated: "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."[17]

The court held that the opinion testimony of the physicians had sufficient factual basis and the district court properly left it to the jury to evaluate the credibility of the witness. This case fatally misconstrued the holding in *Daubert* and is at odds with the current language of Rule 702.

In re *Bair Hugger Forced Air Warming Devices Products Liability Litig.*[18]

In this case, plaintiffs were a group of patients who had undergone orthopedic implant surgeries utilizing defendant's manufactured surgical device. Plaintiffs argued the device caused them to contract joint infections, and asserted claims for negligence,

[17] *Id.* at 974.

[18] 9 F.4th 768 (8th Cir. 2021), cert. denied, 3M Company v. Amador, 142 S. Ct. 2731 (May 16, 2022).

strict products liability, and other related claims. Following a full cross-examination at trial of the plaintiffs' experts, the district court subsequently excluded the expert opinions on general causation theories finding that they did not meet Rule 702 mainly because they included large analytical gaps and were not generally accepted.

On appeal, the Eighth Circuit reversed the lower court's witness exclusions, concluding that the witnesses' opinions had certain weaknesses, but were not "so fundamentally unsupported" so as to merit exclusion. Citing again to the "liberal thrust" of Rule 702 regarding the admissibility of expert testimony, the court re-examined the reasons provided by the MDL court for excluding plaintiffs' experts. Regarding plaintiffs' medical causation experts, the Eighth Circuit disagreed with the MDL court that there was too great an analytical gap between the literature and the experts' opinions. The Eighth Circuit focused instead on the "totality of the evidence" and found that their theories were not unreliable. The court stated that "deficiencies in an expert's factual basis go to weight and not admissibility," and "redress for such weaknesses lies in cross-examination and contrary evidence rather than exclusion."[19]

This analysis is directly criticized in the 2023 amendments to Rule 702: "[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)."[20]

The Eighth Circuit in *In re Bair Hugger* reanalyzed the issues and substituted its own discretion for the district court's. The district court's opinion more closely adhered to the standard found in Rule 702, which should have been upheld by the Court of Appeals absent a finding of an abuse of discretion.

Jenson v. Eveleth Taconite Co.[21]

The plaintiff-employees brought a class action lawsuit against their former employer for sexual harassment and discrimination in violation of Title VII and the Minnesota Human Rights Act. After finding the employer liable, the United States District Court for the District of Minnesota affirmed the

[19] *Id.* at 786, 787.

[20] Advisory Comm. on Evidence Rules, Proposed Amendments to the Federal Rules of Evidence, Rule 702, advisory comm. note 1.

[21] 130 F.3d 1287 (8th Cir. 1997).

Special Master's report and recommendation awarding damages. The employees appealed on several grounds including the Special Master's exclusion of the testimony of their causation experts. The Court of Appeals held that the Special Master erred in rejecting the testimony of the three psychiatrists and three psychologists' plaintiffs proffered as their causation experts.

The *Jenson* court expressed some confusion as to whether the *Daubert* analysis should be applied to "soft" sciences such as psychology. However, the court reasoned that "under either *Daubert* or under the more general parameters of Rule 702, the proffered testimony was both reliable and relevant and should have been admitted into evidence."[22] The court went on to discuss the *Daubert* factors but completely failed to apply them. The court stated:

> The record indicates the opinion evidence offered by the plaintiffs' expert witnesses was thorough and meticulously presented. The methodology for arriving at their opinions was laid out clearly by each witness. The key question in this damages phase of the trial was the causal link between the actions of the defendants and the claimed emotional injuries of the plaintiffs. The expert testimony was therefore without a doubt relevant to the issue before the court.
>
> For these reasons, we find that the overall testimony was erroneously excluded under Rule 702 and established precedents of this court.[23]

The court went on to quote such "established precedents" which happened to be, <u>again</u>, all of the pre-*Daubert* authority discussed above. The court discussed not only the "so fundamentally unsupported" standard but also pointed to the authority stating that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony," and "the rule clearly is one of admissibility rather than exclusion."[24]

After reversing the district court's decision and taking away its gatekeeping role, the court concluded by stating that "the weight and credibility of this evidence is left to the trier of fact, which in this case is the district court. However, there is little doubt that exclusion of such evidentiary proof could appreciably affect the

[22] *Id.* at 1297-1298.

