The Ninth Circuit

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Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.[1]

PLAINTIFF Alaska Rent-a-Car alleged that rental car company Avis violated an antitrust class action settlement prohibiting Avis from using personnel to steer potential customers towards other brands it owned. After granting partial summary judgment on liability, the trial court held a jury trial on damages that resulted in a $16 million award. Avis appealed, arguing in part that the trial court had improperly allowed Alaska's

[1] 738 F.3d 960 (9th Cir. 2013).

expert because he had relied on faulty assumptions and used inappropriate comparison markets.

The Ninth Circuit affirmed the admission of the expert's testimony, holding that "[a]ll of Avis's challenges to Alaska Rent–A–Car's expert are colorable, but none go to admissibility. They amount to impeachment."[2] The court reasoned that Avis lodged only specific criticisms, but did not challenge the expert's "general methodology, comparing the unknown to an analogous known experience. Instead, Avis challenges three aspects of the witnesses' testimony: using Alamo as the comparator, using the national rather than the Alaska market as a baseline, and extrapolating from the Juneau market to the entire Alaska market."[3]

This case provides an example of the Ninth Circuit deferring the Rule 702 analysis—particularly Rule 702(d)—to the jury. Rather than examine whether "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case" by determining whether Alamo was an appropriate comparator, or whether the national market was the appropriate baseline, the court left the resolution of those questions to the jury.

The Ninth Circuit did not mention the preponderance standard. Instead, the court stated a standard that required the trial court "to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable."[4]

City of Pomona v. SQM North America. Corp.[5]

The City of Pomona sued defendant SQM for importing sodium nitrate fertilizer that contaminated city water. The court excluded the City's expert witness. On appeal, the Ninth Circuit reversed holding "the district court abused its discretion by not allowing a jury to resolve contested but otherwise admissible expert testimony."[6]

The Ninth Circuit did not mention the preponderance standard. Instead, it stated that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. The judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions

[2] *Id.* at 969.
[3] *Id.* at 970.
[4] *Id.* at 969.
[5] 750 F.3d 1036 (9th Cir. 2014).
[6] *Id.* at 1041.

merely because they are impeachable."[7]

This case provides an example of the Ninth Circuit deferring the Rule 702 analysis—particularly Rule 702(d)—to the jury. Rather than examine whether "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case," the circuit court held that the "district court did not apply the correct rule of law: only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."[8] The circuit court's holding is contrary to the text of Rule 702(d), which specifically targets "application" of methods to specific facts. The opinion states that "adherence to protocol … typically is an issue for the jury," and that a "more measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the role of the fact finder in assessing and weighing the evidence."[9]

Corcoran v. CVS Health Corp.[10]

Plaintiffs brought a class action accusing CVS of misrepresenting the prices of certain generic drugs. After partially granting certification, the district court excluded the testimony of plaintiffs' pharmaceutical economist because it found his methodology unreliable and then granted summary judgment to CVS. The Ninth Circuit reversed.

The court did not mention the preponderance of the evidence standard. Despite the fact that the trial court found the expert's methodology not to be reliable, the Ninth Circuit did not discuss the methodology in its memorandum opinion.[11]

Elosu v. Middlefork Ranch Inc.[12]

Plaintiffs sued defendant homeowners' association for negligence, alleging that its employee accidentally set their deck on fire after repainting, burning down their cabin. The district court excluded plaintiffs' expert testimony as "too speculative" and then entered summary judgment for the defendant. The Ninth Circuit reversed.[13]

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[7] *Id.* at 1044 (internal citations and quotations omitted).
[8] *Id.* at 1048.
[9] *Id.* at 1047-1048.
[10] 779 F. App'x 431 (9th Cir. 2019).
[11] *Id.* at 435.
[12] 26 F.4th 1017 (9th Cir. 2022).
[13] *Id.* at 1023.

The Ninth Circuit held that the district court's exclusion of the expert "was an abuse of discretion, as the district court assumed a factfinding role in its analysis. [Its] concerns speak to corroboration, not foundation, and are properly addressed through impeachment before a jury at trial—not exclusion by a district judge at the admissibility stage."[14] The Ninth Circuit did not mention the preponderance of the evidence standard.

