The Fifth Circuit

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A. Fifth Circuit Court of Appeals

Bear Ranch, LLC v. Heartbrand Beef, Inc.[1]

PLAINTIFF Bear Ranch, a cattle ranch, sued a beef production company and related entities, alleging breach of contract and fraudulent inducement claims. Defendants called a valuation expert to testify regarding the value of plaintiff's unjust enrichment claims.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "Bear Ranch's objection to this expert opinion evidence is more of a disagreement about the reasonableness of [the expert's] valuation than the rigor of the district court's preliminary assessment."[2] In support of this finding, the Fifth Circuit quoted *Daubert* as follows: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[3]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

GlobeRanger Corp. v. Software AG United States of America[4]

Plaintiff GlobeRanger sued defendant Software AG for trade secret misappropriation. GlobeRanger offered expert testimony regarding its damages. "GlobeRanger's expert based his $19.7 million damages opinion on an unjust enrichment theory rooted in research and development costs that Software AG avoided."[5] Software AG claimed that the damages model was "unreliable and flawed" because it did not account for the value of costs saved and for other reasons.

The Fifth Circuit found that the district court's decision to allow the expert's testimony was not an abuse of discretion. The Fifth Circuit reasoned that "Software AG's arguments go to the weight a factfinder should give the

[1] 885 F.3d 794 (5th Cir. 2018).
[2] *Id.* at 803.
[3] *Id.* at 802.
[4] 836 F.3d 477 (5th Cir. 2016).
[5] *Id.* at 499.

testimony. Indeed, Software AG raised these potential weaknesses both in cross examination and through its own expert testimony. Software AG thus had the opportunity to try to convince the jury not to give full weight to GlobeRanger's expert's calculations, and to instead listen to its expert's opinion about the value of costs saved."[6]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Mathis v. Exxon Corp.[7]

Plaintiffs, fifty-four gas station franchisees, filed suit against Exxon for violating the Texas analogue of the Uniform Commercial Code's open price provision. Plaintiff sought to introduce testimony of economist Barry Pulliam regarding whether Exxon had set a commercially reasonable price in the economic context, as well as his definition of the relevant geographic market for each gas station.

The court provided that "[t]he *Daubert* analysis should not supplant trial on the merits. '[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' We find no abuse of discretion in the decision to admit Pulliam's testimony."[8]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

MM Steel, L.P. v. JSW Steel (USA) Inc.[9]

Steel distributor brought action against steel manufacturers and distributors, alleging an antitrust conspiracy. Plaintiff's damages expert testified using the "yardstick test" – *i.e.*, a study of the profits of business operations that are closely comparable to the plaintiff's business.

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[6] *Id*. at 500 (internal citations omitted).
[7] 302 F.3d 448 (5th Cir. 2002).
[8] *Id.* at 461 (internal citations omitted).
[9] 806 F.3d 835 (5th Cir. 2015).

The Fifth Circuit stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct.

More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Nova Consulting Group, Inc. v. Engineering Consulting Services, Ltd.[10]

Nova Consulting Group, an environmental consulting firm, filed suit against a competitor, alleging claims for misappropriation of trade secrets and tortious interference with contractual relations. Nova Consulting called an expert to testify to the economic harm and computation of economic damages caused by defendant.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "[w]hen, as here, the parties' experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony."[11] The Fifth Circuit relied on *Daubert* as follows: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[12] After "vigorous cross-examination" of the expert, the court instructed the jury that "ultimately, then you all as the judges of the facts still make the determination of whether you want to believe any, all[,] or none of [their] testimony."[13]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Pipitone v. Biomatrix, Inc.[14]

Plaintiffs Thomas and Bonnie Pipitone filed suit against Biomatrix alleging that its product, Synvisc, caused Thomas Pipitone to develop a salmonella infection in his knee following a Synvisc injection. Plaintiffs sought to introduce medical testimony regarding the cause of the salmonella infection in Pipitone's knee.