[23] *Id.* at 1298.

[24] *Id.*

damages awarded to the plaintiff class."[25] This case appears to be inconsistent with the requirements outlined in the current version of Rule 702.

Johnson v. Mead Johnson & Co., LLC[26]

The plaintiff, in his capacity as guardian *ad litem* for an infant, brought a products liability action against the manufacturer of infant formula after the infant ingested the formula and sustained significant brain injuries due to a bacterial infection. Plaintiff retained three physicians among numerous other experts to testify regarding causation. The district court held a Rule 702 hearing and excluded the testimony of the three physicians because they did not do an adequate differential diagnosis. The Eight Circuit reversed.

The Eighth Circuit gave little to no deference to the district court's decision to exclude the expert testimony. "Interestingly, the liberalization of the standard for admission of expert testimony creates an intriguing juxtaposition with our oft-repeated abuse-of-discretion standard of review. While we adhere to this discretionary standard for review of the district court's Rule 702 gatekeeping decision, cases are legion that, correctly, under *Daubert*, call for the liberal admission of expert testimony."[27] The court examined the experts' methods, finding that a differential expert can be reliable even "with less than full information" and such considerations should go to the weight to be given by the jury, not its admissibility.[28]

This case completely disregards the standards in Rule 702. Not only did it suggest that opinions that exclude plaintiffs' experts get less deference because they conflict with *Daubert's* "liberal thrust," the court took away the district court's gatekeeping role, re-examined the issues, and held that the district court abused its discretion in excluding the experts based on their unreliable methodology.

Kuhn v. Wyeth, Inc.[29]

In this case, the plaintiffs were consumers who were prescribed a hormone therapy drug and developed breast cancer after taking the drug. The plaintiffs sued the manufacturer of the drug alleging, among other things, that the drug increased the risk of breast cancer and the manufacturer failed to adequately warn of this risk. Plaintiffs retained an epidemiologist to testify as their causation expert to support their contention that short-

[25] *Id.* at 1299.
[26] 754 F.3d 557 (8th Cir. 2014).
[27] *Id.* at 562.
[28] *Id.* at 564.
[29] 686 F.3d 618 (8th Cir. 2012).

term use of the drug increases the risk of breast cancer.

The proffered expert cited to five studies to support his conclusions, however he conceded that two of the studies should not have been included in the report, two of the studies involved other drug combinations, and one of the studies did not reliably track duration of use. The magistrate judge found that with no studies to reliably support his position, along with a failed effort to discredit other studies' results, the expert's opinion was not sufficiently reliable and must be excluded.

The Eighth Circuit re-analyzed each of the studies cited by plaintiffs' epidemiologist. The court ultimately reversed and found that the expert's explanation as to why the study did not undermine his opinion was sufficient to raise a jury question and the trial court should have allowed the expert to testify in front of the jury. Based on the amendment to Rule 702, the court must find that the proffered expert opinion is based on the application of sound principles and methodology and on sufficient facts and data. The decision of the Eighth Circuit in this case appears to violate those principles and the current language of Rule 702.

Lauzon v. Senco Products, Inc.[30]

The plaintiff was a carpenter who sued the manufacturer of a pneumatic nail gun resulting from an injury to his hand when a nail went through his hand while using the pneumatic nail gun at work.

Plaintiff retained a mechanical engineer as an expert witness to provide opinion testimony about a design defect theory. The district court excluded that opinion testimony. However, the Court of Appeals reversed the decision of the district court to exclude that expert opinion testimony.

Despite citing the then-applicable prerequisites for admissibility of expert opinion testimony under Rule 702, the Eighth Circuit expressed the idea that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony."[31]

It does not appear that this case would continue to be good law under the more recent amendments to Rule 702, since the appellate court appears to have applied the incorrect burden of proof (not the current 104(a) standard) and failed to properly analyze the methodology of the expert and the other prerequisites to admissibility.

[30] 270 F.3d 681 (8th Cir. 2001).
[31] *Id.* at 686.

