The Tenth Circuit

By: Matthew Cairns and Katherine Kazarian

Matt Cairns is a Senior Associate General Counsel at Textron Inc. where he manages non-aviation product liability claims. He practiced law for 32 years in New Hampshire before joining Textron. He is a graduate of Brown University and Case Western Reserve School of law.

Katherine Kazarian is a 2024 graduate of Roger Williams Law School in Rhode Island and 2012 graduate of Barnard College, Columbia University in New York. She currently lives in East Providence, Rhode Island and serves in the Rhode Island General Assembly as the House Majority Whip.

Courts in the Tenth Circuit have generally done well in recent years in properly applying Rule 702 to exclude unreliable expert opinions. There are, however, a few exceptions listed below.

In re *Urethane Antitrust Litig.*[1]

In re Urenthane was a class antitrust action for price fixing related to polyurethane chemical products. Before trial, Dow moved to exclude the testimony of Dr. James McClave, the plaintiffs' statistical expert, because he used "a multiple-regression analysis" to develop models predicting prices that would have existed in a competitive market, compared the modeled prices to the actual prices during the conspiracy period, and opined as to damages. Dow argued that McClave picked variables and time periods that would reach the result he wanted ("variable" and "benchmarking" shopping). The trial court disagreed, and the Tenth Circuit affirmed, writing:

> Dr. McClave's [selection of variables and time periods] is open to debate. But the district court had the discretion to accept Dr. McClave's explanation for omitting variables addressing domestic demand. Thus, the district court did not abuse its discretion in concluding that Dow's complaints bore on the weight of Dr. McClave's testimony rather than its admissibility.[2]

This case is an incorrect application of Rule 702 because an analysis of the methods and reliability of the expert's proffered testimony to the facts of the case is an admissibility requirement. The courts should have determined if the "variable and benchmark shopping" that plaintiff's expert engaged in was a proper and reliable method for an expert to employ. Instead, the courts punted the issue as one for cross examination.

Goebel v. Denver and Rio Grande Western Railway Co.[3]

Goebel was an action involving a locomotive engineer and his employer, where the engineer alleged that he sustained brain damage when exposed to diesel exhaust at high altitude in train tunnels. Plaintiff proffered a medical expert that offered an expert general causation opinion and an expert opinion on the diagnosis of acute high altitude cerebral edema (HACE). The trial court allowed the expert to testify, and the railroad appealed. The Tenth Circuit affirmed noting:

> The Railroad's core argument is that the district court incorrectly concluded that "this is not [a] case" where "too great

[1] 768 F.3d 1245 (10th Cir. 2014).
[2] *Id.* at 1262.
[3] 346 F.3d 987 (10th Cir. 2003).

> an analytical gap" existed between the data and the opinion. When faced with such a claim, we must, as did the Supreme Court in *Joiner*, review the literature to determine whether the district court was within its discretion in finding an adequate link between the existing data and the conclusions. Given the lack of scientific literature directly addressing the confluence of all of the factors at issue in the tunnel, such a review is all the more important here. As we stated above, our review is deferential—only if we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances" will we disturb its ruling.[4]

This case is an incorrect application of Rule 702 because the court allowed an expert to testify even though his testimony was not based on specific facts or data. The expert was allowed to use general information in order to develop his expert testimony, which is not in accordance with the preponderance of the evidence standard.

Macsenti v. Becker[5]

Mascenti was an intentional infliction of emotional distress and negligence action involving a dentist, his dental assistant, and one of their patients. Plaintiff proffered a professor of oral surgery at the University of Oklahoma and practicing dentist as his liability expert. Over defendants' objections, the trial court allowed the expert to testify, and the Court of Appeals affirmed. The opinion contains the following flawed analysis:

> Dr. Sullivan's credentials are not challenged. Defendant focuses his attack on the absence of professional literature to support his opinion and asserted conflicts between portions of Dr. Sullivan's reasoning and principles which do find support in the professional literature. Defendant's positions disputing Dr. Sullivan's opinions were energetically developed at trial through cross-examination of Dr. Sullivan and through the testimony of defendant's own experts, *inter alia*.
>
> On careful review of this record, we find no plain error such as to excuse a

[4] *Id.* at 993 (internal citations omitted).

[5] 237 F.3d 1223 (10th Cir. 2001).

> timely *Daubert* objection to plaintiff Macsenti's expert testimony. We are convinced that Defendant forfeited the opportunity to subject the expert testimony of Dr. Sullivan and plaintiff's other experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted.[6]

This case is an in correct application of Rule 702 because an analysis of the methods and reliability of the expert's proferred testimony to the facts of the case is an admissibility requirement that should be determined by the court using a preponderance of the evidence standard. The court is charged with making this determination for every expert before allowing them to testify, and the Court of Appeals should not have reviewed this under a "plain effort" standard.

[6] *Id.* at 1231.