The court provided that "as *Daubert* makes clear, 'vigorous cross-examination, presentation of contrary evidence, and careful

[10] 290 F. App'x. 727 (5th Cir. 2008).
[11] *Id.* at 733.
[12] *Id.*
[13] *Id.*
[14] 288 F.3d 239 (5th Cir. 2002).

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[15]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Primrose Operating Co. v. National American Insurance Co.[16]

Plaintiff sued its insurer for alleged breach of the duty to defend. Plaintiff called an expert to testify about the reasonableness of attorney's fees charged to plaintiff by two law firms retained independently of the insurer.

In finding that the district court did not abuse its discretion in allowing plaintiff's expert to testify, the Fifth Circuit explained that although the expert's testimony may have been weakened by generic billing entries, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[17]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Puga v. RCX Solutions, Inc.[18]

RCX is a licensed motor carrier. It contracted with Ronald Brown to transport a load across Texas. During his drive, Brown crossed the median and crashed into plaintiff's vehicle. Plaintiff sued RCX for negligence. The district court permitted plaintiff to offer the testimony of State Trooper Andrew Smith as an expert in accident investigation. RCX challenged the relevance of Smith's opinion.

The Fifth Circuit found that "[t]he district court did not abuse its discretion in allowing Smith to offer an expert opinion on the cause of the accident – Smith considered an appropriate amount of physical evidence at the scene of the crime to offer his opinion, and RCX had ample opportunity to show the jury any flaws in his opinion."[19] The

[15] *Id.* at 250.
[16] 382 F.3d 546 (5th Cir. 2004).
[17] *Id.* at 562.
[18] 922 F.3d 285 (5th Cir. 2019).
[19] *Id.* at 294.

Fifth Circuit's analysis included the following generalized statements:

- "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[20]
- "the court's role is limited to ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue so that it is appropriate for the jury's consideration."[21]
- "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence," [22] and
- "[a]t no point should the trial court replace the adversary system."[23]

Under the Rule 702 amendments, these generalized statements are accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Roman v. Western Manufacturing, Inc.[24]

Monique Roman, as administratrix of Dorel Roman, an owner of a stucco business, filed a products liability suit against a stucco application pump manufacturer. Roman sought damages as the result of a stucco pump detaching and striking plaintiff. Plaintiff offered two experts, a mechanical engineer and a failure analyst, to testify regarding the construction or composition of the pump at issue.

After assessing the credentials of each of plaintiff's experts, the Fifth Circuit explained that while the defendant's "cross-examination was quite effective," ultimately such doubts affected "the weight of the evidence, as opposed to the admissibility of his testimony."[25] The Fifth Circuit recognized that there was evidence contrary to plaintiff's expert, but found "that was for the jurors to weigh. [Plaintiff's] liability and causation evidence was admissible under Rule 702."[26]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] 691 F.3d 686, 694 (5th Cir. 2012).
[25] *Id.* at 694.
[26] *Id.*

satisfies the requirements of Rule 702(a)-(d).

Tyler v. Union Oil Co.[27]

Plaintiffs, former employees of Union Oil Company of California ("Unocal"), filed suit against Unocal alleging violations of the ADEA and FLSA. Plaintiffs sought to introduce statistical evidence and testimony of Dr. Blake Frank to support an inference of motive for disparate treatment.

The court opined that "[u]nder the evidence here, Unocal's objection that Dr. Frank created his own database, which was unreliable, goes to probative weight rather than to admissibility. Dr. Frank compiled his database from documents provided by Unocal during discovery. Unocal did not show that Dr. Frank's compilation of the data provided him was itself unreliable. Unocal instead attempts to show that the underlying data – provided *by Unocal* – was itself unreliable. This is an issue that Unocal could – and did – raise in cross-examination."[28]

This language fails to account for the expert witness testimony-proponent's burden to prove by a preponderance of the evidence that the expert witness's testimony is based on sufficient facts or data and the product of reliable principles and methods pursuant to Rule 702(b)-(c).