Loudermill v. Dow Chemical Co.[32]

In this case, the plaintiff was a worker who had been exposed to chemicals at a plant and died due to cirrhosis of the liver. Plaintiff's estate brought an action against the plant for wrongful death alleging that his death by cirrhosis of the liver was a direct result of his exposure to the chemicals.

At the trial of this case, the expert testimony of a toxicologist with doctoral degrees in toxicology and chemistry, but not in medicine, was used to establish causation between the chemical exposure and the plaintiff's injuries. Defendant objected to the admission of this testimony because the toxicologist admitted that he had never done research in this area. Further, because he lacked a medical degree, defendant argued he should not have been permitted to testify as to the high medical probability of the cause of plaintiff's cirrhosis of the liver.

On appeal, the Eighth Circuit held that the district court did not abuse its discretion in admitting the testimony because the toxicologist's testimony "sufficiently assisted the jury to justify the magistrate's decision to allow admission."[33] The court reasoned that the jury was well aware that the expert was not a medical doctor and that the weight and value of the testimony was for the jury to evaluate. "The testimony was, however, sufficient to cross the threshold of admissibility."[34]

This was the first case within the Eighth Circuit to declare that that "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."[35] For many years following this decision, courts within this circuit have continued to apply the *Loudermill* court's analysis and reasoning even though this was a pre-*Daubert* case. This case is relied on by other decisions in the Eighth Circuit to support the admissibility of expert testimony, but it should no longer be considered good law under the current version of Rule 702.

Polski v. Quigley Corp.[36]

The Polskis filed suit against Quigley asserting claims for fraud, negligence, and strict products liability among others, alleging that the use of the Cold-Eeze product caused them sensory loss. The Polskis offered the expert opinion of a physician to prove causation. The district court struck the physician's testimony concluding that his causation opinion rested on an unproven premise about Cold-Eeze. The court determined that his opinions were not sufficiently

[32] 863 F.2d 566 (8th Cir. 1988).
[33] *Id.* at 569.
[34] *Id*. at 570.
[35] *Id.*
[36] 538 F.3d 836 (8th Cir. 2008).

reliable to be admitted under Rule 702.

On appeal, the Polskis argued the district court erred in precluding the physician's opinion. The Eighth Circuit ultimately found no abuse of discretion in the district court's decision to exclude the physician's testimony. However, the court still discussed the faulty application of the Rule 702 standard applied in previous cases such as *Lauzon*, and it is unclear whether this case would still be good law. The Eighth Circuit cited to *Lauzon* for its proposition that Rule 702 is "clearly one of admissibility rather than exclusion."[37] The court also discussed the "so fundamentally unsupported" standard in its analysis. However, the court still found no issue with the district court's decision to exclude the testimony despite citing to these earlier cases which discuss the wrong standard.

Smith v. BMW North America, Inc.[38]

The plaintiff, a motorist who was rendered a quadriplegic after a motor vehicle accident, brought a product liability action against the vehicle manufacturer, alleging the air bag was faulty. The district court excluded testimony of plaintiff's experts.

On appeal, the Eighth Circuit held: (1) forensic pathologist's expert testimony as to how motorist sustained neck injury, and that, to a reasonable degree of medical certainty, a properly deploying air bag would have reduced her injuries, was admissible; and (2) certified accident reconstructionist's expert testimony as to principal direction of force during accident was admissible, but his testimony regarding magnitude of barrier equivalent velocity was inadmissible because it was unreliable.

The Court of Appeals claimed to review the district court's decision under the abuse of discretion standard, but re-examined the issues instead and reversed the district court's decision in excluding the testimony. The district court found that the forensic pathologist was not scientifically or medically reliable for seven reasons. The Court of Appeals found that all the court's cited reasons were insufficient to disqualify him "from offering testimony that would be helpful to the jury."[39] As to the second expert, the district court determined the methods used by the accident reconstructionist were fundamentally flawed and his opinions based upon those methods were therefore inherently unreliable. The Court of Appeals found that the district court's

[37] *Id.* at 839.
[38] 308 F.3d 913 (8th Cir. 2002).
[39] *Id.* at 919.

perception of the expert's demonstration did not provide a valid basis for concluding that his testimony was unreliable.