Hangarter v. Provident Life & Accident Insurance Co.[15]

A chiropractor sued an insurance company alleging it had wrongfully discontinued disability benefits. After a verdict for the plaintiff, defendant appealed, challenging—among other things—the admission of plaintiff's expert testimony.

The Ninth Circuit held that the determination of what underlying facts the expert relied on "went more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination."[16] The Ninth Circuit did not mention the preponderance of the evidence standard.

Hardeman v. Monsanto Co.[17]

Plaintiff filed a product liability action against Monsanto alleging that the main ingredient (glyphosate) in its Round-Up weed killer had given him cancer. The trial court denied Monsanto's motion to exclude plaintiff's expert as unreliable. After a verdict for the plaintiff, Monsanto appealed.

The Ninth Circuit did not mention the preponderance of the evidence standard. Instead, it said that the Rule 702 "inquiry is flexible and should be applied with a liberal thrust favoring admission."[18] The court ignored the 2000 amendments to Rule 702, stating that the "interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system . . . to attack shaky but admissible evidence. The Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost 28 years ago."[19]

The Ninth Circuit held that application of the methodology to facts was not a question of admissibility, but of weight. "We have explained that expert

[14] *Id.* at 1023-1024.
[15] 373 F.3d 998 (9th Cir. 2004).
[16] *Id.* at 1017 n.14.
[17] 997 F.3d 941 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2834 (2022).
[18] *Id.* at 960 (internal citations and quotations omitted).
[19] *Id.* at 962 (internal citations and quotations omitted).

evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*. Imperfect application of methodology may not render expert testimony unreliable because a minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method does not render expert testimony inadmissible."[20]

Messick v. Novartis Pharmaceuticals Corp.[21]

Plaintiff sued defendant for complications arising from breast cancer treatment. The trial court granted defendant's motion to exclude plaintiff's expert testimony as unreliable. The Ninth Circuit reversed, holding that the expert's differential diagnosis was sufficiently reliable even though expert could not explain how the treatment caused cancer.[22]

The Ninth Circuit did not mention the preponderance of the evidence standard. Instead, the court said that Rule 702 "should be applied with a liberal thrust favoring admission."[23]

The Ninth Circuit did not examine the doctor's methodology. Instead, it trusted his testimony that he could tell causation from years of clinical experience: "Medicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis."[24]

Mighty Enterprises, Inc. v. She Hong Indstrial Co. Ltd.[25]

A distributor sued a manufacturer for breach of contract. The manufacturer moved to exclude plaintiff's damages expert as merely parroting figures from the plaintiff. The trial court denied the motion. The Ninth Circuit affirmed the trial court.

Contrary to Rule 702(d), the Ninth Circuit held that "[defendant's] challenge to [plaintiff's] expert, namely that he parroted certain costs from amounts provided to him by [plaintiff], does not render the testimony inadmissible. It is relevant to the persuasiveness of his testimony, not its admissibility."[26] The court also held that the trial court did not need to

[20] *Id.* (internal citations and quotations omitted).
[21] 747 F.3d 1193 (9th Cir. 2014).
[22] *Id.* at 1198.
[23] *Id.* at 1196 (internal citations and quotations omitted).
[24] *Id.* at 1198.
[25] 745 F. App'x 706 (9th Cir. 2018).
[26] *Id.* at 709.

examine whether the date the expert used was appropriate to the point the party was trying to prove: ""[defendant's] second argument, that the expert's use of a ten-year period for lost future profits rendered his testimony inadmissible, also fails. An expert can use assumptions, inferences, and comparisons. Such assumptions are admissible; their reliability is impeachable."[27] "Experts can rely on data provided to them without independent verification because 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."[28] The Ninth Circuit also did not mention the preponderance of the evidence standard.