United States v. 14.38 Acres of Land[29]

Plaintiff United States filed a complaint and declaration of taking to condemn 14.38 acres of land belonging to James C. Coker, III to provide flood control in the Yazoo River Basin in Mississippi. Coker sought to introduce testimony of Rogers Varner and Rip Walker, Coker's engineering and real estate appraisal experts, respectively, regarding the likelihood of Coker's property flooding if his property were to be located on the unprotected side of a new levee and Coker's property's diminished market value as a result of the government's taking.

The court provided that "in determining the admissibility of expert testimony, the district court should approach its task 'with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.'"[30]

This language does not comport with new Rule 702's requirement

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[27] 304 F.3d 379 (5th Cir. 2002).
[28] *Id.* at 392-393 (internal citations omitted).
[29] 80 F.3d 1074 (5th Cir. 1996).
[30] *Id.* at 1077 (citations omitted).

that the court, rather than the jury, determine whether the expert witness testimony-proponent has established the requirements of Rule 702(a)-(d) by a preponderance of the evidence. Additionally, relying on *Daubert*, the court provided that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[31] Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

United States v. Ebron[32]

The United States filed this criminal action against defendant, Joseph Ebron, for the murder of a fellow inmate. Ebron was found guilty and sentenced to death. Ebron appealed his conviction and sentence. The United States called a forensic pathologist to testify regarding the cause and manner of the inmate's death.

After a brief analysis, the Fifth Circuit permitted the expert to testify, finding that "[c]ontrary to what Ebron argues, the fact that Brown's testimony may be assailable does not mean it is inadmissible under Rule 702. The trial court's role as gatekeeper under *Daubert* is not intended to serve as a replacement for the adversary system."[33] In support of this finding, the Fifth Circuit quoted *Daubert* as follows: "[A]s *Daubert* makes clear, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[34]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

United States v. Hicks[35]

Defendant was found guilty of unlawfully possessing firearms and ammunition while subject to a domestic restraining order. Defendant appealed his conviction. The government offered testimony of a ballistics expert that the bullet

[31] *Id.* at 1078 (internal citations omitted).
[32] 683 F.3d 105, 139 (5th Cir. 2012).
[33] *Id.* at 139.
[34] *Id.*
[35] 389 F.3d 514 (5th Cir. 2004).

casings found in a field were fired from a weapon found in defendant's son's bedroom. Defendant challenged the reliability of the expert's methodology.

In assessing the expert's methodology, the Fifth Circuit explained that "the proponent of expert testimony … has the burden of showing that the testimony is reliable."[36] Reaffirming the latitude given to trial judges to determine reliability, the Supreme Court further stated in *Kumho Tire* that "whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[37] The Fifth Circuit, applying these principles, ultimately found that the expert's methodology reliable.

More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

United States v. Perry[38]

Defendants were convicted of crimes related to their gang involvement in selling drugs. Meredith Acosta testified for the government as a ballistics expert. The government did not produce some documents considered by Acosta until the eve of trial or the day before Acosta testified. Defendants claimed that the late production evinced a lack of standards and reliability in her methodology.

The Fifth Circuit found the district court did not abuse its discretion in admitting Acosta's testimony because expert testimony "need not satisfy each *Daubert* factor."[39] In doing so, the Fifth Circuit quoted *Daubert's* statement regarding the traditional and appropriate means of attacking shaky evidence, stated that the *Daubert* inquiry should not supplant a trial on the merits, and stated the following: "Particularly in a jury trial setting, the court's role under Rule 702 is not to weigh the expert's testimony to the point of supplanting the jury's fact-finding role – the court's role is limited to ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue so that it is appropriate for the jury's consideration."[40]

Under the Rule 702 amendments, these generalized statements regarding the court's role in determining the admissibility of expert testimony are accurate only if the proponent of the expert evidence first

[36] *Id.* at 525.
[37] *Id.*
[38] 35 F.4th 293 (5th Cir. 2022).
[39] *Id.* at 329.
[40] *Id.* at 330.

demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Williams v. Manitowac Cranes, LLC[41]

Plaintiff John Williams Jr. was operating a crane manufactured by defendant Manitowac Cranes. The crane Williams was operating tipped, and Williams was thrown from the crane and injured. Williams sued, asserting failure to warn, design defect, and negligence claims against Manitowac. Williams offered Dr. William Singhose as a warnings expert. Manitowac challenged whether Dr. Singhose was qualified to testify as a warnings expert.

