

The Third Circuit

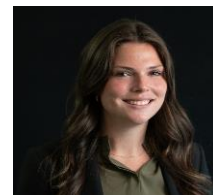
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Cote v. U.S. Silica Co.¹

A WORKER at a rail transfer yard who suffered the partial amputation of his hand brought this product liability action against the manufacturer of the machine that injured the worker, the manufacturer's distributor, the owner of the quarry where the sand that was transferred originated, and the company that transported the sand from the quarry to the worksite. Plaintiff proffered an engineering expert, Thomas Eagar, to establish that the practices by which sand was loaded into railcars increased the risk of harm to a worker in plaintiff's position. Eagar opined that the facts established that the sand loading process caused or substantially contributed to plaintiff's injury.

Defendants challenged the reliability of Eagar's opinions, arguing that the opinions were inadmissible because based on erroneous factual assumptions. Upon analyzing this argument, the court held that underlying factual assumptions affected the weight, not the admissibility, of Eagar's opinions.²

The court's finding is inconsistent with the current version of Rule 702 because the 2023 amendments clarified that the

analysis of Eagar's factual opinions is a question of admissibility. Although the credibility of facts cited by the expert may be attacked on cross-examination, a judge must first determine, as gatekeeper, the admissibility of an expert's factual assumptions by a preponderance of the evidence.

Feit v. Great-West Life & Annuity Insurance Co.³

The beneficiary of a life insurance policy sued the insurer challenging the denial of accidental death benefits. The plaintiff proffered a cardiologist, Dr. Arthur P. Fisch, M.D., to opine that plaintiff's cardiac condition did not contribute to his death following a car accident. Defendant argued that Dr. Fisch's testimony should be excluded because, although it criticized the finding that plaintiff's cardiac condition caused his death, it did not supply an alternative cause of death. Therefore, defendant claimed that Dr. Fisch's testimony was inadmissible because it failed to resolve the ultimate issue in this action.

The court found that Dr. Fisch's testimony was admissible, noting that expert opinions are not

¹ 572 F. Supp.3d 84, 117 (M.D. Pa. 2021).

² *Id.* at 117.

³460 F. Supp.2d 632 (D. N.J. 2006).

inadmissible because they may contain flaws, nor are they excludable because they provide testimony regarding only one aspect of an action but do not prove the whole case. Instead, the court found that these vulnerabilities affect the weight of expert testimony, not its admissibility.⁴

The court's finding conflicts with Rule 702 because the court's gatekeeper role requires an admissibility determination where flaws in the expert's testimony are identified by opposing parties.

Ford v. Ford Motor Co.⁵

A vehicle caught fire in a garage. The plaintiff sued the manufacturer alleging a design defect, a manufacturing defect, and a failure to warn. The plaintiff offered fire investigator Michael Zazula as an expert to testify to the cause of the fire. Defendants asked the court to exclude Zazula's testimony, arguing that Zazula was unqualified and that his opinions were speculative and unreliable.

In analyzing defendants' arguments, the court found that any concerns arising from the alleged deficits in Zazula's methodology could be raised on cross-examination, as they went to the weight of his testimony, not its admissibility.⁶

The court's holding represents an incorrect application of Rule 702, because the reliability of an expert's opinion is a question of admissibility which the court must establish by a preponderance of the evidence.

In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Litig.⁷

The plaintiffs in this talcum powder product liability action against the manufacturer claimed that prolonged perineal use of the product caused ovarian cancer. Both parties proffered many expert witnesses on various scientific issues related to, *inter alia*, causation and testing of talcum powder for asbestos. In its analysis of whether to exclude each expert witness, the court cited to *Feit*, finding that "an expert opinion is not inadmissible because it may contain flaws, nor is it excludable because it provides testimony regarding only one facet or aspect of an action but does not prove the whole case; such vulnerabilities affect the weight of the testimony, not its admissibility."⁸ The court even found that the flaws of experts may be tested on cross-examination and do not warrant the exclusion of an expert.

⁴ *Id.* at 641-642.

⁵ 311 F. Supp.3d 667 (D. N.J. 2017).

⁶ *Id.* at 679.

⁷ 509 F. Supp.3d 116 (D. N.J. 2020).

⁸ *Id.* at 131.

As noted in the analysis of *Feit*, the court's finding is inconsistent with Rule 702 because courts have a role as gatekeeper to make an admissibility determination regarding the flaws of an expert's testimony and cannot leave analysis of an expert's reliability as a question of weight for cross-examination and, ultimately, for jury resolution.