This case represents an incorrect application of Rule 702 because the Court of Appeals supplemented its discretion for the trial court's and completely disregarded the trial court's reasoning for excluding the testimony. Rule 702 specifically provides that the gatekeeping role rests exclusively with the trial court. Here, the trial court found that the testimony was not to be admitted because the proponent did not demonstrate to the court it met the admissibility requirements set forth in the rule. The Eighth Circuit decided to ignore the analysis of the trial court, re-examined the issues, and admitted the testimony because it would "be helpful to the jury."

Structural Polymer Group, Ltd. v. Zoltek Corp.[40]

In this breach of contract case, the plaintiff and defendant had a contract for the sale of carbon fiber. After an entry of a jury award in the plaintiff's favor, the defendant-seller appealed the jury's damages award arguing that it was based on impermissible speculation and other improper grounds. On appeal, the Eighth Circuit considered whether the jury's damage award was adequately supported by the record. In doing so, the court applied a Rule 702 analysis to the defendant's challenges.

According to the court, "[a]s a rule, questions regarding the factual underpinnings of the expert's opinion affect the weight and credibility of [the witness'] testimony, not its admissibility."[41] Additionally, the court applied the "so fundamentally unsupported" standard in its analysis. Ultimately, the court concluded the jury's award was adequately supported by the record. The Eighth Circuit in this case continues to track the language used in its pre-*Daubert* decisions and completely disregards the true Rule 702 standards.

United States v. Beasley[42]

In this criminal case, the defendant challenged on appeal the district court's denial of his motion to exclude DNA evidence. The Eighth Circuit, in analyzing the admissibility of certain testimony regarding alleged deficiencies in the laboratory testing, stated that "these alleged deficiencies . . . go to the weight of the DNA evidence, not to its admissibility."[43]

The problem with the Eighth Circuit's analysis here is that it ignores Rule 702(d) requiring the

[40] 543 F.3d 987 (8th Cir. 2008).

[41] *Id.* at 997.

[42] 102 F.3d 1440 (8th Cir. 1996).

[43] *Id.* at 1448.

trial court find by a preponderance of the evidence that the expert has reliably applied the methodology to the facts. Although this case pre-dates the 2000 revisions, it is important because the Eighth Circuit uses this case to support its later decision in *United States v. Gipson*, and thus, it falls into the long line of poor decisions by the Eighth Circuit which misinterpret Rule 702.

United States v. Finch[44]

In this criminal case involving the charge of possession of crack cocaine, there was a question about the quantity of crack cocaine consumed during laboratory testing. The government presented the testimony of a forensic chemist for the state crime lab to provide opinion testimony about the amount of crack cocaine consumed during testing to support its position that the total amount of crack cocaine possessed by the defendant at the time of arrest was in excess of a certain level required to support the charge for possession. The forensic chemist testified that her experience in analyzing and weighing small quantities of powdery substances gave her "a better judgment about the quantities involved . . . than a lay person."[45] The defendant argued that her testimony was simply based on conjecture and not supported by any reliable principles or methodology.

In this case, the plaintiff's expert testimony was admitted by the district court. This case cites to several earlier decisions standing for the proposition that "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[46]

The court misstates the law here and follows the erroneous analysis of the previous decisions within this circuit. The analysis certainly does not follow Rule 702 and is so engrained in the case law in the Eighth Circuit that it has trickled down to second and third generation decisions. The *Finch* holding is a direct descendant of pre-2000 amendment standards. *Finch* quoted the statement from *United States v. Rodriguez*.[47] *Rodriguez* took the quotation from *Arkwright*. *Arkwright* drew the sentence from *Hose* and *Hose* found the words in the pre-*Daubert* ruling in *Loudermill.*

This case is yet another example of an Eighth Circuit opinion that continued to follow the flawed analysis of earlier Eighth Circuit decisions on the admissibility of expert testimony. A proper analysis of proposed expert testimony under

[44] 630 F.3d 1057 (8th Cir. 2011).
[45] *Id.* at 1063.
[46] *Id.* at 1062.
[47] 581 F.3d 775, 795 (8th Cir.2009) (quoting *Arkwright*, *supra* note 4, at 1183).

the current language of Rule 702 requiring sufficient facts and data as well as a reliable application of the principles and methodology of the expert would likely lead to a different conclusion than the opinion reached in this case.