The Fifth Circuit found as follows: "Manitowac's quibbles about qualifications are better characterized as arguments about the *weight* of Dr. Singhose's testimony – not about its admissibility. But this battle should be fought with the conventional weapons of cross-examination and competing testimony – not the nuclear option of exclusion. Thus, the district court did not manifestly err by qualifying Dr. Singhose as a warnings expert."[42] In so finding, the Fifth Circuit noted that the district court "does *not* judge the expert conclusions themselves."[43]

Under the Rule 702 amendments, this dicta is accurate only to the extent the trial court first finds that it is more likely than not that the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. The expert's conclusion must be supported by reliable principles and methods.

Similar Fifth Circuit Cases

The following opinions permitted expert testimony in part on the rationale that questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and/or that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence:

- *United States v. Hodge*,[44]
- *United States v. Seale*,[45]
- *Wellogix, Inc. v. Accenture, LLP*,[46] and
- *Whitehouse Hotel Ltd. Partnership v. C.I.R.*[47]

[41] 898 F.3d 607 (5th Cir. 2018).
[42] *Id.* at 625.
[43] *Id.* at 623.
[44] 933 F.3d 268 (5th Cir. 2019).
[45] 600 F.3d 473 (5th Cir. 2010).
[46] 716 F.3d 867 (5th Cir. 2013).
[47] 615 F.3d 321 (5th Cir. 2010).

B. District Court Cases

Arlington Southern Hills, LLC v. American Insurance Co.[48]

Plaintiff sued defendant/ insurer for not providing coverage for property damage allegedly incurred during a wind and hail storm. Plaintiff offered several experts, including a meteorologist to testify regarding whether hail impacted the property, and an engineer and building inspector to testify regarding causation issues and scope of loss issues.

This opinion states that the trial court is charged with making a preliminary determination under Rule 104(a) regarding whether the expert's testimony is admissible. This is the incorrect burden of proof under the amendments to Rule 702.

Atlas Global Technologies LLC v. TP-Link Technologies, Ltd.[49]

Plaintiff sued defendants for patent infringement. Plaintiff's expert testified regarding whether defendants infringed on plaintiff's patents.

In finding that the expert's infringement opinions were sufficiently reliable and relevant to avoid exclusion, the district court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[50]

Under the Rule 702 amendments, this generalized statement is accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d). The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Bargher v. White[51]

Plaintiff Dennis Bargher sued Craig White, a correctional officer, after Bargher was attacked by another inmate. Plaintiff sought to introduce the testimony of Dr. George E. Smith, an expert in the field of correctional medicine.

The court provided that "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than

[48] 51 F. Supp.3d 681 (N.D. Tex. 2014).
[49] 684 F. Supp.3d 570, 576 (E.D. Tex. 2023).
[50] *Id.* at 576.
[51] 541 F. Supp.3d 682 (M.D. La. 2021).

its admissibility and should be left for the [trier of fact's] consideration. 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' This is the case here. Defendants have highlighted a technical, rather than scientific, deficiency in Dr. Smith's testimony which may go to the weight of his testimony. As such, the court declines to render Dr. Smith's testimony under Rule 702 inadmissible on this basis."[52]

The court did not assess how the expert applied the methodology but, rather, opted to let the defendants test the reliability and bases for Dr. Smith's opinions through cross-examination. Additionally, this language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Collins v. Benton[53]

Plaintiffs sued defendants seeking recovery for injuries and property damages that plaintiffs allegedly sustained during a car accident. Defendants sought to introduce the testimony of Nancy Michalski regarding the reasonable value of plaintiffs' medical services.

