The Eleventh Circuit

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Adams v. Laboratory Corporation of America[1]

PLAINTIFFS brought this suit against defendant laboratory alleging that its cyto-technologists were negligent in missing signs of abnormalities and pre-cancerous cells in plaintiff's pap smears that ultimately led to a delay in plaintiff's cancer diagnosis. Defendant moved to exclude testimony of plaintiffs' expert, Dr. Dorothy Rosenthal, contending that her review of the pap smear slides was tainted by unreliable methodology. The district court granted defendant's motion and excluded plaintiffs' expert, finding Dr. Rosenthal's methodology to be an *ipse dixit* assessment that could not be proven or meaningfully reviewed by other experts, that it did not follow approved litigation guidelines, and that it was biased.

[1] 760 F.3d 1322 (11th Cir. 2017).

On appeal, the Eleventh Circuit reversed the district court's exclusion of Dr. Rosenthal's expert testimony, holding the district court abused its discretion by finding Dr. Rosenthal's methodology unreliable and biased, and thus, improperly supplanting the jury's fact-finding role.[2] The Eleventh Circuit found common-sense concepts of bias to be especially appropriate for consideration by a jury, and that whether and, if so, the extent to which an expert's philosophical bent biases her review is a credibility determination that has always been within the province of the jury.[3] The Eleventh Circuit found that, at most, defendant established that there is an unspecified level of risk that Dr. Rosenthal's assessment might have been biased, and that she had not sought to exclude the possibility of bias by conducting a blinded review. That meant, at most, the risk of bias would suggest that Dr. Rosenthal's testimony is to some extent "shaky," but shakiness goes to the weight of her testimony, not its admissibility.[4] The Eleventh Circuit held the asserted problems with Dr. Rosenthal's methodology could be addressed, and should have been addressed, through the conventional adversarial means and assessed by the jury. Thus, the district court erred in excluding her testimony.

The Eleventh Circuit's ruling is contrary to the requirements of Rule 702, and ironically, reverses a district court's holding that properly applied Rule 702 and the court's gate-keeping role thereunder. Specifically, the Eleventh Circuit failed to analyze whether the expert's opinion was the product of reliable principles and methods, instead, held the expert's methodology should have been assessed by the jury through cross-examination. In repudiating its Rule 702 obligations, the Eleventh Circuit rejected and reprimanded district court findings that did just that. The district court's reliance on the proffered expert's failure to adhere to the professional society guidelines, which were established specifically for such an expert's review of slides in these situations (and which noncompliance was admitted by the expert herself), in excluding the expert testimony was properly within its role under Rule 702 and should not have been left to the determination of a jury.

Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.[5]

Quiet Technology was a fraud case in which plaintiff alleged that defendant's aerospace product was defective. Plaintiff sought to introduce the expert testimony of Joel Frank, an aerodynamics

[2] *Id.* at 1334.
[3] *Id*. at 1335.
[4] *Id*. at 1334.
[5] 326 F.3d 1333 (11th Cir. 2003).

specialist. Defendant sought to exclude Frank on several bases, including his qualifications, but predominantly on the reliability of Frank's methodology. The district court disagreed with defendant and denied the expert challenge of Frank. The Eleventh Circuit affirmed Frank's admissibility.

The Eleventh Circuit found that because the defendant had not challenged the impropriety of conducting such a study using the sorts of aerodynamic data Frank employed, but had instead challenged the accuracy of the specific data used and Frank's misuse of the methodology, the alleged flaws in Frank's analysis were of a character such that challenge was to the accuracy of his results and not the general scientific validity of his methods. In affirming Frank's admissibility, the Eleventh Circuit found that the identification of "such flaws in a generally reliable scientific study [are] precisely the role of cross-examination" and are "more appropriately considered an objection going to the weight of the evidence rather than its admissibility."[6] Thus, the Eleventh Circuit held that defendant's arguments that Frank's study was methodologically flawed, and that his testimony consequently was unreliable, only go to the weight, not the admissibility, of the evidence he offered. As such, these arguments were subject to effective cross examination and, accordingly, were not a case where the jury was likely to be swayed by facially authoritative, but substantively unsound, unassailable expert evidence.

This holding is contrary to the current version of Rule 702. The Eleventh Circuit failed to apply a preponderance of the evidence standard to test the sufficiency of the data upon which the expert's opinions were based. The court also failed in its Rule 702 role to determine that the methodology used by the expert was applied reliably. Instead, the court left that issue for the jury to decide. In doing so, the Eleventh Circuit's opinion suggested, contrary to the 2023 amendments to Rule 702, a court should not analyze an expert's ultimate opinions for reliability.

Tampa Bay Water v. HDR Engineering Inc.[7]

Plaintiff, a regional water authority, sued the defendant engineering firm for defectively designing a large water reservoir that ultimately led to large cracks in the cement of the reservoir. Plaintiff moved to exclude defendant's engineering expert, Dr. Bromwell, on grounds that his testimony was unreliable based on the methodology used in concluding the cause of the reservoir damage was due to its collapse upon wetting. The

[6] *Id*. at 1345.

[7] 731 F.3d 1171, 1184-1185 (11th Cir. 2013).

district court disagreed and denied plaintiff's *Daubert* motion as to Bromwell. The Eleventh Circuit affirmed.

On appeal, plaintiff argued that Bromwell failed to use the only accepted testing method, and thus, any conclusions as to the cause of the collapse was not the product of a reliable methodology. The Eleventh Circuit disagreed and instead found that even though Bromwell did not use the methodology advocated by plaintiff and plaintiff's expert as the accepted method, because plaintiff's expert testified to that and as to the unreliability of Bromwell's methodology, the disagreement between experts should be an issue for the jury to decide. The Eleventh Circuit held that the failure to include certain variables in testing affects the extent to which the testimony was probative, and not the admissibility of the testimony.[8] The Eleventh Circuit held that these types of disagreements between experts ordinarily go to the credibility of expert testimony, and not its admissibility, "and is the province of the jury."[9] The Eleventh Circuit went even further, and found no error in the district court's sole reliance on Bromwell's "impressive credentials" to support the reliability of his proposed expert testimony.[10] The Eleventh Circuit found that although an expert's qualifications go primarily to the first prong of the *Daubert* inquiry, Bromwell's overwhelming qualifications could bear on the reliability of his proffered testimony even if "they are by no means a guarantor of reliability."[11]

In so finding, the Eleventh Circuit held that Bromwell's impressive qualifications bolstered a showing of reliability of his expert testimony, and thus, that the district court committed no manifest error by allowing the jury to hear Bromwell's testimony. This latter finding was contrary to Rule 702 as it stood at the time of this opinion (and as currently amended), by confusing and conflating the separate inquires mandated by Rule 702 and *Daubert*. By allowing the admission of this expert testimony without evaluating whether the proffered expert testimony was the product of reliable principles and methods and whether the expert opinion reflected a reliable application of those principles and methods to the facts of the case, the court failed in its role under Rule 702.

[8] *See id.* at 1185.
[9] *Id.*
[10] *Id.*
[11] *Id.* (citing *Quiet Technology*, 326 F.3d at 1341).