United States v. Gipson[48]

In this case, Gipson appealed from a final judgment entered in the United States District Court for the District of Minnesota upon a jury verdict finding him guilty of two counts of bank robbery. Gipson argued on appeal that under *Daubert* the district court improperly admitted DNA evidence at trial.

When analyzing the question of the admissibility of DNA evidence in this case, the Eighth Circuit stated "[i]n applying the reliability requirement of *Daubert*, this court has drawn a distinction between, on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the *application* of that scientific methodology."[49] Further, the Eighth Circuit stated that "when the *application* of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable," the court said, "outright exclusion of the evidence in question is warranted only if the methodology 'was so altered [by a deficient application] as to skew the methodology itself.'"[50] The Eighth Circuit went on to agree with the decision of the district court that the method for DNA testing was reliable and then analyzed the contention of the defendant that the application of that method was not performed in a reliable manner. However, the court simply upheld the district court's decision to admit the DNA evidence and stated that any "faulty application" of the method of analysis of the DNA in that case would only go to the weight of the evidence and not to its admissibility.

The current version of Rule 702 should require the court to analyze the scientific methodology in question as well as the application of that methodology to the facts of the particular case. In either instance, the expert should be required to show, by a preponderance of the evidence, that his or her opinion testimony is based on sufficient facts and data and a reliable application of the scientific methodology to those facts. The court cannot simply overlook these issues and state that any deficiencies would go to the weight, and not the admissibility, of the proffered evidence.

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[48] 383 F.3d 689 (8th Cir. 2004).
[49] *Id*. at 696.
[50] *Id*. at 697.

United States v. Martinez[51]

In this criminal case, the defendant was convicted of sexual abuse following a jury trial. The defendant appealed. Among other things, the Eighth Circuit considered the effect *Daubert* had on the admissibility of DNA evidence. The court discussed the requirements of Rule 702 and the application of Rule 104(a), however, the court erroneously stated that "an alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself."[52] While this case pre-dates the 2000 amendments to the Rules, it is important to note in this article because it continues to be cited by the Eighth Circuit and other circuits for this proposition.

Weisgram v. Marley Co.[53]

In the Eighth Circuit's opinion in *Weisgram v. Marley Co*., the plaintiff brought a wrongful death action on behalf of the decedent's estate, against the manufacturer of an allegedly defective home baseboard heater. The district court admitted testimony of three experts: (1) a metallurgist who had examined the subject heater and its components; (2) a city fire captain who arrived with the first fire truck on the scene, and also conducted the investigation for the fire department; and (3) a fire investigator and technical forensic expert. On appeal, the Eighth Circuit concluded that the testimony of all three expert witnesses was unreliable and "the District Court abused its admittedly broad discretion in allowing the suspect testimony."[54]

The Eight Circuit analyzed each of the expert's testimonies and concluded that the opinions amounted to "no more than subjective belief or unsupported speculation."[55] The court re-examined the issues and concluded that there was too great an analytical gap between the data and the opinion proffered and thus the "testimony was unreliable and it was an abuse of discretion to allow it."[56]

While it appears the court applied the correct Rule 702 standard in its opinion, in Judge Bright's dissent, he cited to the earlier decisions in *Jensen* and *Arcoren* for the proposition that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony" and "[t]he rule is one of admissibility rather than exclusion."[57] *Arcoren*, decided in 1991, was not only before

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[51] 3 F.3d 1191 (8th Cir. 1993).
[52] *Id.* at 1198.
[53] 169 F.3d 514 (8th Cir. 1999), aff'd 528 U.S. 440 (2000).
[54] *Id.* at 518.
[55] *Id*. at 521.
[56] *Id.* at 523.
[57] *Id.*

Rule 702 was amended but also before the Supreme Court established the reliability test in *Daubert*. Judge Bright went on to state that even if the testimony of the plaintiffs' experts was unreliable, the matter goes to the weight and not the admissibility of the testimony. While this dissent is not binding law, several later decisions have cited to the *Weisgram* dissent for this proposition, including *Lauzon*.