The court provided that "a court's role as a gatekeeper does not replace the traditional adversary system. A 'review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.' 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' 'As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.'"[54]

This language from *Daubert* is too broad following the Rule 702 amendments. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence only if the proponent of the expert evidence first demonstrates to the trial court

[52] *Id.* at 687 (internal citations omitted).

[53] 470 F. Supp.3d 596 (E.D. La. 2020).

[54] *Id.* at 602-603.

that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d). Further, the court provided that "to the extent that Plaintiffs argue that the Physicians Fee Reference is not a reliable source, 'questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.' It is 'the role of the adversarial system, not the court, to highlight weak evidence.'"[55]

This language does not comport with new Rule 702's requirement that the court, rather than the jury, determine whether the expert witness testimony-proponent has established the requirements of Rule 702(a)-(d) by a preponderance of the evidence.

Cooley v. State Farm Fire & Casualty Co.[56]

Plaintiff, the homeowner-insured, filed suit against its insurer regarding windstorm damage that blew a tree down in plaintiff's yard. Defendant filed a motion to strike plaintiff's expert. Plaintiff retained a public adjuster to offer expert testimony regarding the scope, value, and cause of damages to the property from the windstorm.

The district court, in finding that plaintiff's expert was qualified to provide expert testimony, explained that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system" and that "[e]ven if there is some merit to State Farm's contention that Irwin is not qualified to testify as an engineer, the precise delineations of what opinions [he] can offer are more appropriately the subject of a motion in limine and/or an objection at trial."[57]

Under the Rule 702 amendments, this reasoning is correct only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

DM Arbor Court, Ltd. v. City of Houston, Texas[58]

Plaintiff sued defendant (City of Houston, Texas) for refusing to grant permits to repair hurricane damage to an affordable housing apartment complex. Plaintiff alleged that defendant's refusal to grant the permits constituted a regulatory taking. Plaintiff offered a valuation expert to testify regarding the "before" value of the apartment complex to quantify the compensation due for the alleged regulatory taking.

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[55] *Id.* at 604.
[56] 661 F. Supp.3d 618 (S.D. Miss. 2023).
[57] *Id.* at 622, 624.
[58] 622 F. Supp.3d 426 (S.D. Tex. 2022).

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Garcia v. Columbia Medical Center of Sherman[59]

Plaintiffs sued defendants for medical malpractice. Plaintiffs offered an economist regarding past and future lost earnings and services, as well as several medical experts.

This opinion states that the trial court is charged with making a preliminary determination under Rule 104(a) regarding whether the expert's testimony is admissible. This is the incorrect burden of proof under the amendments to Rule 702.

Lofton v. McNeil Consumer Specialty Pharmaceuticals[60]

Plaintiffs brought a wrongful death action alleging that the decedent suffered a rare adverse drug reaction after taking Motrin. Defendants challenged the admissibility of the causation opinion of plaintiffs' experts.

The district court found that the causation opinions of plaintiffs' experts were admissible because defendants' objection went to the weight or the sufficiency of the evidence and not its relevance or reliability. In particular, the district court found that the failure to consider the most recent epidemiological study, the reliance on case reports, and that plaintiffs' experts did not support their opinions with published studies all went to weight and sufficiency and not relevance and reliability.

Under the Rule 702 amendments, "weight and sufficiency" cannot be used to evade the requirement that the proponent of the expert evidence must first demonstrate to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Manning v. Walgreen Co.[61]

This is a trip-and-fall premises liability action. Plaintiff designated an expert to testify regarding the factors contributing to plaintiff's fall, defendants' actual or constructive knowledge of the dangerous condition, steps that

[59] 996 F. Supp. 617 (E.D. Tex. 1998).
[60] No. 05-cv-1531, 2008 WL 4878066 (N.D. Tex. July 25, 2008).
[61] 638 F. Supp.3d 730 (S.D. Tex. 2022).

could have been taken to prevent the fall, and safer alternatives.