In re Wellbutrin XL Antitrust Litig.⁹

In this Sherman Act and state antitrust and consumer protection action against producers and distributors of a branded antidepressant, the defendants proffered Dr. Martin J. Adelman as an expert in patent litigation. The plaintiffs challenged the reliability of Dr. Adelman's opinions, arguing that he should be excluded. The court, in a footnote, found that plaintiffs' challenges went to the weight of Dr. Adelman's testimony, not its admissibility.¹⁰

This court's holding appears to be an incorrect application of Rule 702, because the reliability of an expert's opinion is a question of admissibility, which a judge must establish by a preponderance of the evidence.

⁹ 133 F. Supp.3d 734, 766 (E.D. Pa. 2015), *aff'd sub nom. In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132 (3d Cir. 2017), *judgment entered sub nom. In re Wellbutrin XL Antitrust Litig.*, No. 15-

In re Zoloft (Sertraline Hydrochloride) Products Liability Litig.¹¹

The mothers of children born with birth defects brought this product liability action against the manufacturer of a prescription antidepressant. The plaintiffs proffered a statistician, Dr. Nicholas Jewell, as an expert witness on general causation. Before this matter reached the Third Circuit, the district court criticized Dr. Jewell's opinions, finding that in using a study he had drawn a different conclusion from the study than had its authors. The Third Circuit stated that this conclusion by the district court was not necessarily justified and was an inquiry more appropriately left to the jury.

In this respect, the Third Circuit incorrectly applied Rule 702(d) which requires judges to analyze whether an expert's methodology supports their conclusions and cannot leave such determinations to the jury.

Krys v. Aaron¹²

In this multi-district securities litigation, the defendants moved to strike the opinion of plaintiff's

2875, 2017 WL 3529114 (3d Cir. Aug. 9, 2017).

¹⁰ *Id.* at 766 n. 47.

¹¹ 858 F.3d 787, 800 (3d Cir. 2017).

¹² 112 F. Supp.3d 181, 201 (D. N.J. 2015).

expert, Dr. Joan A. Lipton, who offered testimony on valuation issues. The defendants challenged the factual narrative underpinning Dr. Lipton's conclusions. In reviewing this argument, the court held that the defendants' "challenges to the underlying bases for Dr. Lipton's Report go to weight, not admissibility, and therefore constitute challenges properly presented through cross-examination, and not through exclusion of her otherwise reliable and relevant valuation work."¹³

The case presents an incorrect application of Rule 702 because the basis for an expert's opinion is a question of admissibility and is not relegated to the weight to be given the testimony by the jury. The court is tasked with determining whether an expert's opinion rests upon sufficient facts or data to be admissible based on a preponderance of the evidence standard, per Rule 702(d).

McGarrigle v. Mercury Marine¹⁴

In this product liability action against an outboard manufacturer by the operator of a boat who fell overboard, the plaintiffs proffered a naval architect as a liability expert. The defendants argued that the expert's opinion was unreliable because it relied solely on the 2007

American Society of Testing and Materials ("ASTM") F 1166-07, the reliance on which was misplaced because this standard did not apply to recreational boats and outboard engines.¹⁵

In analyzing defendants' arguments, the court found that "[i]f there is a gap between the ASTM F 1166-07 standards as written and as applied by [the expert], any inconsistencies go to the weight of the evidence, not to its admissibility."¹⁶

The court's finding here is an incorrect application of Rule 702 because Rule 702(d) requires judges to analyze whether an expert's methodology supports their conclusions.

Perez v. Townsend Engineering Co.¹⁷

In this product liability and personal injury action brought by a worker against a manufacturer of a meat skinning machine, the defendant moved to preclude the testimony of plaintiff's expert engineer, testifying about the hazards of the device, by arguing that the expert's opinion did not rest upon a sufficiently reliable basis, was based on speculation, and did not "fit" the facts of this case.

¹³ *Id.* at 199.

¹⁴ 838 F. Supp.2d 282, 292 (D. N.J. 2011).

¹⁵ *Id.* at 291.

¹⁶ *Id.* at 292.

¹⁷ 545 F. Supp.2d 461, 466 (M.D. Pa. 2008).

In analyzing defendant's arguments, the court stated that, "[an] expert is ... permitted to base his opinion on a particular version of disputed facts and the weight to be accorded to that opinion is for the jury. It is also ... a proper subject for cross-examination."¹⁸

The court's finding is an incorrect application of Rule 702 because the basis for an expert's opinion is a question of admissibility and is not limited to a question of weight for the jury. The court is tasked with determining whether an expert's opinion is based on sufficient facts or data to be admissible based on a preponderance of the evidence standard, as shown by Rule 702(d).

Rossano v. Maxon¹⁹

In this product liability and negligence action related to the operation of a trailer lift-gate, the defendant moved to exclude the plaintiff's biomechanical engineer and alternative design experts, arguing that their respective opinions were not the product of reliable principles and methods and could not serve as expert testimony.