Murray v. Southern Route Maritime SA[29]

Plaintiff sued ship owner for negligently turning over a ship with a faulty floodlight that shocked him. As part of proving injury, plaintiff submitted testimony from a scientific expert. The ship owner moved to exclude, but the trial court admitted the testimony. The Ninth Circuit affirmed the trial court.

The Ninth Circuit held that, despite the expert's lack of testing, "the appropriate way to discredit [plaintiff expert's] theory was through competing evidence and incisive cross-examination."[30]

The Ninth Circuit did not mention Rule 702 or the preponderance standard. Although the trial court did not examine the expert's methodology, the Ninth Circuit held that was not error: "It is true that the order does not scrutinize the testability and error rate factors. Although *Daubert* does not require a methodical walkthrough of each factor, the best practice may be for district courts to at least reference the four *Daubert* factors so as to avoid an appeal issue like the one here."[31]

Primiano v. Cook[32]

Plaintiff sued defendants for manufacturing and installing an allegedly defective prosthetic elbow. As part of her case, the plaintiff submitted expert testimony about the elbow. The trial court excluded the expert evidence because the expert did not talk to the plaintiff, and there was no publication supporting plaintiff's theory. The Ninth Circuit reversed.

The Ninth Circuit did not mention the preponderance of the

[27] *Id.*
[28] *Id.* (citations and quotations omitted).
[29] 870 F.3d 915 (9th Cir. 2017).
[30] *Id.* at 925.
[31] *Id.* at 924.
[32] 598 F.3d 558 (9th Cir. 2010).

evidence standard. Instead, the court held that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion."[33]

Pyramid Technologies, Inc. v. Hartford Casualty Insurance Co.[34]

Plaintiff sued an insurance company for bad faith denial of its flood damage claim. The trial court excluded plaintiff's proposed experts without a hearing and then granted summary judgment to the insurer. The Ninth Circuit held that the trial court had abused its discretion in excluding the testimony and reversed and remanded for a new ruling.

The Ninth Circuit did not mention the preponderance standard. Instead, it held that the "'reliability' test is flexible and should be applied based on the circumstances of the case."[35]

Wendell v. GlaxoSmithKline LLC[36]

Plaintiffs sued pharmaceutical manufacturers alleging bowel inflammatory medicines had caused their son's fatal cancer. As part of their case, they relied on expert testimony to establish causation. The trial court excluded that evidence, but the Ninth Circuit reversed.

The Ninth Circuit held that the trial court did not have a gatekeeping responsibility. "Where, as here, the experts' opinions are not the 'junk science' Rule 702 was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof—to attack shaky but admissible evidence."[37]

The Ninth Circuit did not mention the preponderance of the evidence standard. The Ninth Circuit also did not require a rigorous analysis of the experts' methodology. Instead, it ruled that "the district court was wrong to put so much weight on the fact that the experts' opinions were not developed independently of litigation and had not been published," that it "wrongly conflated the standards for publication in a peer-reviewed journal with the standards for admitting expert testimony in a courtroom," and that "[w]e do not require experts to eliminate all other possible causes of a condition

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[33] *Id.* at 564.
[34] 752 F.3d 807 (9th Cir. 2014).
[35] *Id.* at 817.
[36] 858 F.3d 1227 (9th Cir. 2017).
[37] *Id.* at 1237 (internal citations and quotations omitted).

for the expert's testimony to be reliable."[38]

Wendt v. Host International, Inc.[39]

Cheers actors George Wendt and John Ratzenberger sued the defendant under the Lanham Act for violating their trademark rights by putting robots based on their characters in its "Cheers" airport bars. As part of their case, they sought to submit survey evidence. The trial court excluded the evidence and granted summary judgment to the defendant. The Ninth Circuit reversed.

The Ninth Circuit did not mention the preponderance of the evidence standard. The Ninth Circuit also did not require a rigorous analysis of the experts' methodology. Instead, it held that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility."[40] In so holding, the court relied on a case that predated the *Daubert* ruling.

[38] *Id.* at 1235-1237 (internal citations and quotations omitted).

[39] 125 F.3d 806 (9th Cir. 1997).

[40] *Id.* at 814.