The district court excluded the expert's testimony regarding defendant's knowledge of the dangerous condition, but otherwise found the expert's testimony relevant and reliable. The district court stated the following:

- questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility; and
- vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[62]

Under the Rule 702 amendments, these generalized statements are accurate only if the proponent of the expert evidence first demonstrates to the trial court that it is more likely than not that the expert evidence satisfies the requirements of Rule 702(a)-(d).

Neutrino Development Corp. v. Sonosite[63]

Plaintiff sued defendant for patent infringement. Plaintiff objected to the testimony of seven experts offered by defendant to testify regarding various patent infringement issues.

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Nucor Corp. v. Requenez[64]

Plaintiff sued defendant for breach of contract. Plaintiff and defendant offered several experts to discuss welding standards.

The court stated that the party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable, but need not prove that the testimony is correct. More accurately, the party offering the expert testimony must prove by a preponderance of the evidence that the testimony satisfies all elements of Rule 702(a)-(d), not merely the reliability element.

Other District Court Cases

Numerous other district court opinions in the Fifth Circuit have likewise permitted expert

[62] *Id.* at 734.
[63] 410 F. Supp.2d 529 (S.D. Tex. 2006).
[64] 578 F. Supp.3d 878 (S.D. Tex. 2022).

testimony in part on the rationale that questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and/or that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[65]

[65] Alpizar v. John Christner Trucking, LLC, 568 F. Supp.3d 714 (W.D. Tex. 2021); America Can! v. Arch Ins. Co., 597 F. Supp.3d 1038 (N.D. Tex. 2022); Anders v. Hercules Offshore Servs., LLC, 311 F.R.D. 161 (E.D. La. 2015); Andrews v. Rosewood Hotels & Resorts, LLC, 575 F. Supp.3d 728 (N.D. Tex. 2021); Arlington Southern Hills, LLC v. American Ins. Co., 51 F. Supp.3d 681 (N.D. Tex. 2014); Austin Firefighters Relief & Ret. Fund v. Brown, 760 F. Supp.2d 662 (S.D. Miss. 2010); BNJ Leasing, Inc. v. Portabull Fuel Serv., LLC, 591 F. Supp.3d 125 (S.D. Miss. 2022) (also finding expert testimony should be admitted unless it is "wholly unreliable"); Burton v. Wyeth, 513 F. Supp.2d 719 (N.D. Tex. 2007); CliniComp Int'l, Inc. v. Athenahealth, Inc., 507 F. Supp.3d 774 (W.D. Tex. 2020); Coleman v. BP Expl. & Prod., 609 F. Supp.3d 485 (E.D. La. 2022); Complete Logistical Servs., LLC v. Rulh, 394 F. Supp.3d 625 (E.D. La. 2019); Dockery v. Fischer, 253 F. Supp.3d 832 (S.D. Miss. Sept. 29, 2015); Enniss Fam. Realty I, LLC v. Schneider Nat. Carriers, Inc., 916 F. Supp.2d 702 (S.D. Miss. 2013); Gaddy v. Blitz U.S.A., Inc., No. 2:09-CV-52, 2011 WL 13193319 (E.D. Tex. Jan. 18, 2011); Gaddy v. Taylor Seidenbach, Inc., 446 F. Supp.3d 140 (E.D. La. 2020); Galvez v. KLLM Transp. Servs., LLC, 575 F. Supp.3d 748 (N.D. Tex. 2021); Graham v. Hamilton, 872 F. Supp.2d 529 (W.D. La. 2012); Haimur v. Allstate Prop. & Cas. Ins. Co., 605 F. Supp.3d 887 (S.D. Miss. 2022); Holcombe v. United States, 516 F. Supp.3d 660 (W.D. Tex. 2021); Holt v. St. Luke Health System, No. H-16-2898, 2018 WL 706469 (S.D. Tex. Feb. 5, 2018); *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 166 F. Supp.3d 654 (E.D. La. 2016); Jackson v. Parker-Hannifin Corp., 645 F. Supp.3d 577 (S.D. Miss. 2022); Jagneaux v. United Rentals (N. Am.), Inc., 453 F. Supp.3d 897 (S.D. Miss. 2020); Johnson v. Samsung Elecs. Am., Inc., 277 F.R.D. 161 (E.D. La. 2011); Jones v. Cannizzaro, 514 F. Supp.3d 853 (E.D. La. 2021); Jones v. L.F. Group, Inc., 559 F. Supp.3d 550, 553 (N.D. Miss. 2021); Joseph v. Doe, 542 F. Supp.3d 433 (E.D. La. 2021); Julius v. Luxury Inn & Suites, LLC, 535 F. Supp.3d 600 (S.D. Miss. 2021); Kim v. Nationwide Mut. Ins. Co., 614 F. Supp.3d 475 (N.D. Tex. 2022); Lamar Advert. Co. v. Zurich Am. Ins. Co., 533 F. Supp.3d 332 (M.D. La. 2021); Lewis v. Chet Morrison Contractors, LLC, 959 F. Supp.2d 962 (E.D. La. 2013); Maiden Biosciences, Inc. v. Document Sec. Systems, Inc., 2022 WL 16964752 (N.D. Tex. Nov. 16, 2022); Martinez v. Porta, 598 F. Supp.2d 807 (N.D. Tex. 2009); Matthews v. Allstate Ins. Co., 731 F. Supp.2d 552 (E.D. La. 2010); MCI Communs. Serv. Inc. v. KC Trucking & Equip. LLC, 403 F. Supp.3d 549 (W.D. La. 2019); MedARC, LLC v. Scott & White Health Plan, 618 F. Supp.3d 365 (N.D. Tex. 2022); Nestle v. BP Expl. & Prod., 627 F. Supp.3d 577 (E.D. La. 2022); New Orleans City v.