In analyzing the defendant's arguments, the court found that when a party "object[s] to the application rather than the legitimacy of [an expert's]

methodology, such objections [are] more appropriately addressed on cross-examination...."²⁰

This case is an incorrect application of Rule 702 because an analysis of the application of the principles and methods to the facts of the case is an admissibility requirement to be determined by the court by a preponderance of the evidence.

Stecyk v. Bell Helicopter Textron, Inc.²¹

This matter involved a wrongful death and product liability action against the manufacturer of an Osprey military aircraft after a crash. Plaintiffs argued that the testimony of the defendant's expert, a metallurgist, regarding a leak of hydraulic fluid lacked an adequate factual foundation. The court found that the burden was on the plaintiffs to "explor[e] the facts and assumptions underlying the testimony of [defendant's] expert witness . . . during cross-examination."²² Moreover, the court noted that, "[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those

¹⁸ *Id.* at 466 (citation omitted).

¹⁹ 659 F. Supp.3d 559, 567 (E.D. Pa. 2023).

²⁰ *Id.* at 567 (citations omitted).

²¹ 295 F.3d 408, 414 (3d Cir. 2002).

²² *Id.* at 414.

weaknesses through effective cross-examination.”²³

This passage reflects an incorrect application of Rule 702, because the issue of whether an expert’s opinion is based on sufficient facts is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

United States v. Otero²⁴

The defendant was indicted for using and discharging firearms during a robbery. The government proffered a firearm and toolmark identification specialist as an expert witness and the defendants objected. The court recognized that there was a potential for error in the expert’s methodology, with recent national studies challenging the validity and accuracy of the expert’s methodology. Despite these issues, the court denied the defendants’ motion and admitted the expert. The Third Circuit affirmed the lower court’s ruling, stating that it “see[s] no error in [the district court’s] conclusion.”²⁵

This case represents an incorrect application of Rule 702 because it is an example of a judge declining to disturb an expert’s conclusions even where

unsupported. A judge is required to explore an expert’s conclusions in determining whether, under Rule 702(d), an expert’s conclusions rest upon reliable methodology.

Walker v. Gordon²⁶

In this civil rights action asserting a violation of Fourth Amendment rights, the plaintiff moved to preclude defendants’ expert psychiatrist, who was seeking to testify about plaintiff’s mental state. Plaintiff argued that the expert’s opinion should be excluded, disputing the evidence relied upon by the expert, and arguing that the expert’s conclusions derived from such evidence were unreliable.

The court found that “because [plaintiff] objected to the application rather than the legitimacy of [the expert’s] methodology, such objections were more appropriately addressed on cross-examination and no *Daubert* hearing was required.”²⁷

This passage reflects an incorrect application of Rule 702 because the application of the expert’s methodology is a question of admissibility, not reserved for cross-examination, to be determined by a judge by a preponderance of the evidence.

²³ *Id.*

²⁴ 849 F. Supp.2d 425 (D. N.J. 2012).

²⁵ *United States v. Otero*, 557 F. App’x 146, 150 (3d. Cir. 2014).

²⁶ 46 F. App’x 691, 696 (3rd Cir. 2002).

²⁷ *Id.* at 31.

Wolfe v. McNeil-PPC, Inc.²⁸

This matter involved a product liability action alleging that a children's anti-inflammatory drug caused plaintiff to develop Stevens-Johnson Syndrome and Vanishing Bile Duct Syndrome.

The defendants moved to exclude or limit the testimony of four proposed expert witnesses, a pharmacologist, toxicologist, epidemiologist, and clinical pharmacist. The defendants argued that the opinions of these experts were not based on reliable methodology because they were reliant upon case reports. The court found the following in response to these arguments:

The court rejected an analogous case-report argument in its May 4, 2011, *Daubert* opinion in this litigation. Like the experts addressed in that opinion, Drs. Nelson, Salisbury, and Tackett "did not solely rely on case reports in forming their opinions on causation but used them to supplement their extensive review of plaintiff's medical records" and other evidence, including epidemiological studies and other peer-reviewed literature. "[T]he three doctors' use of case

studies in reaching their conclusion affects only the weight to be given their testimony, not its admissibility."²⁹

The court's conclusion that the doctors' use of case studies was a question of weight is an incorrect application of Rule 702 which requires a determination whether the proposed expert opinions were "reliable application[s] of the principles and methods to the facts of the case," and, therefore, presented a question of admissibility for the court.

²⁸ 881 F. Supp.2d 650, 660 (E.D. Pa. 2012).

²⁹ *Id.* at 660 (internal citations omitted).