BellSouth Telecomms., Inc., 728 F. Supp.2d 834 (E.D. La. 2010); Nixon v. Krause, Inc., No. 3:00-CV-0915, 2003 WL 26098644 (N.D. Tex. Aug. 29, 2003); Perez v. Bruister, 54 F. Supp.3d 629, 640 (S.D. Miss. 2014), aff'd as modified, 823 F.3d 250 (5th Cir. 2016); Page v. State Farm Life Ins. Co., 584 F. Supp.3d 200 (W.D. Tex. 2022); Poole-Ward v. Affiliates for Women's Health, P.A., 329 F.R.D. 157 (S.D. Tex. 2018); Prejean v. Satellite Cty., Inc., 474 F. Supp.3d 829 (W.D. La. 2020); Smith v. DG Louisiana, LLC, 499 F. Supp.3d 280 (M.D. La. 2020); Stafford v. Lyft, Inc., 2022 WL 2106019 (W.D. Tex. April 25, 2022); Sexton v. Exxon Mobil Corp., 484 F. Supp.3d 321 (M.D. La. 2020); Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241 (M.D. La. 1996); Taylor v. B&J Martin, Inc., 611 F. Supp.3d 278 (E.D. La. 2020); Ureteknologia De Mexico S.A. De C.V. v. Uretek (USA), Inc., 434 F. Supp.3d 517 (S.D. Tex. 2020); United States v. E.R.R., LLC, 657 F. Supp.3d 851 (E.D. La. 2023); United States v. La. Generating, LLC, 929 F. Supp.2d 591 (M.D. La. 2012); United States v. Harvey, 405 F. Supp.3d 667 (S.D. Miss. 2019); Vallecillo v. McDermott, Inc., 576 F. Supp.3d 420 (W.D. La. 2021); Van Winkle v. Rogers, 2022 WL 4231013 (W.D. La., Sept. 13, 2022); Vedros v. Northrop Grumman Shipbuilding, Inc., 119 F. Supp.3d 556 (E.D. La. 2015); Wade v. BP Exp. & Prod., 630 F. Supp.3d 776 (E.D. La. 2022); Wagoner v. Exxon Mobil Corp., 813 F. Supp.2d 771 (E.D. La. 2011); Worldwide Holdings, LLC v. Ariix, LLC, 2019 WL 6037989 (E.D. Tex. July 31, 2019).